

CANADA / JUDGMENT

Neil v. Martin

2021 BCSC 1727

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1727 Neil v. Martin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Neil v. Martin,

2021 BCSC 1727

Date: 20210831

Docket: M174651

Registry: Victoria

Between:

Tanya Marie Neil

Plaintiff

And:

Donald Clark Dickie,

Muriel Evalyne Dickie,

Jared Martin

Defendants

Before: The Honourable Madam Justice Watchuk

Reasons for Judgment

Counsel for the Plaintiff:

D.D. McKnight

Counsel for Defendants:

A. Rafuse

Place and Dates of Hearing:

Victoria, B.C.

March 22-24, 2021

April 30, 2021

Place and Date of Judgment:

Victoria, B.C.

August 31, 2021

I. INTRODUCTION

- [1] The plaintiff, Tanya Neil, was injured in a motor vehicle accident ("the collision") that occurred on December 14, 2015. The defendants admit liability.
- [2] The issues in this trial are causation and the assessment of the damages. The plaintiff seeks non-pecuniary damages, past and future wage loss, cost of future care, loss of housekeeping ability, special damages and an in-trust claim for her spouse.
- [3] The defendants submit that although the plaintiff suffered some injuries as a result of the collision, her decision to quit work was the result of other considerations. Thus, they say that damages should be limited to those caused by the injuries suffered in the collision.

II. FACTS

- [4] The parties do not disagree that most of the factual findings can be made on the evidence at the trial as set out in this section. The main issues are the reasons for the plaintiff's decision to quit work and her ability to continue with full-time work. Where there is a factual issue to be determined, it will be addressed below.

A. The collision

- [5] The plaintiff is now 50 years old, and was 45 at the date of the collision in 2015.
- [6] At the time of the rear-end collision she was a front-seat passenger in a pick-up truck driven by her common-law spouse, Darren Wilson, and in which their four month old daughter was a passenger in the back seat.
- [7] The collision itself damaged the vehicle to the extent of \$13,000 estimated for repairs. The plaintiff described being rammed with the force of the impact a jolt which caused her body to move in the vehicle, but not come in contact with the interior. She wore the appropriate seatbelt at the time of the collision.

- [8] Mr. Wilson, who was the only other lay witness at the trial, also testified about the collision. He described it as a sudden jarring followed by a loud noise when they were hit from behind as they were stopped at a red light.
- [9] The plaintiff described almost immediately feeling a burning sensation in her mid back, like it was on fire. She attended at the Nanaimo Regional General Hospital where she was diagnosed with a "soft tissue injury secondary to a motor vehicle crash."

B. Plaintiff's work life immediately pre-collision

- [10] At the time of the collision, the plaintiff was on parental leave having recently given birth to her daughter in August 2015. She had been trying to have a child over the preceding few years and had had several difficulties. The baby was born six weeks prematurely and had health issues that required her to remain at the hospital for six weeks. The plaintiff was a happy and excited new mother.
- [11] In 2015 the plaintiff took maternity leave as well as parental leave from her job as an employee relations coordinator with BC Ferries. She described her job as hard work and good: there were constant demands on her time and changing criteria and tasks. The plaintiff enjoyed the challenges and her work and co-workers. Many days she worked more than eight hours a day, and sometimes close to ten or more hours when tasks were especially demanding. The job gave her self-worth and pride in contributing to her family.
- [12] The plaintiff's education includes some university, courses in make-up, cosmetology, and hairdressing, and secretarial school. BC Ferries had been her employer for about eighteen years at the time of the collision. Her plans were to retire early at age 55, and then to continue working at a pace and work more fitting her interests and circumstances. She is inspired by her mother who is still working at age 80.
- [13] The plaintiff also has a home-based marketing business from which she earns income. No claim arises from this business.

C. Health, activities, and injuries prior to the collision

- [14] The plaintiff had sustained injuries to her neck, shoulder and back in a serious collision in 1994. In 2002, she had another serious collision in which her previously injured features were aggravated. The injuries from both prior collisions had resolved to the point where she could live a full life and be active.
- [15] The plaintiff was attending at a chiropractor about once every 4 to 6 weeks for maintenance. She also went to an acupuncturist on an as-needed basis, and massage therapy about once per month to keep well balanced and healthy.

- [16] The plaintiff continued to be mindful of her neck and back. On November 10, 2015, about a month before the collision, she went to her acupuncturist for treatment of "pain in all joints of the body, knees, hands, shoulders, neck achey and stiff started a couple of weeks ago".
- [17] Generally, her health was good with only mild anxiety, some hypertension and occasional headaches. Sleep was good, and not interrupted by the baby who was a good sleeper. Her fitness level pre-pregnancy was amongst the best of her life, but it was also a time of increased anxiety while waiting to conceive.
- [18] The plaintiff was an avid runner with an ability described by Mr. Wilson as leaving him exhausted trying to keep up. She frequently did long hikes in the steeper hills near Lantzville, and was involved in the family boating trips helping to dock the boat.

D. Home and housework

- [19] The plaintiff has been in a common-law relationship with Mr. Wilson since 2007. Mr. Wilson testified that her emotional state pre-collision was one of excitement - she was "on Cloud 9" being a new mother after all the hurdles. He described the plaintiff as a very strong individual, and their marriage as strong and loving and being everything he would ever want.
- [20] They share a house with stairs between the downstairs and the main floor. The bedroom, living areas and kitchen are all on the same floor; the downstairs area has a recreational area and laundry area. Before the collision, Mr. Wilson would do the outdoor work, including maintaining the yard while the plaintiff would garden and keep house. These tasks included laundry and vacuuming. Mr. Wilson did the heavier tasks, such as painting and interior maintenance. The plaintiff and Mr. Wilson shared meal preparation.
- [21] Mr. Wilson's children had previously lived with them. At the time of the collision, one of the children had moved out, and one child remained with them.

E. Plaintiff post-collision

- [22] The plaintiff testified regarding the changes from her activities prior to the collision. She can no longer run. She was trying to build up her running capacity again but found that her neck became painful if she spent more than seven minutes on the treadmill.
- [23] Hiking was another activity that the plaintiff enjoyed pre-collision, but she can no longer do the steep Lantzville hills. She is now able to walk 5-7 km per day on relatively flat surfaces, such as Newcastle Island.
- [24] In their family of avid boaters, although the plaintiff is now able to stay overnight on the boat and do day trips, she cannot participate as before by tying off the boat because that would require her to jump on and off the boat.

