

CANADA / JUDGMENT

Owens v. Steveston Waterfront Properties Inc.

2019 BCSC 746

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 746 Owens v. Steveston Waterfront Properties Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Owens v. Steveston Waterfront Properties Inc.,

2019 BCSC 746

Date: 20190514

Docket: S157828

Registry: Vancouver

Between:

Kathryn Owens

Plaintiff

And

Steveston Harbour Authority, Steveston Waterfront Properties Inc.,

Shady Island Enterprises Inc., Blitz Properties Ltd., and

Steveston Restaurant Group Inc., carrying on business as

Blue Canoe Waterfront Restaurant

Defendants

Before: The Honourable Madam Justice Maisonville

Reasons for Judgment

Counsel for the Plaintiff:

M.D. Fahey

Counsel for the Defendant, Steveston Waterfront Properties Inc.:

L.C. Boulton

K. Kuefler, Articled Student

Place and Dates of Trial:

Vancouver, B.C.

January 22-24, 2019

Place and Date of Judgment:

Vancouver, B.C.

May 14, 2019

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Introduction

- [1] This case concerns a slip and fall incident outside of the Blue Canoe Waterfront Restaurant (the "Restaurant") in Steveston, BC located on the Fraser River. The plaintiff, Kathryn Owens, fell and shattered her right patella (kneecap) on the boardwalk adjacent to the restaurant entrance (the "Incident"). The actual entrance way to the restaurant is on concrete aggregate which extends from the street. Abutting the aggregate concrete walkway is a wooden plank ramp which leads to the boardwalk, also composed of wooden planks.
- [2] I note Steveston Waterfront Properties Inc. is the only defendant remaining in this action (the "defendant") as proceedings against the other defendants have been discontinued.

Issue

- [3] The main issue in this case is the liability of the defendant under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [OLA]; namely, whether the defendant failed to observe the standard of care it owed to the plaintiff under the OLA, and whether, but for that breach, the Incident would not have occurred. More specifically, the plaintiff claims that there should have been signage that the boardwalk surface could be slippery, and that, if there had been a sign warning of slipperiness on the ramp, the Incident would not have occurred. The defendant concedes it is the occupier and owed a duty of care to the plaintiff to take care that she would be reasonably safe while using the area of the boardwalk where she fell.
- [4] If liability is established, the quantum of non-pecuniary damages, an in-trust claim for the plaintiff's husband, loss of housekeeping capacity, and the cost of future care must be assessed. The quantum for special damages and past wage loss are admitted. The defendant has advanced submissions on the appropriate quantum of non-pecuniary damages, however it has not taken a position concerning the other heads of damages the plaintiff seek. Nonetheless, the onus rests with the plaintiff to prove each head of damage it advances and the appropriate quantum.

Background

- [5] On December 31, 2013, the plaintiff was walking on a part of a boardwalk in Steveson, of which the defendant is the occupier, when she slipped and fell (the "Incident"). She was walking on the boardwalk after having a meal (a soup and one beer) at the Restaurant. The plaintiff was 61 years old at the time of the Incident. She had followed her husband, Mr. Owens, who was also in his sixties, down a ramp with a small incline that was just outside the Restaurant to the boardwalk. Although the wooden planks of the boardwalk looked dry, she slipped, landing on her knee. She testified that, had there been a sign warning of a slipping hazard, she would not have tried to walk down the ramp to the boardwalk.
- [6] The plaintiff fractured her patella when she landed on her flexed right knee. She was transported to Richmond General Hospital where she was diagnosed with a severe comminuted displaced right knee patellar fracture. She was taken to the operating room on January 1, 2014 and underwent an open reduction and internal fixation of the fracture.
- [7] Following the surgery the plaintiff was treated with a knee immobilizer splint. She was discharged home on January 2, 2014. She had to return to the operating room on April 2014 for Dr. Kendall to perform the hardware removal surgery on her.
- [8] The plaintiff claims general damages pursuant to the OLA. As a beneficiary of health services, she claims, as special damages, the costs of the health care services she has received and relies upon the Medicare Protection Act, R.S.B.C. 1996, c. 286 [MPA] as well as the Health Care Cost Recovery Act, S.B.C. 2008, c. 27 [HCCRA]. For her husband who looked after her, she seeks an in-trust claim. She also asks for the cost of future care.
- [9] Past income loss of \$10,450 is admitted, as are the special damages totalling \$1,101.32.

