

CANADA / JUDGMENT

Moon v. Yaranon

2021 BCSC 818

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2021 BCSC 818 Moon v. Yaranon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Moon v. Yaranon,

2021 BCSC 818

Date: 20210430

Docket: M179271

Registry: Vancouver

Between:

Teresa Man Hei Moon

Plaintiff

And

Promencio Eduardo Aduan Yaranon

Defendant

Corrected Judgment: The Table of Contents of this judgment was corrected on May 13, 2021.

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for Plaintiff:

Kelley C. Stewart

Counsel for Defendant:

Alan M. Ross

Place and date of trial:

Vancouver, BC

October 26-30, 2020

November 2-6, 2020

Further written submissions:

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April 30, 2021

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I. Introduction

- [1] The plaintiff, a nurse, brings this claim for soft tissue injuries that she suffered in a motor vehicle collision that occurred on November 13, 2015. At the time, she was 30 years old. She filed this claim on November 3, 2017.
- [2] The accident was unremarkable. It occurred around 6:30 am, during the plaintiff's commute to her work at the St. Paul's Hospital emergency department. The plaintiff was stopped at the intersection of East 1st Avenue and Victoria Drive in Vancouver. The defendant, travelling around 40 kilometres an hour, rear-ended her vehicle. The plaintiff's vehicle was pushed forward, hitting the vehicle in front of it. Photographs reveal significant dents to the grills of both vehicles, and to the rear bumper of the plaintiff's vehicle. The defendant's vehicle was written off. The plaintiff was able to drive her car away from the accident scene, onward to work.

- [3] The defendant admits liability, and accepts that the plaintiff has suffered some injuries as a result of the accident. Causation is not disputed. The defendant does not advance a failure to mitigate argument, but asserts that the plaintiff's conditions are readily manageable, even with the physical demands of a nursing career, and may resolve themselves in the future.
- [4] The defendant advanced no expert evidence. The defendant called only one witness: Mr Lai, a physiotherapist who treated the plaintiff in December 2015 and January 2016, just after the accident. His evidence lasted all of 10 minutes; he remembered almost nothing from his brief treatment of the plaintiff, nearly five years previous. Nor did the defendant advance hidden video or evidence from neighbours or associates indicating exaggerated disability, as is typical in personal injury cases. Such evidence is especially important where the credibility of the plaintiff or her experts is not significantly challenged on cross-examination, as in the present case. Its absence makes the task of the court exceedingly difficult in a case such as the present, where the injuries are not discernible by medical imaging or other objective means. Evidence of the existence and extent of the injury is presented through the subjective assertions of the plaintiff, both directly, and via expert testimony largely based, in turn, on those same subjective assertions.
- [5] These observations are not directed at all toward Mr Ross, who was only brought in as counsel a few months before trial, after most deadlines had passed for such evidence, and who was acting on his client's instructions. Unfortunately, this strategy of contesting a plaintiff's claim, and forcing a plaintiff to proceed to trial, in an effective game of chicken, is not confined to this case: this judge alone has presided over at least one other recent trial with minimal evidence, minimal cross-examination, and minimal argument, presented by the provincial automobile insurer qua defendant. [1]
- [6] Of course, it is the defendant's right to force the plaintiff to prove her case, and the defendant is not required to adduce any evidence at all. One may question whether the provincial insurer is penny-wise and pound-foolish by advancing such a strategy in the face of a \$1.7 million claim, which cost will ultimately be borne by British Columbians if the plaintiff is successful. But I reiterate that such a strategy makes the task of the Court exceedingly difficult, and undermines its truth-finding function.

II. Credibility and reliability

A. Law

- [7] *Jenkins v Irving*, 2020 BCSC 391 gathers the law governing credibility in soft tissue injury cases:
- [100] The injuries in this case are soft tissue injuries. There is no objective indication of those injuries; they cannot be detected on an MRI, X-ray, or other device. Thus the six expert medical reports and two vocational and rehabilitation reports adduced by the plaintiff all rely almost entirely upon the plaintiff's self-report of her pain symptoms. In cases such as the present, credibility findings are important.

[101] The court must be "exceedingly careful" when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery. As McEachern CJ stated in *Price v. Kostyba* (1982), 70 BCLR 397 (SC), citing his earlier decision in *Butler v. Blaylock Estate*, [1981] BCJ No. 31 (SC):

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

[102] Price must be read with more recent authority that recognizes that even minor motor vehicle accidents can cause long-term and debilitating soft-tissue injuries. For example, in the recent case of *Sekhon v. Gill*, 2019 BCSC 811 at para. 39, N. Smith J tempered Price:

Medical knowledge has obviously advanced in the almost four decades since Price was decided. In this case, there is expert evidence of an identified medical/psychological condition -- chronic pain syndrome -- that explains the persistence of the plaintiff's symptoms.

[103] In *Kallstrom v. Yip*, 2016 BCSC 829, Kent J stated:

[329] Much scepticism, some might say cynicism, can accompany claims that significant injury has been sustained as a result of a minor MVA, and particularly so where there is little objective evidence of physical injury and where complaints of pain persist far beyond what most observers might consider to be "normal". It must be remembered, however, that not everybody has the mental or physical constitution of a rugby prop forward.

[104] Kent J also notes (at para. 335) that the *Butler* decision cited in Price was later overturned: *Butler v. Blaylock Estate*, [1983] BCJ No. 1490 (CA), where the Court stated:

[12] With the greatest respect, I am of the opinion that there is no evidence upon which one could reasonably conclude that the appellant did not continue to suffer pain as of the date of the trial. After careful consideration of the expert testimony and the evidence of that appellant and his wife, I have reached the conclusion that the only finding open to the learned trial judge was that as of the date of trial the appellant continued to suffer moderate pain and in the words of Dr. Lehmann, his symptoms 'will gradually subside with further time. Having been present for approximately two and a half years, it is doubtful that they will disappear completely'.

[13] It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. There is no suggestion in this case that the pain suffered by the plaintiff did not result from the accident. I would add that a plaintiff is entitled to be compensated for pain, even though the pain results in part from the plaintiff's emotional or psychological makeup and does not result directly from objective symptoms.