- [25] The plaintiff goes to the gym at least three or four times a week, and is able to do a number of activities there.
- [26] With regard to household activities, the plaintiff confirmed that she is able to vacuum, but she cannot vacuum the stairs. Her house is not as tidy as it was pre-collision. She described Mr. Wilson as doing many of her light maintenance tasks. As it was difficult for her to lift their child, Mr. Wilson assisted with bath time and the use of the car seat.
- [27] The plaintiff has experienced significant anxiety since the collision. She described it as being so much anxiety that gets in the way of being able to do normal things. She says that because she is not progressing in her recovery, she is frustrated with the neck pain, cannot turn her head, and sleep has become so precious. She now has a tendency to catastrophize, or worry about worst-case situations. The upside has been mindfulness, mediation and being positive with her gratitude journal.
- [28] She described not having the ability to be the mother she wanted to be after waiting twelve years for a child. However, to the plaintiff's credit, her daughter has thrived and has overcome the challenges that she had in her first few years. Mr. Wilson's evidence was that there is a close bond between the plaintiff and her child, and the child thrives in the presence of the plaintiff.
- [29] The plaintiff is also not the spouse she wants to be. Her relationship with Mr. Wilson has changed from great to being one of worry that she will lose him. He wants his "old Tanya" back, and she feels guilty and ashamed for not being able to be that person now.
- [30] Mr. Wilson is a Marine Engineer with BC Ferries, and is also a volunteer firefighter with the District of Lantzville. He testified that prior to the collision the plaintiff never complained about neck or back problems or pain, and only occasionally about headaches. Then, she was very active and very fit. Post-collision, her activities have changed drastically as a result of her pain, and now she can no longer run or hike more challenging routes. She is unable to participate fully in family boating outings.
- [31] The plaintiff's emotional state and personality have also changed. She has become very sensitive, whereas prior to the collision they could talk about anything. Mr. Wilson described feeling bad because it is not really a "true relationship" now. The changes post-collision have caused huge stress and a rift in the relationship.

F. Injuries - Plaintiff's evidence and medical evidence

- [32] The plaintiff claims damages arising from these injuries:
- (a) Whiplash Associated Disorder - Grade 2;
 - (b) Lumbar spine muscle injury;
 - (c) Chronic post-traumatic pain in both heels;

- (d) Post-traumatic headaches;
- (e) Increased anxiety; and
- (f) Sleep disturbance.

1. Medical evidence - experts

[33] The Court had evidence from two expert medical witnesses. Dr. Lynne MacKean, a physiatrist, provided two reports dated May 26, 2020 and June 1, 2020, and testified at the trial. The defence relied on the September 10, 2020 report of Dr. Chris Steyn, an orthopedic surgeon, who did not testify. As both doctors reviewed the medical and treatment records, I do not need to repeat them here. However, I will first quote from their reports.

Dr. Lynne C. MacKean - report of June 1, 2020:

Impression:

1. Chronic neck and low back pain. This condition is due to a number of factors.
2. Post traumatic headaches following the motor vehicle accident that occurred on December 14, 2015 which have been getting progressively worse over the past few years.

I do think that the previous motor vehicle accident that occurred in 1994 is significant in contributing to her ongoing chronic neck and back pain symptoms.

The motor vehicle accident that occurred in 2002 caused aggravation of her neck and back pain symptoms.

The motor vehicle accident that occurred on December 14, 2015 caused aggravation of her neck and back pain symptoms and as well, she has had persistent headaches since then.

In my opinion the motor vehicle accident that occurred in August 2016 [Las Vegas] caused temporary aggravation of her neck and upper back symptoms but she did not sustain any new injuries in that motor vehicle accident.

She also has significant degenerative changes involving the mid to lower cervical spine and mid to lower lumbar spine. This is another condition that is contributing to her chronic neck and back pain symptoms at this time.

In my opinion the injuries sustained in the motor vehicle accident that occurred on December 14, 2015 would not cause worsening of the degenerative changes in the cervical and lumbar spine.

She is probably at the point of maximal medical improvement as it has been over four and a half years following the date of the motor vehicle accident that occurred on December 14, 2015.

Dr. Chris Steyn - report of September 10, 2020:

Diagnosis 1

Whiplash associated disorder.

Causation

It is my opinion that the patient suffered from Whiplash associated disorder grade 2, following the subject motor vehicle accident in 2015. It is my further opinion that the symptoms following the accident probably represent an aggravation/reactivation of a previous whiplash associated disorder that the patient sustained in a previous motor vehicle accident around 1994. I based my opinion upon:

1. The mechanism of injury in the subject motor vehicle accident on 14 December 2015 is one that commonly produces a whiplash injury.
2. Ms. Neil reports that she had similar neck symptoms since in [sic] 1994 accident but that they were relatively well controlled by the time she had the accident in 2015.
3. Ms. Neil reports that her neck pain was significantly worse and more frequent following the motor vehicle accident 2015.
4. It is documented in her medical records that she was still treated for neck discomfort in December 2014 (medical brief p 417).

Diagnosis 2

Chronic post traumatic pain in both heels of uncertain etiology.

Causation

The heel pain that the patient occasionally experiences is in my opinion probably a result of soft tissue injury sustained in the subject motor vehicle accident in December of 2015 in view of the fact that she never had any of these symptoms, nor had any heel issues reported in her medical records provided prior to the accident.

Diagnosis 3

Lumbar spine muscle injury.

Causation

It is my opinion that the patient suffered from a lumbar area muscle strain/injury that probably represents an aggravation/reactivation of a previous similar injury sustained in the motor vehicle accident around 2005 [sic] My opinion in this regard is based on the fact that:

1. The mechanism of injury in the subject motor vehicle accident could in my experience plausibly produce a lumbar injury with symptoms such as the ones in this patient.

2. Ms. Neil report [sic] that even though she had back pain in the same area as a feature of to [sic] the 1994 accident she could do exercises such as running without back pain previous to the 2015 injury.

Diagnosis 4

Degenerative lumbar and cervical spine disease with radiculopathy from disc protrusions

Causation

It is my opinion that this is a condition that pre-existed to the subject motor vehicle accident 2015 [sic] and is probably not caused, nor is the natural progression of this condition hastened by the subject motor vehicle accident, with the exception of the possibility that the radiculopathy (leg pain) possibly developed quicker as a result of the motor vehicle accident in 2015. I base my opinion on:

1. Ms. Neil reports intermittent back pain before the accident in 2015.
2. Typical degenerative changes reported on MRI (medical brief p 90-92) as well as radiographs (medical brief p 89)."

Opinion

In my opinion, as also explained in my opinion on issue number 3, it is probable that both the neck and back injuries following the subject motor vehicle accident represent aggravations of these previous injuries rather than new discrete injuries. It is however in my opinion not likely that she would have developed symptoms again, to the degree she that she [sic] has experiencing, had she not been involved in the subject motor vehicle accident in 2015. My opinion in this regard is based upon the general natural history of these injuries that tend to not worsen once they stabilize, as they have done in her case prior to the subject motor vehicle accident.

Degenerative disc disease in her neck and back

Ms. Neil has long-term symptoms suggesting degenerative neck and back disease. She does not report any leg pain (radiculopathy) prior to the subject motor vehicle accident. The natural history of degenerative disc disease in the spine often results in radicular symptoms.

Opinion

It is my opinion that her symptoms of left leg pain (radiculopathy) would likely have developed in any case, had she not been involved in the subject motor vehicle accident but that the accident accelerated the onset of this symptom. How much the onset was accelerated is not possible to say with any certainty.

Motor vehicle accident in Las Vegas in 2016

It is my opinion that this motor vehicle accident probably caused an exacerbation of her neck and back symptoms but did not alter the ultimate long term outcome of these injuries or the symptoms from these injuries significantly.

Prognosis

It is my opinion that the patient's current injury symptoms are probably going to be stable long-term with around a 10-12% of moderate improvement, and a similar probability of slight worsening of her current symptoms. My opinion is based on:

1. It has been longer than four years since the accident and the symptoms has [sic] been stable for over a year.
2. In my experience, and supported by the spinal surgery literature these types of injuries tend to stabilize and not change after stabilization in most cases as long as the patient stays active and is not involved in any further accidents.