Evidence at Trial

Evidence of the Plaintiff

- [10] The plaintiff testified. She is now in her mid-sixties. At the time of the Incident, she worked for an automobile dealership as a warranty administrator. She retired in July 2017. Together with her husband, she would often go to the Restaurant. They were frequent customers, not once a week, but often. In the summertime, she approximated that they would be there every other week. They would often go for lunch. They would drive there and then walk down to the restaurant from the street along the cement aggregate pathway.
- [11] On the evening of New Year's Eve 2013, they went to the Restaurant for a light meal before returning home to celebrate the New Year. They sat at the bar.
- [12] When they arrived at the restaurant on December 31, 2013, she ordered a beer and the soup special, which was a lobster bisque. While she had only one beer, her husband may have had two. She believes that was so because when she saw her Visa bill, the amount was just over \$30. The soup, together with three drinks, would have been approximately that amount.

- [13] The plaintiff was asked whether she was feeling the effects of the alcohol when she left the Restaurant, she testified "not at all". After they settled the bill, they exited the restaurant onto the concrete aggregate walkway at the door. They continued walking straight ahead to where the ramp started. She looked at the ramp and it did not seem wet. Her husband was ahead of her and was to her left. She followed him down the ramp. After the ramp, she stepped on the boardwalk. She testified she took one to two, or three to four steps, then fell. Her right foot slipped and she fell forward onto her right knee and her body ended up on the right side. The pain she described was "incredible". She felt shocked and stunned.
- [14] When asked what she noticed, the plaintiff testified that she noted that her palms were sore and she felt that the wood was wet when she was lying there. She was in so much pain she asked her husband to not touch her. After a minute, her husband picked her up and moved her to a bench. She sat there for one to two minutes crying. She had been wearing boots that had a rubber soul on the heel and some tread. There have been no suggestions in this trial that her footwear contributed to the fall. The plaintiff noted that her kneecap was in a strange position and appeared to be protruding but not outside her skin.
- [15] The bartender came out from the Restaurant to help. She recalls his name being Jim van der Tas. The restaurant owner also came out. The plaintiff was helped to the car and she and her husband drove immediately to the Richmond General Hospital's emergency department.
- [16] Upon arriving at the hospital, her husband retrieved a wheelchair to take her into the emergency department. She waited an hour to two hours to be seen. The hospital staff then removed her clothes and X-rays were taken. She said that she was in horrible pain the entire time.
- [17] Dr. Kendall examined her kneecap and told her that she would be having surgery the next day. She did and she was ultimately discharged home on January 2, 2014. The plaintiff was in a wheelchair for three to four weeks and did not leave the house except for doctor's appointments. She testified that the Incident caused the most pain she has ever had in her whole life.
- [18] In February 2014, she commenced her rehabilitation and attended physiotherapy at the Richmond General Hospital two to three times a week until the end of April 2014.
- [19] After the surgery, in February, she started wearing a soft cast. She returned to work for two days a week for four to five hours a day.
- [20] On May 5, 2014, she returned to work full-time.
- [21] Her husband helped her with her personal care. He would hold on to her so that she could have a shower and he also helped with her toileting.
- [22] When she was back to work full-time, the plaintiff described her pain level as 7 to 8 out of a scale of 10.