- [105] In *Karim v. Li*, 2015 BCSC 498, Abrioux J (as he then was) usefully gathered the guiding authorities for assessing credibility:
- [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para.186, aff'd 2012 BCCA 296:
- [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) (BC CA), [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).
- [89] In addition, the following principles should be taken into account by the trier of fact:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
 - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
 - it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114; and

- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 20122 BCCA 516.

B. Decision and discussion

- [8] Subject to the comments below, I generally found the plaintiff to be a credible and reliable witness, based on the factors set out in the cases surveyed above. I am also guided by the principle that truthfulness is presumed, subject to credibility and reliability concerns raised by the opposing party: *Hardychuk v Johnstone*, 2012 BCSC 1359 at para 10.
- [9] The plaintiff responsibly conceded points, and took care not to overstate her symptoms. She did not claim many of the symptoms associated with migraine headaches, such as nausea or vomiting. She acknowledged that some of her sick days may have been due to issues other than those flowing from the accident.
- [10] In his assessment of the plaintiff, the plaintiff's medical expert Dr Aaron MacInnes did not perceive any exaggerated pain behaviours or reports; he confirmed that her pain complaints were consistent and proportionate with his examination and diagnosis. There was no evidence at trial or on the record that she exaggerated or obsessed over her pain, either consciously or unconsciously.
- [11] That said, the plaintiff herself did not call many witnesses to confirm the effect of her injuries on her work and life. Such witnesses were limited to family members -- her sister (who lives in Toronto) and her husband -- and a solitary co-worker, who is also a friend. The lack of more objective witnesses, such as workplace supervisors, prompts the Court to accept the plaintiff's evidence with some caution. In this, I direct the comments made in the introduction to the plaintiff as well: adjudication of soft tissue injuries is difficult enough on full evidence, let alone on incomplete or unhelpful evidence.

III. The plaintiff

- [12] The plaintiff is married. Her husband is a firefighter. They have one daughter, born in March 2017.
- [13] The plaintiff is a driven individual. Throughout her life, she has maintained a high level of fitness and activity. In high school, she was a competitive swimmer at the national level, and played several other sports. At university and up to the date of the accident, she competed in triathlons, cycling races, and running races up to the half-marathon distance. She generally finished in the top 10 percent of her age and sex category. She wholly incorporated this zeal for and focus on athleticism in her daily work routine: she regularly commuted from her home in Port Coquitlam to her work at St. Paul's Hospital. She regularly went on runs at lunch, and before and after work.

- [14] After obtaining her B.Sc. in genetics and cell biology, she started a 20-month B.Sc. in nursing in January 2009. After graduation, she was hired in the sub-acute medicine department on a full-time permanent line at St. Paul's Hospital. In that role, she picked up overtime shifts whenever she could.
- [15] As will be expanded below, under "Past and future loss of earning capacity", at the time of the accident the plaintiff worked full-time in the St. Paul's Hospital emergency department. She also did part-time time work at the Inviva infusion and injection clinic, and instructed clinical nursing at the University of British Columbia.

IV. Medical evidence

A. Introduction

- [16] The plaintiff relied upon a single medical report: that of Dr MacInnes, an anesthesiologist and pain management specialist. He conducted a virtual assessment in May 7, 2020, followed by physical assessment on June 4th, leading to a written report dated July 19, 2020.
- [17] As stated, the defendant called no medical evidence (apart from Mr Lai), and adduced no medical expert reports. The defendant listed amongst its witnesses Dr Khan, a pain specialist, as well as Dr Wong, the plaintiff's family doctor, but called neither.

B. Pre-accident and unrelated health issues

- [18] Before the accident, the plaintiff was in excellent health. She admitted to some left hip pain in 2013, which she treated with physiotherapy, and which went away over time. She did not suffer from any chronic pain issues. Nor did she suffer from depression, anxiety, or sleep issues.

C. The progression of the plaintiff's conditions

- [19] The plaintiff felt initial shock at the accident. Her head, neck, and shoulders felt stiff. She nonetheless proceeded to work at the emergency department, where a doctor in that department checked her conditions. She worked her shift that day. Over the course of that shift, she felt increasing stiffening and pain in her head, neck, shoulders, and back.
- [20] Over the next few days, the pain increased steadily. A few days after the accident, she could hardly move due to back pain. Her family doctor advised her to stop her work at St. Paul's Hospital and Inviva, which she did on November 21, 2015. She stayed off work until the end of the year. As she was the only instructor of her UBC course, she completed her evaluations, in December 2015.

- [21] The plaintiff reported that the pain was more intense after the collision. There was then some improvement. Nonetheless, a baseline level of pain settled in. It has remained to this day. She complains of ongoing neck, shoulder and back pain. If she changes position or reaches for an item without taking proper care, she will feel a sharp pain, and the condition will be exacerbated.
- [22] The constant pain manifest itself frequently at work. She had to avoid certain positions and actions, such as reaching over patients. Due to the nature of nursing, it was not always possible to avoid positions and actions that triggered increased pain. Her evidence did not set out how frequently her baseline pain jumped up to sharp pain.
- [23] Another jump from the baseline pain is occasioned by painful neck spasms which occur one or two times a year.
- [24] She also suffers from headaches, which she describes as constant, to a varying degree. From time to time, the headaches manifest themselves as migraine headaches; she reports that these have increased in frequency over the past five years. The migraines occur once every two, three, or four weeks. At their worst, she feels a crushing pain in her head, and the room seems to shake. She must lie down, in the dark, removed from noise and other stimuli.