In addition [to the musculoskeletal injuries and conditions that Ms. Neil currently struggles with], the patient also has anxiety, presenting with palpitation following the injury.

2. Injuries - Neck and back pain

[34] The plaintiff relied on the reports of Dr. MacKean to establish the causal nexus between the symptoms she described to the Court and the collision. She confirmed in her evidence-in-chief that she was truthful in describing her symptoms and circumstances and that she had reviewed Dr. MacKean's report and confirmed that it was accurate.

[35] Dr. MacKean noted that the plaintiff suffers from chronic neck and low back pain. She opines that this condition is due to number of factors. These include the plaintiff's significant degenerative changes along portions of her spine and the previous motor vehicle accident in 1994 which was aggravated by the 2002 accident. The 2015 collision caused further aggravation of her neck and back pain symptoms and as well, persistent headaches.

[36] The evidence of Dr. Steyn is thorough and consistent in this regard.

[37] As Dr. MacKean explained in her testimony, the plaintiff's 1994 injuries had stabilised, then the subsequent trauma in 2002 increased pain levels, which had become manageable, and then with the next accident in 2015 the pain level is higher than prior to that and stays at an elevated level. This increased pain level is fairly common in patients with multiple trauma to an area.

[38] The pain the plaintiff described was consistent with what she told Dr. MacKean. She stated she had back pain every day, fluctuating between 2-3/10 but can increase to 5-7/10 if she is doing a lot of bending, crouching or sitting for a long period of time. Driving longer than 15 or 20 minutes also increases the pain level.

[39] The plaintiff testified that her neck bothers her every day. With activity, even stretching, it becomes stiff and painful. She reported at trial that her neck was a 7/10. The neck pain comes and goes in waves. In 2017 it seemed to have been improving but it became problematic and worse again in 2019.

[40] Since the collision she has had medical attention and treatments with acupuncture, massage, physio and IMS. In addition, she practices yoga, movement, stretching and meditation.

3. Headaches

[41] Dr. MacKean noted that the plaintiff stated that she has headaches occurring once every two to three weeks and they could last up to three days. The plaintiff stated during the trial that she gets headaches every day.

4. Heel pain

[42] The plaintiff did not report the heel pain to Dr. MacKean, who was not aware of this symptom. However, she did report it to Dr. Steyn who accepted that the heel pain was caused by the collision. The plaintiff now wears orthotics every day.

5. Increased anxiety

[43] The plaintiff testified that she had increased anxiety and palpitations following the collision. This increased anxiety was not discussed in Dr. MacKean's medical report, but Dr. MacKean noted that the plaintiff had increased anxiety after the collision in Las Vegas in August 2016. Dr. Steyn noted the anxiety with palpitation following the injury.

[44] The plaintiff confirmed that she had mild anxiety prior to the collision, and described the time that she was struggling to have a child as stressful and the cause of some anxiety.

[45] Since the collision, however, the plaintiff said that she cannot handle stress, even the small stresses like she had always been able to. For treatment, she attended cognitive behaviour therapy and went to a counsellor eight times. On April 10, 2017 her family physician assessed her as having "Anxiety Disorder Generalized". The doctor's notes also state: Palpitations, anxiety and poor sleep are all her symptoms. Palpitations are worse when she goes to work." Although the plaintiff has historically preferred natural remedies, she took the medication prescribed for her anxiety.

[46] On one occasion in October 2018 she was hospitalised for her emotional condition as her levels of anxiety and pain resulted in her being unable to eat or sleep. Her sister took her to the hospital for psychiatric attention, and she was seen by a psychiatrist as a follow-up. The diagnosis was "major depressive episode, with anxious distress", and the medication, Cipralext, that she was taking for anxiety was increased.

G. Injuries - Findings

- [47] On the basis of the testimony of the plaintiff and Mr. Wilson and on the expert medical evidence, I find that the plaintiff has proven her injuries from the collision of: whiplash associated disorder - grade 2; lumbar spine muscle injury; chronic post-traumatic pain in both heels; post-traumatic headaches; increased anxiety; and sleep disturbance.
- [48] Drs. MacKean and Steyn agree on the diagnosis of the back and neck injuries. Dr. Steyn diagnosed the heel pain, and Dr. MacKean discussed the plaintiff's headaches. With regard to the evidence of anxiety and sleep disturbance, since *Saadati v. Moorhead*, 2017 SCC 28, compensation for emotional and psychological injuries is based on the symptoms and effects of the problem rather than on its formal diagnosis. I accept the evidence of the plaintiff and Mr. Wilson and find that the plaintiff has suffered anxiety and sleep disturbance as a result of the collision.
- [49] The plaintiff was involved in another motor vehicle accident post-collision in August 2016 when she was in Las Vegas for a conference. She was a passenger in a vehicle that was hit from behind. Her injuries and palpitations were aggravated for about four weeks and then resolved to the level prior to that collision. The medical evidence confirms that there was no lasting negative effect from that collision.

III. DAMAGES

A. Causation

1. Law

- [50] The oft-cited law regarding causation was recently discussed in three cases in this Court. In *Baglot v. Fourie*, 2019 BCSC 122, MacDonald J. canvassed the law on causation in the context of a medical malpractice action:
- [271] The generally accepted test for causation is the 'but for' test. The plaintiff bears the onus of proving, on a balance of probabilities, that but for the defendant's negligent act or omission, the injury would not have occurred: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [*Athey*] and *Blackwater v. Plint*, 2005 SCC 58. Put simply, causation is found if the injury would not have occurred without the defendant's negligence: *Ediger* - SCC at para. 28.
- [280] I agree that the plaintiff is not required to prove that the defendant's negligence was the sole cause of his injuries. This is articulated by the Supreme Court of Canada in *Athey* at 467:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a 'fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so

forth'. 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. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[Emphasis in original.]

[51] More recently, in *Sharma v. Bhullar*, 2020 BCSC 379, Weatherill (G.C.) J. wrote:

[70] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: 'causation need not be determined by scientific precision'. It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a 'substantial connection between the injury and the defendant's conduct' in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11."

[52] Regarding the evidentiary basis necessary to prove causation, in *Chagnon v. Clover Trading Co. Ltd.*, 2019 BCSC 2397, a motor vehicle accident case, the plaintiff did not tender any expert medical evidence, relying solely upon her own testimony and that of her husband. In finding that the defendants' negligence caused or materially contributed to that plaintiff's injuries, Francis J. noted:

[27] This is a civil, not a criminal, proceeding. The standard of proof is the balance of probabilities. This means I must weigh the evidence before me and find facts based on the preponderance of probabilities. The plaintiff need only put sufficient evidence before the court to meet the civil standard of proof. She has done so in this case.

2. Discussion

[53] On the basis of the totality of the evidence, I find that the plaintiff's injuries were caused by the collision. I rely on the opinions of the two medical experts who are in substantial agreement with regard to the injuries suffered by the plaintiff and caused by the collision.

[54] The plaintiff resigned from her job at BC Ferries on November 15, 2017. The reasons for the plaintiff's resignation are important for the discussions on past and future loss of income capacity, which I will address below in the analysis of damages.

[55] The disagreement between Drs. MacKean and Steyn is with regard to whether the plaintiff's inability to continue her job at BC Ferries was caused by the collision, and the extent to which she is able to work in the future. As will be discussed below, I prefer the evidence of Dr. MacKean and find that but for the injuries suffered in the collision the plaintiff would have continued at that job.