- [23] For the first year following the Incident, she described the pain as being 8 out of a scale of 10. For the first year, she did not experience any pain-free days, but she did experience pain-free hours. One year after the Incident, the pain, which was in and around her right kneecap, would come and go; it would occur if she sat for too long. She would have rated the pain as approximately 5 to 7 on a scale of 10.
- [24] The plaintiff testified that she was taking OxyContin in January 2014. She switched over to Tylenol in February. She said that her knee now hurts but only on the scale of 2 to 7, depending on what activity she had done. She followed a physiotherapy regime as prescribed by her doctor. She still feels pain, which comes occasionally.
- [25] In July 2015, as she was trying to get into a small swimming pool her right knee locked. She fell backwards and injured her left shoulder. She did not get immediate medical attention until November but did tell her physiotherapist. Ultimately, she had an X-ray, and then later an MRI, which revealed a tear in her left shoulder. The shoulder tear does not prevent her in performing any activities and, consequently, she has not had surgery on it.
- [26] Following the surgery, she has a 5-inch long scar on her right knee. She believes her knee looks different. She thinks it looks ugly. There are still things that she cannot do, for instance, she cannot squat, kneel or sit on the ground. She does not take baths because she cannot get her knee into proper position to stand. She no longer vacuums the house. She recently tried to start yoga but cannot get into positions. She is a golfer and does try to continue enjoying golf; she went golfing five or six times this past summer. She did not golf at all for one-and-a-half years following the Incident. She now finds it difficult to walk the course and needs to rent a golf cart to participate. Sometimes together with her husband they will take a golf holiday and have done so three times since the Incident. When they went to Palm Springs, they rented a golf cart.
- [27] Her sleep is still affected by her knee injury. When it hurts at night, she rubs it with cream. When the knee area is hot from the rubbing, she will try to get it into position with a pillow. She believes she can sleep at most five hours at a stretch. She has tried Asper Crème, CBD Oil and Voltaren cream. She continues to take Tylenol No. 3.
- [28] Describing the day of the incident, she testified that she did not see any signs respecting the boardwalk. She testified that if there had been a sign, she would have grabbed her husband's arm or taken a different way down to see the boats.
- [29] The ramp was a slope but it did not have a large incline. Photographs of the ramp were placed into evidence. She had walked around in that area before to see boats when the tall ships came in but that had been in the summertime.
- [30] The plaintiff was vigorously cross-examined on whether she had seen that the boardwalk was wet. She was adamant that had she seen it was wet, she would not have gone down the ramp and onto the boardwalk. She testified it did not look wet at the time she fell, nor could she see water on the surface of the ramp or the boardwalk.

- [31] The plaintiff agreed under cross-examination that there was no discussion with her husband about going down to see the boats. She just simply followed him down the ramp. There was no frost on the surface of the ramp.
- [32] Her knee took the brunt of the fall. She noted that when she was on the ground, the wood around her waist felt wet. She agreed that when wood is wet, it can be slippery. She agreed that she had said at her examination for discovery that it was wet and that the wetness of the wooden planks caused her to fall.

Evidence of the Plaintiff's Husband

- [33] The plaintiff's husband, Mr. Rodger Owens, also testified. He retired in June 2017 from his position as a music teacher at a high school in the Lower Mainland. He testified that they lived in Steveston about a mile away from the Restaurant. They had been there for 15 years. Mr. Owens testified that he was somewhat familiar with the area and that they would shop and go to the grocery stores there. They did not use the boardwalk to walk around when shopping, however.
- [34] Mr. Owens testified that in the summertime, he and his wife would walk along the boardwalk but that was when it was dry and warm. They would go to the Restaurant or down to Steveston dock to buy fish.
- [35] On New Years' Eve of 2013, the Owens parked their car on Chapman Street and walked down the exposed cement aggregate sidewalk to the Restaurant. After the meal they left. That evening later at the time of the Incident, he looked at the boardwalk and it looked dry. He wanted to look at the boats in the harbour.
- [36] There were no warning signs at the ramp going down to the boardwalk. He testified, "I look for them if there had been a sign, there was no way I would have gone down the ramp". He said a consideration he had was that they were in their sixties. Mr. Owens was adamant that if there was a warning sign, they would not have gone down the ramp because he was cautious due to their age.
- [37] Mr. Owens testified that when the plaintiff fell, he heard her scream. He tried to pick her up. She was on her right side when she fell on the ground. He did not see her fall. He put her on the bench and went into the restaurant to get a bag of ice. He noted that the area where she fell was dangerously slippery but it actually looked dry. His wife's kneecap appeared to be protruding at a right angle and he knew it was a very serious injury. Her clothing was soaking wet on the right side. The restaurant owner came out and Mr. Owens testified he told him that the ramp "was ridiculously slippery". Mr. Owens then went to get his vehicle and drove his car to the loading area and he, the bartender, Mr. van der Tas, and the owner took the plaintiff to the car. Mr. Owens drove her to the Richmond General Hospital.