D. Diagnoses and prognoses

- [25] Dr MacInnes diagnoses the plaintiff with chronic whiplash-associated disorder, chronic mechanical spine pain, cervicogenic headaches, chronic myofascial pain syndrome, and sleep disruption.
- [26] These diagnoses were not solely based upon the plaintiff's self-report. It was also based upon more objective medical evidence: appropriate report and referral of pain consistent with the pain complaints upon palpation of specific trigger points and body locations.
- [27] Dr MacInnes provides a guarded prognosis for each condition. He notes that as the pain has lasted for five years, she will likely continue to suffer from daily pain. The plaintiff will likely require ongoing self-management of her symptoms, through a combination of active and passive treatment modalities. In cross-examination, he responsibly acknowledged the uncertainty of future predictions.
- [28] The diagnosis of sleep disruption is undermined by other evidence directly from the plaintiff. A December 1, 2015 clinical record records the plaintiff's report that she was able to sleep. In a June 2018 massage therapy initial intake questionnaire, she reported that her sleep was restful, and that she slept eight hours a night. In her October 15, 2019 discovery, she denied that the accident had caused fatigue or sleeplessness.
- [29] The defendant notes that Dr MacInnes's diagnosis is largely based upon the plaintiff's self-reports. Accordingly, the defendant argues that the sleep disruption inconsistencies should cast doubt on her testimony generally. Ultimately, as noted above, the Court generally believed the plaintiff; the defendant generally did not undermine that credibility through

cross-examination, or the introduction of specific evidence undermining her pain complaints. I reach the same conclusion as did N. Smith J in *Carvalho v Angotti*, 2007 BCSC 1760:

- [17] Although there are inconsistencies in the plaintiff's evidence, I am satisfied that she was attempting to tell the truth as she recalls it. Those inconsistencies may cause me to question the accuracy of her recollection on some points, but they come nowhere near to being a basis for a finding of outright and deliberate dishonesty.
- [30] In summary, I do not accept that the plaintiff has discharged her burden of proving that the accident caused compensable sleep deprivation. I do accept that the accident has inflicted on the plaintiff chronic whiplash-associated disorder, chronic mechanical spine pain, chronic cervicogenic headaches, and chronic myofascial pain syndrome. There is a significant chance that she will continue to suffer from these conditions to some extent for the rest of her life, subject to further treatments, as discussed in the next section.

E. Treatments

- [31] For a health care professional, the plaintiff has explored and attempted surprisingly few treatments for her condition.
- [32] On a daily basis, her main pain management techniques are lying down, resting, and stretching. Since the accident, she has received some five acupuncture treatments. She received a few registered massage therapy treatments, concentrated in November and December 2015, February 2017, and then regularly and frequently from July 2019 through to the trial date. These treatments and strategies offer only temporary relief.
- [33] She has also tried physiotherapy: again, to a limited extent. She had four sessions in January 2016; she stopped as she found it to give her "no benefit". That said, the physiotherapist testified that the plaintiff had told him that she felt some improvement, and that it enabled her work with less pain. She did not attempt physiotherapy again until September 2020, after some spasmodic neck pain, just before trial.
- [34] The plaintiff does not use prescription medication to attempt to control her symptoms. Since the accident, she has only attempted, briefly, one prescription, for diclofenac, in 2015. She says that she occasionally takes over-the-counter Tylenol (acetaminophen) or Advil (ibuprofen), if needed. As she admitted in discovery, those medications sometimes bring the pain down to a manageable level, and sometimes completely relieve the pain:

Q How do Advil and Tylenol affect the pain?

A Sometimes it helps, and sometimes it doesn't.

Q Now, when you say it helps - - does it completely relieve the symptoms? Or just brings it down to a manageable level?

A Yeah. So sometimes it brings it down to a manageable level, and sometimes it does -- it does go away.

- [35] She admitted that she avoids taking ibuprofen, due to the long-term risks to the kidneys. She only takes it if she is in acute pain or needs the medication to "get her to the end of her shift."
- [36] The plaintiff herself admits that common, over-the-counter medications ordinarily taken for aches, pains, and headaches, will generally manage or eliminate her symptoms. These are of course are not novel, obscure, expensive, invasive, painful, or expensive treatments.[2]
- [37] That said, the fact that her conditions are largely treatable, even where she elects not to treat them, does not render them non-compensable: the need for such medicine to function is itself a burden inflicted on the plaintiff by the defendant. But it establishes that the plaintiff's pain complaints, while chronic, are not as debilitating as the plaintiff complains.
- [38] Dr MacInnes also provides a few recommendations for future treatment and management of her symptoms. He cautions, however, that these treatments will not likely cure her conditions, but may assist in management of her chronic pain, and improve the overall quality of her life. These include active self-management, as guided by various websites and health professionals. Psychological aids and treatments -- through mindfulness meditation training, cognitive behavioural therapy, and acceptance-based cognitive behavioural therapy -- could assist. He recommends an active land- and water-based exercise programme, available at a fitness facility, and overseen by a physiotherapist or kinesiologist. He also recommends yoga.
- [39] Dr MacInnes also notes that trigger point injections, with Botox or anaesthesia may be effective. He opined that they "would at best modestly assist her with symptom management."
- [40] One may be forgiven a creeping cynicism that in some cases litigation distorts rehabilitation. Most soft tissue injuries resolve on their own or through an active rehabilitation process; chronic soft tissue injuries are outliers. Typically, a sequenced variety of different treatments must be attempted before finding one that works for the individual plaintiff. This plaintiff is a trained nurse, who teaches nursing, and who has been surrounded by doctors and other healthcare professionals since the accident. She is well-placed in education and training to actively investigate and canvas with her treating physicians the plethora of treatments and strategies for soft tissue injuries. Even a plaintiff not blessed with such an education could, with minimal energy, discover, on the Internet and elsewhere, other treatment strategies, that they could then explore with their physician. On one hand, the plaintiff bemoans the dire effect of the accident on every aspect of her life. On the other, she has done little to actively seek to resolve her condition. In contrast to many medico-legal reports presented to the court which provide a long list of soft tissue injury treatments and strategies, Dr MacInnes's report is parsimonious and pessimistic about alternative treatment strategies. In any case, the one treatment that he recommends -- Botox or anaesthesia injections -- would have been known or readily ascertainable by this

plaintiff as a viable option well before receiving that report. Her credence in the potential benefit of that treatment is evidenced by the fact that she claims \$55,536 for it as a future cost of care. Yet in the three months between the MacInnes report and the trial, or the almost 5 years between the accident and the trial, she has not attempted that treatment.