B. Non-Pecuniary Damages

[56] The parties acknowledge that the framework for assessing non-pecuniary damages was set out in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100. The non-exhaustive list of factors that will influence an award include age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism as a factor that should not, generally speaking, penalize the plaintiff. The court also stated:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders, Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[57] An award of non-pecuniary damages should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured in part against awards made in comparator cases. However, these cases serve only as a "rough guide", and each case will turn on its own unique facts: *Trites* at para. 189.

[58] The plaintiff claims \$100,000-\$130,000 in non-pecuniary damages. She seeks compensation for pain and suffering resulting from the injuries sustained in the collision. As discussed above, I find that the injuries sustained as a result of the collision are: whiplash associated disorder - grade 2; lumbar spine muscle injury; chronic post-traumatic pain in both heels; post-traumatic headaches; increased anxiety; and sleep disturbance. The pain has continued for more than five years, and the prognosis is that she has reached maximal medical improvement. The continuing serious anxiety has significantly impaired her emotional health and her primary relationship.

- [59] Before the collision the plaintiff was generally healthy and physically active. She says that the pain from her collision-related injuries was the "final straw" in making the choice to leave her job with BC Ferries, which she found challenging and rewarding. The pain and anxiety have deprived her of some leisure activities such as running and more difficult hiking, and have had a negative effect on her relationship with Mr. Wilson and her ability to parent and enjoy their now five-year old daughter.
- [60] I find the plaintiff to be an entirely credible and reliable witness. She was straightforward in her testimony, and sincere and restrained in expressing her physical and emotional pain and distress. Her evidence is consistent with that of Mr. Wilson, who I also found to be an entirely credible and reliable witness. It is also consistent with the medical evidence, and her reports to the assessing doctors were consistent with her testimony. I have no hesitation in accepting her evidence in its entirety.
- [61] The plaintiff relies on the following eight comparator cases: *Jenkins v. Irving*, 2020 BCSC 391 (47 years old; \$100,000); *Stoneson v. Testa Estate*, 2015 BCSC 1549 (57 years old; \$100,000); *Taba v. North Shore Taxi (1996) Ltd.*, 2016 BCSC 1989 (36 years old; \$110,000); *Beaton v. Perkes*, 2016 BCSC 2276 (56 years old; \$110,000); *Chahal v. Righele*, 2014 BCSC 1086 (46 years old; \$120,000); *Moreira v. Chrichton*, 2018 BCSC 1281 (41 years old; \$130,000); *Gurung v. Trampleasure*, 2020 BCSC 1643 (49 years old; \$130,000); *Gill v. Borutski*, 2021 BCSC 554 (47 years old; \$140,000 for non-pecuniary damages and \$80,000 for loss of housekeeping capacity).
- [62] The plaintiff noted that many of the cases she provided were now several years old. As such, she submits that the award ought to be in the upper range of the amount sought to account for inflation.
- [63] The defendants submit that an award in the range of \$55,000-\$75,000 is appropriate, and provided the following cases: *Jansson v. Malone*, 2021 BCSC 585 (45 years old; \$55,000); *Carleton v. Warner*, 2020 BCSC 436 (29 years old; \$60,000); *McGonigle v. Panda*, 2018 BCSC 1017 (38 years old; \$65,000); *Devito v. Watson*, 2020 BCSC 1106 (30 years old; \$65,000).
- [64] The cases provided by both parties were helpful, but each had their distinguishing factors. As for the plaintiff's cases, for example, the plaintiff in *Moreira* suffered greater deterioration in her family and social relationships, and a greater burden in caring for her home, as her husband had left. In addition to general anxiety, the plaintiff in *Gurung* had suffered from bouts of depressive episodes.
- [65] Turning to the defendants' cases, I find that each are distinguishable in many respects from the plaintiff's case. While the plaintiff in *Jansson* suffered from some mental health issues, those that were caused by the accident included a somatic symptom disorder that was "not severe", and an adjustment disorder related only to driving anxiety. Notably, there was likely to be significant improvement for both the plaintiff's physical pain and her somatic symptom disorder, and her driving anxiety was likely to improve with treatment. Finally, the plaintiff managed her pain at work with accommodations. She did not predict any job

insecurity arising from her injuries: at para. 26.

- [66] Similarly, in the remaining cases of the defendants, the inability to work at the same capacity, or at all, was not a present or significant feature. In Carleton, the plaintiff's work hours increased between the accident and trial. Similarly, in Devito, the plaintiff had an accommodating employer and was earning more at trial than he did at the time of the accident.
- [67] I note also that in both Carleton and Devito, the plaintiffs did not suffer from anxiety following the accident.
- [68] On balance, I conclude that the plaintiff's cases are more factually similar to the plaintiff's circumstances. I consider Beaton and Chahal to be helpful. The plaintiffs in those cases are of a similar age to Ms. Neil. In addition, although the plaintiffs in Beaton and Chahal continued working, both experienced significant pain. The plaintiff in Beaton did work that was "markedly less demanding than the work she did prior to the accident", while she "struggle[d] to get through her shift": at paras. 40-41. Finally, the plaintiffs in both Beaton and Chahal had pre-existing conditions, with the Chahal plaintiff's injuries "superimposed on degenerative changes": at para. 14.
- [69] That said, in Beaton and Chahal both plaintiffs experienced depression following the accident.
- [70] I also find Gill to be instructive. In Gill, the plaintiff was injured in a "low-speed collision": at para. 12. The plaintiff suffered from soft tissue injuries to her back and shoulder as well as a "significant" psychological injury: at para. 73. In addition, the plaintiff had suffered from pre-existing fibromyalgia. She was an "active, extroverted, sociable, and energetic individual" prior to the accident: at para. 34.
- [71] However, unlike in this case, there was a 50 percent prospect that the plaintiff's condition would improve within two years to the point where she could work part-time, and an equal possibility that she would remain stable or worsen: at paras. 56, 83. Moreover, her psychological condition was described as "disabling", to the point that she was often bed-ridden and "barely functioning at all": at para. 74.
- [72] Taking all of the circumstances into account, I conclude that an award of \$115,000 is fair and reasonable.

C. Wage Loss - Past and Future

- [73] In *Grewal v. Naumann*, 2017 BCCA 158, Mr. Justice Goepel explained how courts deal with hypothetical past and future events:
- [44] The appellants' submission conflates the way courts deal with alleged past events and the way courts deal with hypothetical events, past or future. This fundamental distinction was explained in *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458:

- [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, 1985 CanLII 62 (SCC), [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 1977 CanLII 1332 (ON CA), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 1990 CanLII 7005 (ON CA), 74 D.L.R. (4th) 1 (Ont. C.A.).
- [28] By contrast, past events must be proven, and once proven they are treated as certainties. In a negligence action, the court must declare whether the defendant was negligent, and that conclusion cannot be couched in terms of probabilities. Likewise, the negligent conduct either was or was not a cause of the injury. The court must decide, on the available evidence, whether the thing alleged has been proven; if it has, it is accepted as a certainty: *Mallett v. McMonagle*, *supra*; *Malec v. J. C. Hutton Proprietary Ltd.*, *supra*, *Cooper-Stephenson*, *supra*, at pp. 67-81.
- [29] This point was expressed by Lord Diplock in *Mallett v. McMonagle*, *supra*, at p. 176:
- The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:

- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [47] I note that neither Reynolds nor Ostrikoff referenced Smith. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as per incuriam.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. ...