- [38] After the Incident, Mr. Owens went back to the area. He noted there were a number of places in other areas on the boardwalk that had warning signs and grates on the boardwalk to make it safe. Photographs of the signs were placed into evidence.
- [39] Mr. Owens noted that a photograph of one of the signs that was placed into evidence was taken near the boardwalk at a neighbouring property which says "CAUTION. BOARDWALK MAY BE SLIPPERY DUE TO VARIABLE WEATHER".
- [40] Mr. Owens testified about the household duties that he took over following the plaintiff's fall. In addition to gardening, which he had been doing before the Incident, he took on more household chores including doing dishes and cleaning. They ended up retaining the service of cleaners to come in once in a while.
- [41] Mr. Owens testified that he would help the plaintiff to the washroom and to shower. Since the Incident, they have moved to a home in Tsawwassen where there are no stairs. Mr. Owens testified that not having stairs in their home has been helpful for his wife. The plaintiff has difficulty with going up and downstairs generally. Her knee will lock up.
- [42] Following the Incident, Mr. Owens testified that they also retained a cleaner to come in once a month. He explained that the Incident has impacted their intimacy.
- [43] Prior to the Incident, they travelled a lot and played golf. Where they live now has a golf course. However, the plaintiff now needs a golf cart. Mr. Owens testified that the plaintiff tries to walk to the extent she can.

Plaintiff's Experts' Evidence

Dr. Fadi Tarazi

- [44] Dr. Fadi Tarazi, in a medical report dated June 24, 2015, was of the opinion that the Incident caused the plaintiff's right knee patella to fracture. He described it as a "severe fracture because there were multiple comminuted bone fragments that involve the articular cartilage surface of the knee joint [where bone rubs on bone]". He indicated that the treatment of surgery was appropriate where the fracture fragments were repositioned and held together with pins and wires until they are removed in further surgery.
- [45] Dr. Tarazi, in summary, wrote:

It is my opinion that the slip and fall accident of December 31, 2013 has caused a right knee patellar fracture which required two surgical interventions. She still has residual pain, which is affecting her day-to-day activities. She is now at increased risk of developing osteoarthritis of her right knee. Osteoarthritis will likely develop and progress over the next 10 to 12 years and she will likely eventually require knee replacement surgery. She will likely have to modify her activities in the future to accommodate for her knee pain. She will have to avoid heavy lifting, squatting, kneeling, and prolong sitting to minimize the risk of flare-up of her right knee pain. She is now prone to future injury to her right knee secondary to the slip and fall accident is December 31,

2013.

Mr. Armit Toor

- [46] The plaintiff also called Mr. Armit Toor of Intech Engineering Limited as an expert witness. He prepared an incident report on the slip and fall, which included photographs, and testified in court. Mr. Toor had examined the ramp and the part of the boardwalk near the bottom of the ramp in the general area where the Incident occurred. He used the boots the plaintiff was wearing to conduct friction tests and provide an opinion on the cause of the fall.
- [47] Mr. Toor visited the site in October 2018, five years after the Incident, therefore his observations about the scene are of limited assistance to this court as the evidential record demonstrates that there have been changes to site. Given the passage of time, some of Mr. Toor's findings are not reliable, as they are based on his observations of conditions that did not exist at the time of the Incident, some of which are not supported by or corroborated by the evidence of the plaintiff or her husband concerning the time of the Incident.
- [48] By way of example, Mr. Toor had noted that there were some areas of green moss or algae. I discount this evidence as there was no evidence of that given at trial by the plaintiff or her husband.
- [49] In his report, Mr. Toor concludes that there was a variance in frictional properties of the boardwalk at the site where the plaintiff fell. Slip and fall incidents occur when an individual unexpectedly encounters an area that has reduced friction. He notes that where there is reduced friction, that people can walk on slippery surfaces without slipping and falling but those are frequently in situations where an individual is aware of the surface or where "the hazardous surface is expected and identifiable".
- [50] In this case, he noted there were no visual clues to the changes in friction regions and would have limited the plaintiff's opportunity to respond to any slippage or loss of balance.
- [51] The plaintiff had given Mr. Toor the region where she fell. I accept that there have been some changes to the areas where the plaintiff fell in that garbage bins would have been to her left as she walked down the ramp and off on the boardwalk, however, she had identified the general region where she fell which was unchanged. I accept Mr. Toor's evidence on the explanation of how the plaintiff fell.

Defence Evidence

Mr. Albert Abah

- [52] Mr. Albert Abah was called as a witness by the defence to give evidence.