[41] At the same time, the Court must decide this dispute based upon the evidence before it. An expert medical report from the defendant would have likely provided a more complete list of other treatment options, which list of untried treatments might have provided the basis for a failure to mitigate argument, or a conclusion that the potential benefit of such future treatments should prompt a contingency deduction.[3] But there is no such defendant expert report before the Court. The Court cannot import the recommended treatments from expert medical reports adduced in other soft tissue injury cases into this case. Accordingly, as set out below, despite this specific and general frustration at the limited evidence adduced by both sides, the Court still awards significant damages to this plaintiff.

F. Conclusion: the plaintiff's conditions

[42] As stated, I generally accept Dr MacInnes's diagnoses and prognoses. The plaintiff's neck, shoulder, and back pain is chronic and will likely to some extent remain for a long time or the rest of her life. At the same time, I agree with the defendant, that for the most part the chronic pain and headaches remain at a low baseline, and are manageable presently through a combination of stretching, avoidance of triggering actions and positions, and occasional over-the-counter medication. Dr MacInnes's further recommendations, set out above, including the Botox or anaesthesia injections sought by the plaintiff, will only improve the prognosis. More frequent, while still restrained, recourse to the over-the-counter medication that the plaintiff presently takes and benefits from, would make the pain further manageable. These avenues for greater management of the plaintiff's pain symptoms will result in a significant contingency reduction, incorporated under the various heads of damages, below.

V. Damages

A. Introduction

[43] The plaintiff seeks the following damages:

Non-Pecuniary Damages

\$140,000

Past Loss of Earning Capacity

\$150,000

Future Loss of Earning Capacity

\$600,000 to \$1,000,000

Loss of Housekeeping Capacity

\$25,000

Cost of Future Care

\$382,744

Special Damages

\$7,587.22

Total

\$1,305,331.22 to \$1,705,331.22

B. Law: damages and contingencies

[44] The assessment of damages measures the extent of the plaintiff's loss: that is, the difference between the plaintiff's life as it is, and plaintiff's life as it would have been, but for the negligence that caused those injuries. Damages awards seek to place the plaintiffs in the position they would have been but for the defendant's negligence: no better or worse. The defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would likely have experienced regardless of the defendant's negligence. The defendant is liable for the additional damage but not the pre-existing damage: *Athey v Leonati*, [1996] 3 SCR 458 at paras 32-35.

[45] As McLachlin CJC states in *Blackwater v Plint*, 2005 SCC 58 at para 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: [*Athey v Leonati*]

[46] As Warren J explains in *Abbott v Gerges*, 2014 BCSC 1329:

[55] The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendants' negligence: *Athey*, at para. 32. This requires a determination of the plaintiff's position after the negligence and an assessment of what the original position would have been. The difference between these positions represents the quantum of the defendants' liability: *Athey*, at para. 32.

[56] The defendants need not put the plaintiff in a position better than her original one and should not compensate the plaintiff for any damages she would have suffered anyway: *Blackwater v. Plint*, 2005 SCC 58, at para. 78. In determining the plaintiff's original position, it may be necessary to reflect any debilitating effects of a pre-existing condition, or a

measurable risk that such a condition would have detrimentally affected the plaintiff in the future regardless of the defendant's negligence. This is the crumbling skull rule and, where applicable, it results in the damages award being reduced to reflect risks inherent in the plaintiff's pre-accident condition: *Athey*, at para. 35.

[57] As explained in *T.W.N.A. v. Canada (Ministry of Indian Affairs)*, 2003 BCCA 670, at para. 48, a measurable risk need not be proved on a balance of probabilities:

Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

[47] In *Athey*, Major J provides guidance on adjustments for contingencies. He contrasts past events, which must be proven on a balance of probabilities and are thereafter treated as certainties (at para 28), with hypothetical and future events:

[27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 160 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1997), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).

[48] The extent, if any, to which awards should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v Bottle*, 2011 BCSC 1389 at para 253.

C. Non-pecuniary damages

1. Introduction

[49] The plaintiff seeks \$140,000 in general, non-pecuniary damages for pain and suffering. The plaintiff says that every aspect of her life has been impacted by the chronic pain caused by the accident. The accident has forced her to change her career plans significantly, moving into roles that she had no interest in or intention of pursuing before the accident, and working less than she did before the accident.

[50] The defendant argues for an award of \$95,000 under this head.

2. Discussion and decision

[51] I will consider the factors set out in *Stapley v Hejslet*, 2006 BCCA 34 at para 46. The plaintiff is 36 years old. The pain is chronic, and will likely persist to some degree, for the rest of her life. That said, it is only moderately disabling: it is largely manageable, and she is largely able to function in life with treatments and adaptations.

[52] Her injuries have lessened her performance in and enjoyment of athletic activities which were a central part of her life: both in terms of competition, as well as daily health. She can no longer compete in triathlons or go on difficult hikes. Her post-accident participation in a half-marathon and in the Grand Fondo were sources of frustration, rather than accomplishment. That said, she is still able to cycle, hike, jog, and swim, albeit at a less intense pace, and will likely be better able to do so in future with the benefit of treatments set out above. The primary burden is that she will have to take over-the-counter medication, and undergo certain treatments, and regular stretching, in order to hike or ride; it is not the case that she has been wholly deprived of these activities.

[53] Before the accident, the plaintiff and her husband were enthusiastic travellers; travel was adventurous and physical, focusing on hiking, rock-climbing, and other outdoor activities. After the accident, holidays must be more restrained.

[54] At the same time, it is not uncommon for people to enjoy less intense and less frequent holidays in their 30s than they enjoyed in their 20s, through the natural aging process, the pressures of work, and the arrival of children. Similarly, it is not unusual for those factors, coupled with sports wear and tear, for athletic prowess and enthusiasm to diminish during this period.

[55] The plaintiff's injuries have resulted in marital stress: she is no longer able or willing to participate in as many athletic and other enjoyable activities, and her husband must carry a greater household maintenance burden. The injuries have also affected marital intimacy. Her chronic pain also limits her activities with her young daughter, causing maternal guilt.