[emphasis added]

- [74] I have found above that the injuries in issue were caused by the collision which, it is admitted, was caused by the defendants' negligence. The damages sought by the plaintiff for loss of wages, past and future, are based on her submission that as a result of the injuries, she was not able to continue working at her job at BC Ferries. Or, but for the injuries, she would have still been working at that job.
- [75] Dr. MacKean discussed the reasons that the plaintiff quit her job at BC Ferries in her second report:

We talked a bit more about her reasons for quitting her job at BC Ferries in February 2018. She states when she returned to full time work in January 2017 as the employee relations coordinator for BC Ferries, it was very stressful as she would often work eight to nine hours a day and sometimes longer. She states it did involve a lot of computer work and she would have increased neck and midback pain as the day progressed with her work. She states she had a lot of anxiety and difficulty sleeping due to the stress.

She stopped working on February 28, 2018. She has not worked since March 1, 2018.

She is hoping to look for a part time job where she is not confined to a desk and she can get up and move around and where the work is not as stressful; probably working a few days a week.

It is my opinion that one of the reasons why she stopped working in February 2018 was because of aggravation of her neck and back pain symptoms with her job at BC Ferries.

I would recommend that she look for part time work in a job position that is not as stressful where she has the opportunity to get up, move around and change position. She could probably work for two to three days a week in this type of job position.

[76] On questioning by the Court, Dr. MacKean clarified that that recommendation was one of "an ideal situation for the plaintiff for her and her situation, to work part-time for two to three days, that would be just an estimate of the recommendation. She is capable of working full-time in a different type of job position than the one she was working in where she is moving around more and changing position. But she would also have increased stress, and other considerations like child care and those types of things. So this would just be a recommendation in terms of the ideal situation for her based on where she is and her life circumstances."

[77] The more complete responses of Dr. MacKean are set out in these excerpts from questioning by counsel for the plaintiff and the court:

RE-EXAMINATION BY CNSL D. MCKNIGHT, Continuing:

Q Now, my friend said, as a result of your physical examination, nothing in your examination of Ms. Neil that would indicate that she could not work at a sedentary job and you said, "Correct".

A Yes.

Q He then said, in fact, she could work full time in a sedentary job based on your physical examination, correct -

A Yes.

Q And you answered, "Correct". From a medical perspective, from a specialist in physical and rehabilitation medicine, the fact that Ms. Neil could do those things, does that mean she should?

A Okay. So often times when you examine someone that has chronic neck or back pain, they may have good mobility, they may not have any neurological findings. They may complain of pain when you push on certain areas. But it's really hard to measure the pain. It's a very subjective - pain is a very subjective experience for people. So I've been practicing for over 25 years as a specialist, and so when I listen to my patients, if they tell me that they're having escalation of their pain or increased pain symptoms. That they're not sleeping well and if they're having problems with their work. So the type of work that they're doing if they're having increased pain as the day goes on, they're not sleeping well, then it is usually my recommendation that they change something in terms of, either, how many hours they're working or the type of work that they're doing to try to modify that. And that's my opinion as a specialist.

And I believe that it's not only about, are you able to work eight hours a day? Who cares if you have high pain levels? It matters. You're going home, you might have children, you have to make dinner. You have things that you have to do outside of work. It's not just about being able to work physically for eight hours, it's about can you live your life and balance your life and do everything else that you need to do in your life and be able to manage your pain, and also be able to sleep. So it's not just one thing, it's -- it's extremely complex.

Q All right.

A I try to take all those things into consideration when I make a judgment about a person's ability to work an eight or a - a nine hour day, or whatever it is.

Q Thank you, Doctor.

A Yes, and I know there's all sorts of other factors as well, contributing.

CNSL D. MCKNIGHT: That was my final question, My Lady.

THE COURT: Yes, thank you. I have just two questions, doctor, for clarification.

...

Q Thank you and then my next question is similar to the question asked for clarification by Mr. McKnight a moment ago with regard to full-time work. your reference is to a recommendation to look for part-time work and then probably work for two or three days a week.

So would you assist me with regard to your oral evidence and this recommendation?

A That would be an ideal situation for her in her situation, to work part time. Two to three days a week would be just an estimate of - of the recommendation. She is capable of working full time in a different type of job position than the one she was working in, where she's moving around more, changing position. But she would also have increased stress and - and - and other considerations like child care and those types of things. So this would just be a recommendation in terms of the ideal situation for her.

[emphasis added]

[78] Dr. Steyn was of the opinion that the plaintiff likely would have needed four to six months to recover from her injuries before returning to work, if she had not been on maternity leave at the time of the collision. She might then have had to work on diminished or modified duties for several months. It was his opinion that the plaintiff should presently be able to work close to full-time hours or full-time hours in an occupation similar to that at her previous job. It was his understanding that the decision to stop working in 2018 was mostly based on factors other than symptoms from the collision.

- [79] I prefer the evidence of Dr. MacKean who opined that one of the reasons why the plaintiff stopped working was because of aggravation of her neck and back pain symptoms with her job. That opinion is consistent with the evidence of the plaintiff that if it were not for the collision, she believes that she would still be working with BC Ferries. In other words, the injuries suffered in the collision contributed to her decision to stop work. Pain was the last straw.
1. Past loss of earning capacity
- [80] The plaintiff seeks damages of \$180,000 under this heading. This is a revised amount having made the earlier submission that \$90,000, or a reduction of 50%, would be fair and do justice to all parties.
- [81] The defendants submit that there is no entitlement to damages for loss of past earnings capacity because the plaintiff quit her job to have more time to raise her daughter.
- [82] Prior to the collision, although her work was demanding, Ms. Neil was not disabled or impaired in performing any of the duties associated with her job as an Employee Relations Coordinator. Mr. Wilson testified that she did not complain of any back or neck pain at the end of a working day. The work and environment were challenging as she noted in a Worksheet For Employees in 2017, but overall she enjoyed the challenges, and she enjoyed the people with whom she worked. She derived a sense of self-worth from accomplishing her tasks and in being able to contribute to the family income.
- [83] At the time of the collision, Ms. Neil was on maternity leave after having been employed on a continuous basis since 1997. She was scheduled to return to work in mid-September 2016 on a full-time basis. Due to heart palpitations, a condition related to the increased anxiety and from which she did not suffer prior to the collision, between September 12, 2016 and December 31, 2016, on her doctor's recommendation, she worked only two days per week. She then resumed working full-time in January 2017, and continued until she resigned from her position with her last working day in March 2018.
- [84] The plaintiff had considered resigning from her position at BC Ferries earlier in 2017 but determinedly kept working. On November 15, 2017, the plaintiff signed the letter of resignation stating: "I have decided to leave BC Ferry Services Inc. to pursue other interests; specifically, being a Mom to a daughter I waited so many years for." On October 31, 2018, in her psychiatric consultation, the plaintiff informed the doctor that she had quit work in March 2018 to take care of her daughter.
- [85] The plaintiff was questioned about not giving pain as a reason for resigning to her employer or to the psychiatrist. She stated that she decided not to refer to her medical difficulties in the letter to her employer, because it would, in her opinion with her human resources expertise, hinder her opportunities to be hired back on contract in the future. With regard to the statements at the psychiatric consultation, the plaintiff described being in a terrible place at the time, having previously been in the psychiatric ward for anxiety. I accept her

evidence of those explanations.