- [53] Mr. Abah was 51 years of age at the time of the trial and had worked in property management for a number of years. He had been with the defendant since 2013. Mr. Abah is familiar with the Steveston area for a period longer than that, however, as he has lived in that area for 17 years.
- [54] Mr. Abah testified that he has never heard of any safety issues around either the Shady Island restaurant or the Restaurant, two restaurants located near to each other and close to where the Incident occurred. He testified that the materials on the dock, being the wooden dock, are the same materials all the way through from the east to the west. Mr. Abah is responsible for the eastern portion of the dock and that would encompass the area of where the Incident occurred.
- [55] Mr. Abah testified that thousands of people come through that area. On Canada Day alone, 100,000 people were in the general area of Steveston. In the summertime, it would get very busy. It rains quite often in the area.
- [56] Part of Mr. Abah's job is to interact with owners, tenants, contractors, and trades. He also covers inspections, and oversees the trades. Mr. Abah testified that he is familiar with the ramp going down to the boardwalk and the boardwalk there. It is sloped. He testified that, to his knowledge, the water level below the ramp and the boardwalk areas depends on the tide, but it never rises up from below to splash on the boardwalk.
- [57] Mr. Abah testified that no one has expressed any concerns to him about the surface of the ramp being slippery. Most of the risks, he believes, occur in the winter when there is frost. They would put salt to melt down the ice on the walkways up to the city sidewalks. Mr. Abah testified that his phone is on 24/7. He is on call all the time, so he never gets a break. He is on the general site where the Incident occurred approximately two to three times a week.
- [58] Mr. Abah did concede that there are other times when it can be slippery on the boardwalk. No one had brought this issue to his attention, however. I note there was no evidence of an obvious place to contact if someone does slip. If someone did slip and told a store owner, then it would be up to the owners to contact him, he testified. He was asked about the fact, however, that an incident had in fact occurred here but he did not get notice from the tenants. He testified that the owner and the bartender at the Restaurant were aware of the Incident but they did not contact him about it so he did not learn of the Incident until well past the time it occurred.
- [59] Mr. Abah testified that, in practice, he does not have a set inspection schedule. He said that he does these inspections randomly. He indicated in his testimony that he was sure the ramp was slippery, "sure in the winter it is frosty". He agreed that there were variable weather conditions at that site and that they varied from foggy to rainy in the area. Mr. Abah agreed it was possible that the surface can be slippery when it is above-zero degrees.
- [60] He noted that there is far more usage of the boardwalk and the ramp in the summertime when it is sunny.

- [61] When asked about slippery conditions for the boardwalk, Mr. Abah said "in the winter, yes".
- [62] When asked about erecting signs, he answered that, in his mind, it would make more sense to have Cantonese or Mandarin signs as opposed to English. He was asked about the other photos of caution signs that were in evidence. He noted they were on the Steveston Harbour Authority's property rather than the defendant's property.
- [63] Mr. Abah testified that the defendant performs an annual pressure wash, usually in March or April. He testified that it is a three-day process. The Incident took place, however, on December 31, 2013 and there had been no power washing between March and April of that year.
- [64] There was no non-slip material put down before December 31, 2013. The surface of the ramp and the area by boardwalk have never been painted since he has managed that area.
- [65] Mr. Abah does not believe the site to be sufficiently worrisome to attend to it in any manner, apart from pressure-washing it once a year.
- [66] At the time of the trial, the defendant still had not erected any signs, applied any abrasive paints, put down sandwich boards signs or metal grates on the walkway, or made any changes to address the potential slipperiness of the ramp or the boardwalk.

Liability

Legal Framework

- [67] The governing test for occupier's liability is set out in s. 3 of the OLA: *Agar v. Weber*, 2014 BCCA 297. Section 3 of the OLA states:

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

- (a) condition of the premises,
- (b) activities on the premises, or
- (c) conduct of third parties on the premises.

- [68] It is conceded that the defendant was the occupier of the boardwalk where the plaintiff fell. As such, it owed a duty to take care that, in all the circumstances of the case, the plaintiff would be reasonably safe using the boardwalk. The issues are whether the defendant breached the standard of care it owed to the plaintiff, and if so, whether, but for that breach, the Incident, and damages flowing from it, would not have occurred.