[56] As to the other *Stapley* considerations, her continued full-time work, and the absence of catastrophisation of her injuries, exhibit stoicism.

[57] Both sides provided cases that they encourage the Court to use as comparators in facts and damages awards.

- [58] The plaintiff presented the following cases: *Mattson v Spady*, 2019 BCSC 1144 (30 years old; \$150,000); *Kirkham v Richardson*, 2014 BCSC 1068 (26 years old; \$130,000 (\$145,000 adjusted in 2020 dollars))[4]; *Gill v Lai*, 2018 BCSC 101, var'd on other grounds 2019 BCCA 103 (29 years old; \$140,000); *Chai v Greenwood*, 2020 BCSC 1294 (46 years old; \$120,000).
- [59] The defendant presented the following cases: *Mathews v Noble*, 2020 BCSC 1499 (60 years old; \$80,000); *Reely v Zhu*, 2020 BCSC 1520 (29 years old; \$100,000); *Tzotzolis v Wyman*, 2019 BCSC 2026 (45 years old; \$95,000); *Dhaul v Meahan*, 2019 BCSC 990 (40 years old; \$90,000); *Bain v Goodridge*, 2019 BCSC 1450 (47 years old; \$100,000).
- [60] The cases cited by both sides were helpful, but all had distinguishing characteristics.
- [61] In *Mattson* and *Chai*, the plaintiffs' injuries were more severe and debilitating than that of the present plaintiff, extending beyond soft tissue injuries and headaches. The accident in *Chai* inflicted regular sleep disturbance. The plaintiff in *Kirkham* was an elite athlete, on the verge of competing internationally. The prognoses in *Kirkham*, *Gill*, and *Chai* were more dismal than the present. The *Gill* plaintiff suffered from multiple accidents. The *Gill* accident more profoundly limited the plaintiff's employment aspirations and prospects. The *Chai* plaintiff suffered significant social isolation and mood disturbance due to the accident. The *Mattson* and *Kirkham* plaintiffs' injuries persisted despite a wider and more active battery of treatments.
- [62] I turn to the defendant's cases. With the exception of *Mathews*, the plaintiffs in those cases had less fulfilling athletic and personal lifestyles than the present plaintiff. The plaintiffs in all of the defendant's cases were older than the present plaintiff; the *Mathews* plaintiff was twice the age of the present plaintiff. In *Dhaul* and *Reely* the paths and prognoses for improvement were more rosy than the present. The plaintiffs in *Reely* and *Tzotzolis* suffered from no, or less severe, headaches than the present plaintiff.
- [63] With an eye to the effect of the plaintiff's chronic and likely continuing conditions on her active and athletic lifestyle, measured against the comparator cases, the Court awards \$100,000. It is decreased to reflect the fact that her conditions are generally manageable now, and may improve in future through the treatments recommended by Dr MacInnes or otherwise. It is also increased, to provide compensation for greater pain and inconvenience in carrying out household tasks instead of awarding that amount as a separate head of damage, as next discussed.

D. Loss of housekeeping capacity

- [64] The plaintiff seeks \$25,000 for past loss of housekeeping capacity. Carrying heavy objects, such as laundry, causes pain. Vacuuming flares her low back pain. She is unable to complete yard work. While before, she and her husband split household duties, she must now rely upon him to carry more of the burden.

- [65] The defendant argues that no damages should be awarded under this head, based upon the following authorities.
- [66] *Liu v Bains*, 2016 BCCA 374 sets out principles guiding such awards:
- [25] Since the decision in *Kroeker*, it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. McGillivray*, 2000 BCCA 164 at para. 63.
- [26] It lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
- .
- [28] The appellants are correct that an award for loss of capacity is generally assessed rather than precisely calculated. Where the award is treated as a separate pecuniary claim, however, there is nothing wrong in using labour force information regarding the value of replacement services as guidance in determining the appropriate quantum: *McTavish* at paras. 63, 67-68. What is important is the ultimate reasonableness of the award.
- [29] I appreciate that *Kroeker* and, more recently, *Westbroek*, urge caution in assessing awards for loss of housekeeping capacity. I do not, however, understand these decisions to endorse an award that provides less than full compensation for a proven loss. Nor do they mandate a routine reduction of two thirds if a trial award is successfully challenged. Any reduction will be dictated by the facts of the individual case.
- [67] After an expansive review of the authorities, *Kim v Lin*, 2018 BCCA 77 concludes:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

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

[68] The injuries have not rendered the plaintiff incapable of doing housework, but have only rendered those activities more painful: just as she is able to work, albeit with adaptations and treatments, she is able to do housework. I reach the same conclusion on this head of damages as I recently reached in *Warnock v Weijdeman*, 2021 BCSC 553 at para 122:

As set out above, it is more appropriate to consider and compensate the effects of the accidents on the plaintiff's housekeeping ability, under the heading of general or non-pecuniary damages. The accidents did not render the plaintiff incapable of doing housework: only more slowly and with adaptations. Her husband's additional housework is that which might be expected of a spouse in sickness and in health. The inclusion of this consideration has increased the non-pecuniary damages award above.

E. Past and future loss of earning capacity

1. Positions of parties

[69] The plaintiff's claim for loss of past and future earning capacity is the largest component of her claim. The plaintiff argues that her loss is not represented by specific lost wages or shifts, but in the disruption of her entire career plan: her lingering conditions have forced her to make career decisions that she would not have otherwise made. She seeks \$150,000 for past loss of earning capacity. For future loss of earning capacity, she posits a range of \$600,000 to \$1,000,000, suggesting a specific award of \$800,000.

[70] The defendant argues, again, that the plaintiff's ongoing conditions are manageable, as evidenced by her general ability to work to the date of trial and beyond, apart from the brief time off work immediately post-accident.

[71] The parties agree, and I agree, that the loss of capital asset approach is appropriate for both heads of damage. The plaintiff's career was not yet settled, as she combined work at several hospitals, with clinic work, with teaching, with a stated aspiration to move into travel nursing. It is further complicated by the facts that, personally, the plaintiff's injuries are not completely debilitating, and, professionally, there are a wide number of contexts in which to utilise one's nursing skills and training.