- [86] The plaintiff concedes that her daughter's developmental hurdles were also a factor in her resignation from the workforce at that time. However, when asked in examination-in-chief, "If not for the [subject collision], do you believe you would still be working for BC Ferries", the plaintiff's response was, "I believe so". She said that even with the accommodation of a sit-stand desk, with a child, and her neck and back pain and anxiety, she could not work. It was just too much.
- [87] I accept the plaintiff's evidence that the reasons for quitting her job included the pain from the injuries suffered in the collision. It was also Dr. MacKean's opinion was that "one of the reasons why she stopped working in February 2018 was because of aggravation of her neck and back pain symptoms with her job at BC Ferries."
- [88] Although Ms. Neil did attempt to return to that employment full-time following her maternity leave, the symptoms of the injuries that she sustained in her accident substantially impaired her in her ability to perform her job and, ultimately, those persisting difficulties were a significant factor (the "last straw") in her decision to resign from her position.
- [89] Ms. Neil's mother is still working at age 80, and the plaintiff has plans to return to work where she is not confined to a desk. She enjoys helping people and using her computer and letter-writing skills. However, the Covid-19 pandemic and her desire to spend time with her daughter, to be a mother and assist with speech therapy, has prevented her from returning to work. She is waiting for her daughter to be in school, as Covid-19 has delayed her in-person enrolment.
- [90] I conclude that the defendants' negligence therefore contributed to the loss of past income earning capacity. What would have happened in the past but for the injury is no more knowable than what will happen in the future, and therefore it is necessary to assess the likelihood of hypothetical events.
- [91] With regard to the plaintiff's earnings between the collision and the date of trial, April 2021, these are the relevant income tax records:

Year

Gross income from BC Ferries

2014

\$56,496

2015

(mat leave)

\$33,503

2016

(RTW Sept 6

- 2 days/week)

\$17,816

2017

(full-time)

\$59,327

2018

(to March)

\$9,731

2019

0

2020

0

2021

0

[92] It was Dr. MacKean's recommendation that the plaintiff work for two to three days per week in a different job with more ability to move around. She therefore had about half the capacity to earn income. Such a work schedule would also have assisted her preference to have more time with her daughter before she started school. Thus, for a different reason, I agree with the plaintiff's first submission that 50% of the possible wage loss is an appropriate assessment for this head of damages. That amount is assessed at \$95,000, based on the full-time earnings of \$59,327 in 2017. After returning from maternity leave in September 2016, the plaintiff's pre-collision earning capacity at this job was \$190,025 greater than her actual gross earnings from employment (2016 - \$2000; 2018 - \$49,596; 2019 and 2020 - \$59,327; and 2021, 3 months - \$19,775).

[93] The plaintiff is therefore awarded \$95,000 for past wage loss subject to statutory deductions which are left to counsel to attend to.

2. Future loss of earning capacity

a) Law

[94] More than three decades ago, Finch J. (as he then was) enunciated some of the considerations that can be taken into account in assessing this head of damages in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.).

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[95] In *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2nd) 393 (C.A.), Taggart J.A. endorsed *Brown* and reiterated those same considerations.

[96] More recently, in *Johnson v. Heer*, 2020 BCSC 1168, in assessing a claim for loss of future earning capacity, Majawa J. affirmed that a plaintiff is not excluded from an award for loss of future earning capacity when she is still able to work after the accident, and even where the evidence shows that her income has been steady or has actually increased since the accident. At para. 91, Majawa J. cited from *Willett v. Rose*, 2017 BCSC 627:

[69] Even in circumstances where employment data appear to show no reduction or even an increase in income following an injury, where a plaintiff continues to suffer to some degree from the effects of an accident which have an impact on his work, there is an impairment of earning capacity. For example, in *Cheung v. MacDonald et al*, 2004 BCSC 222, it was argued that the plaintiff's income following the accident was higher than it had ever been. Mr. Justice Ehrcke said at paras. 84 and 85:

[84] As logically rigorous as that approach seems to be, it ignores the reality that Dr. Cheung continues to suffer to some degree from the effects of the accident, and that these effects have an impact on his work. While he may have demonstrated that he can, if he wills himself to, carry on and produce billings as high as before, one must ask whether it is reasonable to expect him to do so in the face of the pain he must endure.

[85] The proper question under this head of damages is not simply whether a plaintiff will suffer an actual wage loss, but rather whether there has been an impairment of his income-earning capacity. This latter approach treats the ability to earn income as a capital asset, and the proper question is then whether that asset has in any way been diminished by reason of the defendant's negligence.

- [97] As Weatherill (G.C.) J. remarked in *Green v. International Cosmetics Inc.*, 2020 BCSC 1187:
- [148] The court is entitled to rely on common sense to determine if there is a real and substantial possibility of future loss of income: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41:
- [41] In my view, it was open to the trial judge to find - essentially as a matter of common sense - that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make.
- [149] These principles were applied by this court in *Merko v. Plummer*, 2016 BCSC 1403 at para. 99:
- [99] When I consider the totality of the evidence, the fact that Mrs. Merko's pain is chronic and as severe as it is, and the fact that her job is as intense as it is, I conclude that there is a real and substantial possibility her injuries will lead to her having to reduce the hours or years that she works in the future. This is so even though to date she has carried on full-time. This has been based on pure force of will, but there is a real possibility that will diminish as she ages and as the cost to the rest of her personal life becomes more and more pronounced.
- [98] Thus, even in cases where a plaintiff's earnings increase following an injury, the test for an award for loss of future earning capacity remains the same -- is there a "real and substantial possibility" of a future event leading to an income loss? Once that is established, the assessment of the loss proceeds by one of two methods: (1) the earnings approach; or (2) the capital asset approach.
- [99] As for which approach is preferable in any given case, in *Siu v. Clapper*, 2020 BCSC 944, Gomery J. wrote as follows:
- [60] The cases identify two approaches to the assessment of loss of future earning capacity: the 'earnings approach' and the 'capital asset approach'; Perren at para. 32. The earnings approach involves what Justice Duncan described in *Ali v. Rai*, 2015 BCSC 2085 at para. 149 [Ali] as 'a form of math-oriented methodology'. The capital asset approach is better suited to cases where the loss is not easily measurable, as in this case.
- b) Discussion
- [100] The plaintiff submits that an award of \$120,000 to \$180,000 ought to be made under this head of damages. The defendants submit that her gross pay for a half year of work, or \$30,000, would be a suitable award.