- [69] The OLA does not place an occupier in the position of an insurer of all those who enter upon its premises; the operative word of s. 3 is "reasonable": *Clark v. Royal Oak Holdings Ltd.*, 2003 BCSC 275 at para. 109.
- [70] The OLA imposes a standard of care on the defendant to take reasonable care in the circumstances to make the premises safe. "That duty does not change but the factors relevant to the assessment of what constitutes reasonable care is necessarily factually specific to each fact situation": *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 at 472.
- [71] "The standard is reasonableness and occupiers are not expected to achieve perfection, nor are they meant to act as insurers to those who get injured on their premises": *Khoury v. Vancouver (City)*, 2015 BCSC 805 at para. 42.
- [72] In assessing whether the defendant took reasonable care in the circumstances to ensure the plaintiff was reasonably safe in using the boardwalk, this court must assess "whether there was a recognizable risk of injury, the gravity of the risk, the ease or difficulty with which the risk could be avoided, and the burden or cost of eliminating the risk": *Agar* at paras. 53 and 57; see also *Ryan v. Victoria (City)*, [1991] 1 S.C.R. 201 at para. 28.
- [73] "Evidence of prior safety and continued safe use is relevant but not determinative to whether the area was reasonably safe at the time of the fall": *Khoury* at para. 43.
- [74] In addition to establishing a breach of the standard of care, the plaintiff must prove that the defendant "caused" the Incident--but for the defendant's actions, the Incident would not have happened: *Athey v. Leonati*, [1996] 3 S.C.R. 458. In other words, if the plaintiff proves the defendant breached its standard of care by failing to put a sign warning of the hazard, for the defendant to be found liable, the plaintiff must also prove that the defendant's failure to warn of the potential slipping hazard caused the plaintiff's fall: *Khoury* at para. 43; *Newsham v. Canwest Trade Shows Inc.*, 2012 BCSC 289 at para. 96.
- [75] For a "slip and fall" case, like the present one, there are effectively two sets of causation inquiries. As explained by Justice N. Brown in *Newsham*, there is
- [98] one under the standard of care analysis and the other under the "causation" analysis as it is traditionally labelled in the law of negligence. The first analysis requires the plaintiff to establish what hazard caused the slip and that the defendant's negligence caused the hazard to be present. The second analysis requires the plaintiff to establish that the defendant's negligence caused the injury he suffered because of the slip.
- [76] Counsel cited a number of cases, a few of which I find are pertinent to an analysis in this case.
- [77] In *Waldick*, the plaintiff was seriously injured when he fell on the defendants' icy parking area, which had not been salted or sanded. It was a rural area, and apparently few people in that region salted or sanded their driveways. The plaintiff conceded that he knew the laneway was slippery and could tell that was the case without difficulty.

- [78] The Court held that occupiers liability legislation promotes and requires positive action on the part of occupiers to make their premises safe. After considering the weather, time of year, size of the parking area, cost of preventative measure, length of the pathway, and the fact that the accident occurred on rural and residential premises, the lower courts concluded that by not doing anything, the defendants fell short of reasonable care. The defendants knew the parking area next to the entrance would be used by visitors. The courts also considered that sand and salt are inexpensive and readily available.
- [79] Clark concerned a plaintiff and her husband, who owned a food kiosk in the defendant's mall. They were walking towards a meeting for the other merchants being held after the mall closed, when the plaintiff slipped. An employee of the defendant maintenance contractor had been mopping the floors and did not put any caution signs to warn of the wet floors.
- [80] The defendants challenged the cause of the plaintiff's fall. They led evidence that oil and grease on the cooking floor of the plaintiff's kiosk would have made the rubber of her shoes more susceptible to slippage; the judge accepted the kiosk floor was kept clean. They also pointed to the lack of evidence that there was any water on the tiles where the plaintiff fell. The plaintiff testified she did not notice the floors to be wet or anybody mopping, and did not know what caused her fall. The evidence is that the tiles were shiny, but that was the case whether wet or dry. The husband testified that he did notice someone was mopping and that the floor was wet as they were walking, but did not observe any wetness on the plaintiff as he helped her up. The employee testified that he mopped the area where she fell one to two minutes before the fall and that moisture would generally remain on the tiles for up to five to ten minutes after. As such, the judge accepted that the plaintiff slipped because the floor was wet.
- [81] The judge further concluded that the defendants did not take reasonable steps to inform the plaintiff of the risk that existed while the employee was mopping the floors. He considered that the employee's bucket was not sufficient to warn users of the mall floor that it was potentially dangerous, particularly because there were warning signs available and it was simply a choice not to use them. The employee testified that it was only after the plaintiff's fall that he was instructed to use these signs.
- [82] In *Daniels v. Westfair Foods Ltd.*, 2004 ABQB 746, the court found that the plaintiff did slip on snow or ice while leaving the defendant's store, but that she had not proved the defendant did not take reasonable precautions to maintain the sidewalk in a safe condition that day. Therefore, the defendant was not found to be liable under Alberta's occupiers liability legislation.
- [83] The evidence demonstrated that the defendant had not followed its own store policy regarding maintenance and sidewalk safety, however these breaches did not establish a breach of the defendant's standard of care.