2. Facts: employment

- [72] In July 2013, she moved to the St. Paul's Hospital emergency department. She reported that she enjoyed the excitement of the ward. She underwent specific training in the emergency specialty, and again working on a full-time line in that department in April 2014. Whenever she could, she picked up lucrative overtime shifts, limited only by her lack of seniority.
- [73] In June 2015 she picked up additional work at Inviva infusion clinic. In September 2015 she added part-time instruction in clinical nursing at UBC. These three positions represent her employment at the time of the November 2015 accident.
- [74] The plaintiff testified that she planned to shift towards travel nursing: being dispatched on a part-time basis to out-of-town hospitals, clinics, and worksites. Pay for travel nursing shifts is higher than in the public health system: \$52 per hour. Her stated plan was to concentrate shifts at St. Paul's Hospital, such as to free up time for travel nursing assignments; in the long term she planned to shift to full-time travel nursing. Just two weeks before the accident, she took two steps towards this plan. In October 2015, an opportunity arose, and she shifted down to a temporary part-time 0.4 position at St. Paul's Hospital, effective December 2015. She also applied to two companies (one unnamed) that contract travel nursing, and says that she was hired by both (although no documentation was provided in this regard). Ultimately, she only did one brief stint as a travel nurse: two days in Sechelt in October 2016 (paying \$1,191). She attributes the limitations imposed by her injuries as the reason for not pursuing travel nursing further.
- [75] After the accident she stopped instructing at UBC, in part due to the uncertainty of her injuries. In September 2016 she again tried a term instructing at UBC. She ultimately did not renew, as she says that she had decided that teaching was "not for me" (although she has since, twice, returned to teaching, she says that her injuries necessitated those decisions).
- [76] She was off work at St. Paul's Hospital and Inviva for some three weeks after the accident. She began a graduated return to St. Paul's Hospital, working 0.4 of a shift on December 8, 2015. By January 12, 2016 she had returned to full-time work at St. Paul's Hospital, and by February 2016, she had returned to work at Inviva.
- [77] At both locations, she made adjustments to accommodate her injuries. She avoided lifting and movements that would aggravate pain. She asked coworkers for help. Sometimes she had to tell patients that she was unable to shift or move them, or would draft a family member to assist. At St. Paul's Hospital, but more so at Inviva, there would often be no one who could assist her. Instead of taking runs during her break, she would usually lie down and take an ibuprofen capsule.
- [78] In August 2016, she learned that she was pregnant. She took a leave of absence from Inviva, in part over her concerns that exposure to immunosuppressant medications at Inviva might harm her baby, and in part due to the physical demands of the work.
- [79] After the March 2017 birth of her daughter, she took a 12-month maternity leave from St. Paul's Hospital.

- [80] From May 2016, and during her maternity leave, she worked casual shifts at the Eagle Ridge Hospital emergency department. At the end of her maternity leave, in April 2018, she briefly returned to work at St. Paul's Hospital. After a month, she transferred to Eagle Ridge emergency department, starting a full-time position around May 2018. She remained at St. Paul's Hospital on a casual designation. She also took on a term of teaching at UBC, twice a week.
- [81] The plaintiff found work in the emergency department too physically demanding with her injuries. She switched to perinatal care. She took training for this role, and in July 2019 started a full-time position at Royal Columbian Hospital. She found that the physical demands of the perinatal position were no better than in the emergency department. She also found it less interesting and exciting than the emergency department. She said that she realised that she could not maintain the role, and started looking at other options.
- [82] In September 2020, she was offered an instructor role at the British Columbia Institute of Technology ("BCIT"). She dropped down to a 0.8 position at Royal Columbian Hospital. She finds the BCIT position less physically taxing with her injuries. As at trial, the plaintiff anticipated taking a full-time position (35 hours per week) at BCIT, starting in January 2021. That position will require her to complete a master's degree within five years of starting permanently, in order to continue.

3. Law

- [83] In *Grewal v Naumann*, 2017 BCCA 158, Goepel JA (in dissent, but endorsed by the Court on this point) summarises the approach to assessing loss of both past and future earnings capacity:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [84] In *Parker v Lemmon*, 2012 BCSC 27 at para 42, Savage J (as he then was) summarises the principles for assessing loss of future earning capacity:

- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
- (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
- (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
- (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
- (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
- (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
- (8) An earnings approach will be more useful when the loss is more easily measurable; and
- (9) The capital asset approach will be more useful when the loss is not easily measurable.

F. Discussion and decision: past loss

- [85] The defendant argues that the only income loss that has been proven with reasonable certainty is that arising from the plaintiff's time off from St. Paul's Hospital from November 15, 2015 to January 12, 2016: \$9,234.02. In her October 2019 discovery, she stated that she did not miss any time off work due to her injuries, or any opportunities for work, either at Eagle Ridge or at Royal Columbian Hospital. At the same time, the defendant does not raise any specific disagreement with the calculations or models set out by the plaintiff, below. The defendant suggests that the Court take the plaintiff's calculations, and reduce the amount by 50 percent, to reflect the inherent uncertainties of how the past would have unfolded but for the accident.
- [86] The plaintiff has provided a set of scenarios, with calculations, for past losses. Scenario A hypothesises that the plaintiff would have worked a combination of travel nursing (32 hours per week) and St. Paul's Hospital (20.25 hours). Scenario B hypothesises that she would have continued working full-time at St Paul's. Scenario A results in a slightly higher claim.
- [87] The defendant raises several objections to the plaintiff's calculations. For example, the defendant notes that Scenario A, for 2016, postulates the plaintiff working 52 weeks in the year, almost full-time. He also notes the paucity of demand-side evidence that the plaintiff would have received the travel nursing opportunities hypothesised, especially in light of the fact that she only did a single weekend of travel nursing, in 2016. He notes the general opacity of evidence about the terms and remuneration of such travel contracts.