- [101] Dr. Steyn opined that the plaintiff likely would have needed four to six months to recover from her injuries before returning to work, and might have had to work on diminished or modified duties for several months following return. He was also of the opinion that she should presently be able to work close to full-time hours or full-time hours in an occupation similar to her previous job, and that ability to work should not change significantly in the future.
- [102] The plaintiff is not totally disabled. She is physically capable of working full-time, but according to Dr. MacKean that is not viable as it would lead to such fatigue and pain that she would not be able to enjoy a reasonable quality of life.
- [103] I prefer the opinion of Dr. MacKean. As a physiatrist, she is much better positioned to give a full picture of how the plaintiff's injuries have affected and will likely affect her, rather than the more narrow focus brought by an orthopaedic surgeon.
- [104] On the basis of the evidence of the plaintiff and of Dr. MacKean, I find that there is an impairment of the plaintiff's income earning capacity. There is therefore a real and substantial possibility of future loss of income.
- [105] Ms. Neil testified that her plan pre-collision was to stay with BC Ferries and pay into the pension plan until at least age 55, then start a new career where she could move around more. She had considered contracting out to other companies as her mother had done with her expertise.
- [106] Pre-collision the plaintiff was likely to work full-time at BC Ferries for four more years until age 55, or September 2025. Post-collision, however, she is capable of working on a part-time basis, two to three days per week. In the circumstances she will suffer a future loss of approximately 50% of her potential earnings at BC Ferries.
- [107] The plaintiff's plan after early retirement was to continue working at a pace and at work more fitting her interests and circumstances. Her injuries are unlikely to seriously impair that plan as she remains capable of part-time work, albeit there may be some work she will not be able to do.
- [108] The parties agree that the capital asset approach is appropriate. The plaintiff submits that damages of two or three times her annual salary is the appropriate amount. In the circumstances, and taking into account all of the available evidence, I would assess damages for loss of future earning capacity at \$120,000.

D. Loss of homemaking capacity past and future

1. Law

- [109] In *Westbroek v. Brizuela*, 2014 BCCA 48, the Court of Appeal revisited the subject of claims for loss of homemaking capacity. The Court emphasized the distinction between awards for homemaking capacity and awards for household assistance made under the head of future cost of care:
- [74] I agree that the trial judge miscategorised the homemaking award under the head of future cost of care damages. In *O'Connell v. Yung*, 2012 BCCA 57, at paras. 59–68, this Court clarified that homemaking costs, properly considered, are awarded for loss of capacity and are distinct from possible future cost of care claims. 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. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the Plaintiff rather than by the Plaintiff. [Emphasis in original.]
- [110] Grauer J. also recognized this distinction in *Fatin v. Watson*, 2018 BCSC 306:
- [47] An award of damages for loss of homemaking capacity is intended to compensate the plaintiff for the lost value of work that the plaintiff would have undertaken, but is now incapable of performing. It recognizes the value of the loss of an asset. Future care costs, on the other hand, are to compensate the plaintiff for the value of services that are to be rendered to the plaintiff: see the discussion in *Westbroek v Brizuela*, 2014 BCCA 48 at para 74. Consequently, a plaintiff may be awarded damages for loss of homemaking capacity even if there is no expectation of using replacement services: *McTavish v MacGillivray*, 2000 BCCA 164 at para 43.

[emphasis added]

2. Discussion

- [111] The plaintiff submits that loss of homemaking capacity is an asset that she possessed before her accident, and one that has been significantly diminished in value as a result of the injuries that she suffered in the collision. She seeks \$80,000 to \$100,000 damages in this regard.
- [112] The defendants submit that no award ought to be made under this head of damages. They say the plaintiff is able to do most household tasks, including vacuuming stairs which she has since discontinued, and laundry, but at a slower pace. They say that there is no clear evidence as to the extra time her husband has put in to do the work that the plaintiff states she cannot perform.
- [113] In this regard I rely on the evidence of the plaintiff, Mr. Wilson, and Dr. Steyn. Dr. Steyn's report states:

Degree of Disability

When using the guides to the evaluation of permanent impairment of the American Medical Association, 6th edition, the injuries and resultant symptoms that Ms. Neil suffers from would confer between 3% and 6% whole body impairment. This impairment in my opinion:

2. Does cause partial permanent ability [sic] in the ability to enjoy and perform certain domestic and home keeping activities such as:
 - a. The inability to do certain sports such as a [sic] running which she enjoyed prior to the subject motor vehicle accident
 - b. The inability to do certain house work, especially where she needs to bend over and worked in a stooped over position, as well as outside activities such as snow shoveling which requires the same actions."

[emphasis added]

[114] I accept the evidence of Dr. Steyn, plaintiff and Mr. Wilson that she has lost the ability to do certain types of housework due to the injuries caused by the collision. In light of the evidence of the comparatively modest degree of the loss, I would award damages in the amount of \$16,000.

E. Cost of future care

1. Law

[115] In *Suthakar v. Humble*, 2016 BCSC 155, Ballance J. discussed the legal framework for awards under this head of damage, writing as follows:

[123] The approach to be taken in assessing future care costs was settled by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[116] In *Cheema v. Khan*, 2017 BCSC 974 at para. 166, Chief Justice Hinkson endorsed the following recitation of the law on this head of damage from *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124:

[162] The test for an award of future care is 'whether a reasonably-minded person of ample means would be ready to incur the expense. When measuring reasonableness, the expense should not be a squandering of money': *Brennan v. Singh*, [1999] B.C.J. No. 520 (S.C.). In formulating this test Harvey J. referred to the decision of *Zapf v. Muckalt* (1995), 26 B.C.L.R. (3d) 201 (C.A.), where Donald J.A. stated at para. 36:

I think the proper test is reasonableness and that the psychological and emotional factors influencing the choice of where to live must be considered: *Andrews v. Grand & Toy Alberta Ltd...* Medical necessity is too stringent a test.

[117] With regard to the method of making such awards in the present circumstances with limited expert evidence, Johnston J. in *Lewis v. Worth*, 2020 BCSC 57, discussed assessing the cost of future care:

[92] Counsel for the plaintiff invites the Court to 'ball park' the damages for future care costs, following the examples in *Flores v. Burrows*, 2018 BCSC 334 at paras. 146-147, in turn adopting *Rahimi v. Ma*, 2014 BCSC 710 at para. 161. These decisions take some comfort from the decision of the Court of Appeal in *Loewen v. Bernardi* (1994), 93 B.C.L.R. (2d) 242. (C.A.) [*Loewen*] where a trial judge had refused to order damages for future care costs because there was no evidence of those costs in addition to what would be available under an open claim under Part 7 of the former Revised Regulation 1984) Under the Insurance (Motor Vehicle) Act, B.C. Reg. 447/83. I note that Part 7 has been amended over the years, and although its substance remains the same, the applicable regulation is now called the Insurance (Vehicle) Regulation.

[97] In this case, I have somewhat more evidence than appears to have been available in *Loewen*, and that decision appears to not only allow the court to assess damages with little evidentiary basis, but to require it.

2. Discussion

[118] The relevant evidence in this case is primarily that of Dr. MacKean. She recommended that:

I would recommend that she have continued access to treatment with physiotherapy and IMS twice a month as this treatment provides her with significant relief of her chronic pain symptoms on an ongoing basis.

She should also have continued access to massage therapy once a month on an ongoing basis for relief of her chronic neck and back pain symptoms.

She should continue with her regular exercise program at home and activities such as walking on a regular basis.

I would recommend that she have help for heavier housecleaning, yardwork, gardening or home maintenance activities.

I would recommend that she avoid repetitive bending or heavier lifting or carrying with the spine as this will aggravate her chronic neck and back pain symptoms.

[119] I accept and rely upon Dr. MacKean's evidence in this regard. I also accept Dr. Steyn's recommendation for the continued use of pain cream. Their reports are the only evidence regarding future care.