- [84] The court accepted evidence that the sidewalk had been inspected twice that morning and concluded that the unsafe condition that caused the plaintiff to fall either developed within a 40-minute period or the potential hazard was not visible to a person who walked over the area checking for hazards. It was a winter day but was not snowing. The court held that to find the defendant negligent would impose too high a standard of care, one that would oblige the defendant to inspect its sidewalk at least once every forty minutes and indicate that a simple visual inspection would be insufficient.
- [85] In *Goddard v. Bayside Property Services Ltd.*, 2018 BCSC 1498, the plaintiff brought an action against the defendants (the strata and management) under the OLA and for negligence (respectively) after he slipped and fell on a wooden exterior staircase outside a fire exit at the rear end of his residence. He alleged the defendants breached their statutory duty and were negligent (respectively) with respect to the condition of the stairs.
- [86] The plaintiff had resided in the unit for 26 years before the accident. His evidence was that he was conducting a personal fire drill to measure the time it would take him to reach various fire exits in the building. He recalled using his left hand to grab the left railing of the stairs as he prepared to descend and then being at the bottom of the stairs, not recalling the stairs collapsing or falling.
- [87] Justice Ball found the plaintiff did not meet his burden for either action, writing:
- [15] The plaintiff is required to prove on a balance of probabilities first, what condition or hazard caused his trip and fall; and second, that the condition or hazard existed due to a breach of duty by the defendants. If the plaintiff cannot prove the former, he cannot prove the latter [citations omitted].
- [16] Further, the court is not permitted to speculate to find what condition or hazard caused the plaintiff to fall. It is insufficient for the plaintiff to simply depose "what else could it have been?" [citations omitted].
- [17] In this case, the plaintiff advanced a theory about what caused his fall, but the Court cannot speculate in respect to a theory; the cause of the fall has not been established on the evidence called by the plaintiff.
- [88] As such, Ball J. found that the facts of the plaintiff's fall did not establish the occupier defendant (being the strata) failed to take reasonable care to ensure he would be reasonably safe on the stairs that day.
- [89] In *Khoury*, the plaintiff slipped and fell on a bridge in botanical gardens. Justice Sharma found that the nature of the premises where the plaintiff fell was a significant factor with respect to the standard of care owed to visitors. The garden was not a regular park; it was intended to provide a non-urban experience. Therefore, it was reasonable that the trails were not paved and the land was not necessarily level. She also noted that the conditions on the bridge were not out of the ordinary given that it was a cold, sunny winter day.

- [90] Although informal, the defendants had a reasonable response to the possible ice and snow build up that was tailored to the reality of the unpredictability of ice formation. It was irrelevant that this policy was not written. Further, it was not unreasonable to only have one person working to address ice and snow, and to not have anybody on duty at the time of the accident.
- [91] Justice Sharma also noted that the plaintiff was familiar with the gardens, having visited many times before and that he and his wife were aware of the characteristics and the fact that the bridge may have been slippery given the weather conditions. There was evidence demonstrating that the plaintiff's wife called out to him when he was at the bridge to be cautious. All of this resulted in a finding that there was no breach in the duty owed to the plaintiff.
- [92] In *Simmons v. Yeager Properties Inc.*, 2014 BCCA 201, Justice Lowry, for the court, overturned the trial judge's finding that the defendants were liable under the OLA for the plaintiff's injuries resulting from a fall caused by her tripping on a 3-inch raised patio at the entrance to the defendants' bakery.
- [93] The trial judge, Justice Fisher, as she then was, found that the patio step presented a potential hazard, and the defendant had not sufficiently discharged its obligation to take reasonable care to make the premises safe. There was a white stripe painted along the top and side edges of the patio before the landing as well as a sign stating "WATCH YOUR STEP PLEASE". However, as the words "watch" and "step" on the sign were faded and difficult to read, Fisher J. found the defendants had not set up a system of inspection and maintenance with respect to the sign that was sufficient to refute the breach.
- [94] The defendants appealed arguing their failure to maintain the sign did not cause the plaintiff's fall; the court of appeal agreed, stating the following:
- [14] The fact the sign was not properly maintained such as to have been readable cannot have caused Ms. Simmons to fall if, as the judge found, she was "not looking in that direction and did not see the sign at all". Had the sign been readable it would have made no difference. Ms. Simmons would not have seen it. The bakery owners' breach of the duty they owed to patrons like Ms. Simmons cannot have caused her fall.
- [15] Thus Ms. Simmons failed to "show on a balance of probabilities that 'but for' the defendant's negligent act, the injury would not have occurred" (see *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32] at para. 8). The facts found by the judge do not provide a legal basis for determining the owners of the bakery to be liable for the injuries Ms. Simmons suffered when she fell.
- [95] In *Zary v. Canada Mortgage and Housing Corporation*, 2015 BCSC 1145, Justice Skolrood found that the plaintiff's injuries were not caused by an act or omission by the defendant in breach of its obligations under the OLA.