- [88] It is always challenging for a court to assess the likelihood that a career aspiration would have come to perfect fruition. While the plaintiff is driven and talented, her multiple changes in nursing career paths undermine the certainty that she would have shifted to full-time travel nursing work. Just as she found earlier that nursing instruction was not her desired occupation, and just as she made multiple changes of hospitals and clinics and work configurations, just as she shifted from an emergency to a perinatal focus, she may well have decided that travel nursing was more desirable in theory than in practice. The arrival of her daughter in March 2017 would also challenge a travel-focused career. Accordingly, the Court must consider the model based upon a substantial shift to travel nursing guardedly.
- [89] At the same time, despite the plaintiff's limited foray into travel nursing, she took steps to realise that objective before the accident occurred. Her drive, energy, and love of travel made that mode of nursing a perfect fit.
- [90] The Court finds that there is a real possibility that she could have obtained and maintained at least some increased hours at the more lucrative rate provided by that mode of nursing. Up to the accident, the plaintiff maintained an ambitious schedule of overtime, at multiple places of employment: there is no evidence that she would not have continued to do so but for the accident. She had the physical and mental ability and stamina to achieve this objective. The fact that she was able more or less to persevere through a regular schedule after the accident should not be held against her.
- [91] Finally, the amount sought must be partly discounted by the conscious decision of the plaintiff to take less over-the counter medication or seek other readily-accessible methods to manage her pain. The present is not a case of total disability.
- [92] In view of all of these factors, the Court awards \$100,000 for past loss of earning capacity.

G. Discussion and decision: future loss

- [93] The plaintiff's calculation of future loss is two-stepped. First, she compares her future earnings as a BCIT instructor to what she would have earned as a registered nurse at St. Paul's Hospital; the figures are adjusted by multipliers provided by Mr Benning, an accountant, whose suggested conversion rates are not disputed by the defendant. Second, she notes that the BCIT position is only 35 hours per week, with no opportunity to earn overtime, in contrast to a position at St. Paul's Hospital or another hospital as a registered nurse. This additional loss of future earning capacity ranges from \$232,357 and \$929,094. On top of this, the plaintiff argues that she will likely have to reduce her BCIT hours in order to obtain her master's degree, which itself will likely cost \$12,000 (for a Master of Nursing-Nurse Practitioner) or \$21,000 (for a Master of Science in Nursing), each taking two years. Ultimately, the plaintiff returns to the dominant theme that her injuries have limited her employability and employment options in the nursing field.

- [94] The defendant argues that there are too many uncertainties as to the plaintiff's future to allow a precise calculation. The defendant argues that the plaintiff's likely vocational path is continue teaching at BCIT. He suggests an award of \$200,000, representing two years' income loss as the plaintiff earns her master's degree in nursing in order to continue teaching at BCIT. In supplemental responsive submissions, the defendant follows the plaintiff's comparative approach, and argues that an appropriate award for future loss of capacity is \$290,000.
- [95] The Court accepts that the plaintiff has acquitted her evidentiary burden of proving a real possibility of future loss of income earning capacity attributable to the injuries flowing from the accident. The Court also rejects the defendant's proposition that her compensation should be limited to necessary adaptations, in the form of the master's degree, to allow her to continue the less-lucrative BCIT position. One must keep in mind that the Court is awarding compensation for a loss of capacity. While the plaintiff may be content with her BCIT position, her daily pain and the therapeutic burdens to deal with that pain, drive her to this position. Most importantly, she must avoid more conventional nursing roles which expose her to quotidian pain with the occasional aggravation of that pain through lifting or twisting. As stated in *Morlan v Barrett*, 2012 BCCA 66:
- [41] In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. 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
- [96] Her conditions, albeit largely manageable, will hinder the plaintiff's vocational performance and options, for all or some of the approximately thirty years remaining in her career. As stated in *Crimeni v Chandra*, 2015 BCCA 131:
- [15] An award for loss of income earning capacity is intended to put the plaintiff in the position she would have occupied had she not been injured. It must be founded upon a real and substantial loss and must be measured by seeking to approximate the actual economic loss the plaintiff has suffered. The quantum of damages under this head has not been set or limited by convention, such as the non-economic heads of damages discussed by Dickson J. in *Thornton v. School District No. 57 (Prince George) et al*, [1978] 2 S.C.R. 267, at 284.
- [16] Whether the award is a wholly erroneous assessment of the claim cannot be addressed by asking whether it is simply "too large". Such an award cannot be said to be excessive in the absence of a misapprehension of evidence or an error in principle. An award for the loss of the capacity to earn income can only be said to be "wholly erroneous" if it cannot have been arrived at on any reasonable view of the evidence, such as might be the case where there has been an error in the estimation of the pre-injury stream of earnings or the effect of the injury on earning capacity.

- [17] The appellants argue the award is excessive because it amounts to an award of \$14,000 per annum for every year of the plaintiff's work life to age 65. That is not an argument that the award is excessive or founded upon an error in principle. A moderate limitation in a lucrative occupation may lead to substantial award.
- [97] At the same time, there are several factors indicating that the accident injuries should not result in the full compensation sought by the plaintiff. The BCIT decision is not solely motivated by the injuries. Apart from the ease of physical burdens, it also provides a more regular, less stressful, and less physically taxing role than emergency room or perinatal nursing. Further, it is still possible for the plaintiff to acquire some part-time additional work in more conventional nursing roles. Finally, as noted above, the treatments recommended above could well put the plaintiff in the same situation that she would be without the accident.
- [98] The plaintiff argues that positive contingencies ought to offset any negative contingencies such as those just surveyed. For example, the plaintiff argues that she may not in fact complete the master's degree, or she may not be able to continue teaching due to residual pain. The Court is confident that the plaintiff's past academic and vocational successes, and her general drive, and her general ability to work notwithstanding post-accident pain, even before these recommended treatments, make the contingencies cited by the plaintiff unlikely to materialise.
- [99] In view of all of the evidence, illuminated by the jurisprudence, \$500,000 is an appropriate award for future loss of earning capacity.