[120] The defendants do not disagree with an award for costs of future physiotherapy, IMS, and gym attendance. They say that they all are subject to s. 83 deductions as would be the recommended massage therapy. There is no evidence of the future cost or duration of those therapies.

[121] The plaintiff submits that some evidence of the costs of the various recommendations that have been made for the plaintiff's future care by Dr. MacKean can be taken from the amounts that the plaintiff has paid for services and goods to date, particularly physiotherapy, IMS, and massage therapy. However, there is no evidence of the recommended duration.

[122] With regard to the cost of housekeeping, counsel for the plaintiff submits that prior to the limitations imposed by the Evidence Amendment Act (EAA) S.B.C. 2020, c. 7, it was relatively common in similar trials to have in evidence cost of future care reports in which the range for such services was generally between \$25.00 and \$35.00 per hour. However, that submission is not evidence in this trial.

[123] The remaining items medically recommended are the housekeeping services, which include some tasks not historically undertaken by the plaintiff, and the pain cream. In this regard, the comments of Johnston, J. in Lewis citing Loewen are instructive:

[95] Carrothers J.A. dealt with the appellant's argument that an award of \$25,000 to \$37,000 for future cost of care would be appropriate at paras. 26 to 27:

26 The answer of the respondent simply is that there was no evidence before the trial judge on which to base a claim for future care costs. The authority cited to us by the appellant exhorts the court assessing loss and which is unable to estimate damages or loss "with anything approaching mathematical accuracy" not to abandon the attempt and relieve the wrongdoer of the necessity of paying damages, but must "do the best it can".

27 The above quoted description of the future care cost loss derived from the pedestrian's permanent incapacities is fraught with uncertain assumptions and contingencies which make the estimate of the loss far too generous. Doing the best I can and taking into account these factors and the potential longevity of the elderly pedestrian in this case, I would consider damages for future care costs in the amount of \$7,500 to be appropriate.

[96] Rowles and Prowse JJ.A. said at para. 61:

61 The trial judge refused to make any award for costs of future care because "no evidence has been provided". Defendants' counsel conceded during argument that there was some medical evidence about the onset and type of incapacity the plaintiff may suffer as he gets older as a result of the knee and shoulder injuries he sustained in the accident. In the circumstances an award of \$7,500 would appear to me to be reasonable.

[97] In this case, I have somewhat more evidence than appears to have been available in Loewen, and that decision appears to not only allow the court to assess damages with little evidentiary basis, but to require it.

[emphasis added]

[124] Although I agree with the plaintiff that there can be a global award made to the plaintiff for her cost of future care, in the absence of evidence it is "fraught with uncertain assumptions and contingencies".

[125] In the circumstances of this case given my understanding that any award for the costs of future physiotherapy, IMS, massage therapy, and gym attendance would be deducted under s. 83, I need not make an award for those items. With regard to the remaining items, I would award the amount of \$14,000.

[126] The plaintiff is therefore awarded \$14,000 for the cost of future care.

F. In-trust awards

1. Law

[127] In *Sarginson v. Nordquist*, 2019 BCSC 1386, Winteringham J. reiterated the factors to be considered in determining entitlement to an award under this head of damage:

[88] The parties agree that the factors to be considered are as set out by Justice Smith in *Bystedt v. Bagdan*, 2001 BCSC 1735 at para. 180, as follows:

- a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship ;
- c) the maximum value of such services is the cost of obtaining the services outside the family;
- d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,

- f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

2. Discussion

[128] The plaintiff submits that an in-trust award for Mr. Wilson of \$10,000 is appropriate. The defendants say that nothing in Mr. Wilson's evidence supports this type of claim.

[129] The plaintiff submits that:

As the evidence shows, over the past five years, Mr. Wilson has been required to assume an increasing load of domestic responsibilities beyond those which had been assigned to him prior to the accident that is the subject of this action. In addition, Mr. Wilson has been required to assume a greater burden of the duties associated with raising their daughter SaBryn. While Mr. Wilson undoubtedly does not resent his necessarily increased parental role, the fact remains that he is a busy marine engineer and volunteer firefighter, other demands upon his time need to be taken into account in the assessment of this claim.

Obviously, because claims under this head of damage are highly fact-driven and turn on their own peculiar facts, resorting to comparators is of limited or no utility.

Bearing in mind the claims under this head of damage must be "over and above" what would be expected in a family relationship, it is submitted that a nominal award of \$10,000.00 would be fair and reasonable and would recognize the additional contributions of Mr. Wilson to his family's care and maintenance.

[130] While I do not disagree that Mr. Wilson diligently and graciously provided additional services for the plaintiff and their household after the collision, upon review of the case law it is my view that the evidence does not support an in-trust claim in this case.

[131] There is therefore no award of damages under this heading.

G. Special damages

[132] At the request of the defendants' previous counsel, Dr. Steyn was asked to respond to the following question:

7. Please include your recommendations for present and future treatment, including medication, exercise, passive modalities, surgery etc. (If surgery is indicated, advise how much time off work will likely be needed for recovery.)

[133] Dr. Steyn's response was:

In my opinion this patient has received appropriate and complete care for these injuries in the five years since the accident.

[134] I agree with the plaintiff that there is no evidence to the contrary, medical or otherwise.

[135] The defendants have paid or agree to pay the amount of \$17,055.94 which is \$918.63 less than claimed.

[136] The out-of-pocket expenses that Ms. Neil has incurred to date for treatment of the injuries that she suffered in the subject accident, as supported by the evidence are:

No.

Description

Amount

1.

Southcare Chiropractic

\$1,516.51

2.

Knead Registered Massage Therapy

\$1,895.36

3.

Inner Harmony Registered Acupuncture

\$980.00

4.

Island Optimal Health + Performance

\$2,483.00

5.

Advanced Health Clinic

\$486.02

6.

Long Lake Chiropractic

\$2,170.00

7.

Lifehouse Chiropractic Studio

\$45.00

8.

Dr. Deborah Nelson (counselor)

\$252.00

9.

prescription medications

\$73.99

10.

medical supplies and devices:

· B.D. Mitchell (orthotics)

\$450.00

· pain relief cream and sleep spray

\$1,202.02

· Omega Fish Oil (x3)

\$120.00

· D Drops

\$36.00

· pain medication and supplements

\$747.70

11.

mileage

\$2,358.53

12.

The Great-West Life Assurance Company (subrogation claim)

\$3,158.44

TOTAL:

\$17,974.57

[137] The plaintiff is entitled to be reimbursed for the difference between the amount expended, \$17,974.57, and the amount paid to date as special damages.

IV. SUMMARY OF DAMAGES

[138] In summary, the plaintiff is awarded the following amounts of damages:

Amount

Non-pecuniary

\$115,000.00

Past loss of earning capacity

\$95,000.00

Future loss of earning capacity

\$120,000.00

Loss of homemaking capacity

\$16,000.00

Cost of future care

\$14,000.00

In-Trust claim (Darren Wilson)

\$0.00

Special damages (total)

\$17,974.57

TOTAL:

\$377,974.57

[139] These individual amounts total \$377,974.57. I am satisfied that this sum fairly and reasonably compensates the plaintiff for her losses.

[140] The plaintiff is entitled to her costs of this action. As the parties have requested, they are at liberty to make submissions regarding the quantum of costs within 30 days of the date of these Reasons with reply submissions 20 days thereafter.

"The Honourable Madam Justice Watchuk"

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