H. Cost of future care

1. Law

- [100] The purpose of an award for cost of future care is to restore, as best as possible with a monetary award, the injured person to the position he or she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Gignac v Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras 29-30.
- [101] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v Bartsch*, (1985) 49 BCLR (2d) 33 (SC) at 84, *aff'd* (1987) 49 BCLR (2d) 99; *Tsalamandris v McLeod*, 2012 BCCA 239 at paras 62-63.

- [102] While a physician need not testify to the medical necessity of every item of care that is claimed, there must be some evidentiary link drawn between the physician's assessment of the plaintiff's condition and recommended treatment and the care recommended by a qualified health care professional: *Gregory v Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 39.
- [103] A future care costs award should be moderate and reasonable: *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229 at 242; *Dabu v Schwab*, 2016 BCSC 613 at para 89.
- [104] At the same time, consideration of an appropriate future care costs award is not an exercise in how to save money. The court should appropriately compensate the plaintiff to allow her to reasonably address the ongoing injuries inflicted by the defendant: *Williams v Low*, 2000 BCSC 345 at para 25.
- [105] In *Prempeh v Boisvert*, 2012 BCSC 304 at para 108, Dardi J summarises the effect of contingencies on the assessment of costs of future care:

The assessment of damages for cost of future care necessarily entails the prediction of future events: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21; *X. v. Y.* at para. 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or conversely the prospect that additional care will be required: *O'Connell v. Young*, 2012 BCCA 57 at paras 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

- [106] The resulting award is to reflect the reasonable or normal expectations of what the injured person will require while being fair to both the claimant and the defendant: *Krangle (Guardian ad litem of) v Brisco*, 2002 SCC 9 at paras 21-22.
- [107] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para 21.

2. Discussion and decision

- [108] The plaintiff seeks damages for the anticipated costs of future care of \$382,744. This is based upon the July 27, 2020 report of Jacquelyn Abdel-Barr, an occupational therapist and functional capacity evaluator, which is based in turn on the treatment recommendations of Dr MacInnes. The largest items are physiotherapy (\$28,875), acupuncture (\$52,671), massage therapy (\$65,839), seasonal cleaning (\$63,007), yard and garden care (\$34,028), and ongoing Botox (with the 50 percent contingency: \$55,536).

- [109] The defendant argues that Ms Abdel-Barr's recommendations are excessive, and submits that consideration of a future costs of care award should start with a 50 percent reduction of those amounts. He also notes that the plaintiff has not specifically confirmed that she will avail herself of all of the recommended services
- [110] The plaintiff's claims overlap or are rendered redundant by other heads of damages. She has already been compensated for diminished housekeeping capacity, as set out above under non-pecuniary damages. Similarly, the award of future loss of earning capacity recognises that the plaintiff has been forced in part to work in the less physically demanding role as a nursing instructor, rather than an emergency ward nurse, thus lessening the need for regular rehabilitation through physiotherapy, acupuncture, and massage therapy. By corollary, the defendant's arguments that treatments may improve the plaintiff's conditions, necessitating a contingency reduction, themselves indicate the appropriateness of awarding costs of future care designed to bring about those anticipated physical improvements.
- [111] In addition to being redundant with non-pecuniary damages award, the substantial amount claimed for home and yard maintenance must be considered in light of the shared duties of the plaintiff and her husband. She cannot expect compensation on a model wherein she is the sole party providing household services. Nor may she expect full compensation modelled on a total physical inability to carry out these tasks; many people must take a Tylenol or Advil before or after garden work or a deep household clean.
- [112] The Court also notes that physiotherapy, acupuncture, and massage therapy have provided, by the plaintiff's own admission, only fleeting or minimal relief. They are expensive substitutes for what Tylenol and Advil would likely bring, if taken only slightly more regularly.
- [113] Further, the contingency discussed above must be applied to all of the future care needs to recognise the possibility that the plaintiff's condition may partially or wholly improve.
- [114] In light of the above, the Court awards the full amount sought for medications and supplements, and psychological assessment (\$2,822). The Court awards 25 percent of the projected therapeutic modalities sought (\$37,902). The Court awards the full amount sought for health maintenance and leisure, including the Botox trials, subject to contingency (totalling \$74,149). The future care costs awarded total \$114,873.

I. Special damages

- [115] The parties agree on special damages at \$7,587.22, and the Court orders that amount be paid.

VI. Conclusion

- [116] The Court awards the plaintiff the following damages:

Non-pecuniary damages

\$100,000.00

Loss of past earning capacity

\$100,000.00

Loss of future earning capacity

\$500,000.00

Loss of housekeeping capacity

\$0.00

Special damages

\$7,587.22

Cost of future care

\$114,873.00

Total

\$822,460.22

[17] Unless there are facts not presently known to the Court, the plaintiff is entitled to her costs at Scale B.

"Crerar J"

[1] Kempton v Struke Estate, 2020 BCSC 2094.

[2] As set out in Chiu v Chiu, 2002 BCCA 618 at para 57, the defendant must prove two things in order to establish a failure to mitigate: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. Ordinarily, one requires medical evidence with respect to both aspects of the test. But the quoted passage above, from the plaintiff's discovery, addresses both aspects. That said, as the defendant does not advance a failure to mitigate argument, the Court will not consider one.

[3] Treatment options for soft tissue injuries recommended by medical experts in other cases include: physiotherapy, chiropractic treatment, massage therapy, kinesiology, active rehabilitation, acupuncture, dry needling, trigger point injections, medial branch nerve blocks, ketamine infusions, RFL (radio frequency lesioning or ablations), prolotherapy (injections of sucrose or other liquids to stimulate a healing process), extracorporeal shockwave therapy (delivery of shockwaves to injured tissue to promote healing and reduce pain), platelet rich plasma injections, and various anti-inflammatory and pain medications: see Carroll v Hunter, 2014 BCSC 2193 at paras 46-117; Risling v Riches-Glazema, 2016 BCSC

2423 at para 170; Tsonis v Mizuguchi, 2020 BCSC 643 at paras 153- 155.

- [4] The award was actually \$120,000, reduced by \$10,000 to reflect the possibility that deconditioning associated with a concussion would have resulted in hip pain in any event: see para 195.
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