- [96] The plaintiff fell, injuring her knee, while leaving a stall in a washroom in the Granville Island Public Market. Her evidence was that when she entered the washroom she did not see any water in the main area, but did see some on the floor when she entered the first stall. Her evidence was that when she saw the water, she turned to leave the stall, taking one step with her left foot. Her right foot slipped from under her, causing her to fall.
- [97] Skolrood J accepted that there was some water on the floor of the washroom, at least in the stall, and that the plaintiff's fall was caused by dampness on the floor. He also accepted that she slipped due to the water on the floor.
- [98] However, Skolrood J. found the plaintiff failed to establish some act or omission on the defendant's part that caused the injury. He did not accept that the defendant breached its standard of care by failing to use absorbent mats or adding slip resistant flooring material to the area. He found that given the nature of the business at the market and the volume of foot traffic on weekends, it was inevitable that there would be some moisture in on the floor of the washrooms at any given time. However, there was no evidence that the mere presence of water rendered the floors unsafe.
- [99] Skolrood J noted that the plaintiff was aware the washroom floor was often damp and went on to note that the defendant had a reasonable system of maintenance in the washrooms, involving inspection and cleaning at reasonable intervals and a system for dealing with unusual events, such as a water leak. This system effectively minimized hazards and fulfilled the defendant's duty to keep the bathrooms reasonably safe for use by users.

Positions of the Parties

- [100] The plaintiff's position is that the defendant was negligent by omission; it failed to take reasonable steps to ensure those using the ramp and the boardwalk would be safe. She argues that the slipperiness of the boardwalk is a recognizable risk, which the defendant was aware of, but failed to address. Its failure to do anything in the face of that risk was a breach of the duty it owed to the plaintiff. The plaintiff points to various steps that she argues would have been reasonable for the defendant to take, including erecting signs to warn of the slipping hazard, applying non-slip material, conducting regular safety inspections, and power washing more frequently. In particular, she argues that the standard of care for occupiers of boardwalks in the area is to erect signs warning of slipping risks. This would have been an inexpensive solution, one which the evidence demonstrates was taken by the Steveston Harbour Authority with respect to the part of the boardwalk for which it is responsible.

- [101] The plaintiff argues that causation has been proven. Her fall was caused by the slipperiness of the ramp. As a consequence of not seeing any signs warning of the slipping hazard, the plaintiff and her husband went down the ramp and the Incident ensued. Had she been alerted to the slipping hazard, she would have taken a different route or she would have been more vigilant in proceeding down the ramp by holding onto her husband's arm; she argues this would have prevented her fall.
- [102] The defence's argues that it did not breach the standard of care. Its position is that the plaintiff has failed to prove what hazard, if any, caused the Incident. The defence submits that the plaintiff has not advanced a credible explanation for the cause of her fall. It submits that she does not remember how she fell, that she was not paying attention at the relevant time, and that her explanation for how she impacted her right patella does not make any sense. Without establishing what hazard caused her fall, the defendant argues that the plaintiff is unable to establish that the defendant was negligent in allowing the hazard to be present.
- [103] The defendant further submits that the boardwalk "is a rustic wood deck in a marine setting, which is entirely exposed to all elements". It argues that the possibility of the boardwalk being wet or slippery was an inherent risk of which any adult would be aware. In the circumstances, it did not fail to take reasonable care to make the premises safe in the face of objectively unreasonable risks of harm.
- [104] Further or in the alternative, the defence argues that a sign would have made no difference here and that the plaintiff has failed to establish that, if the defendant did breach its duty to the plaintiff, the Incident, and consequently her damages, were caused by that breach. The defence position is that a sign would have done nothing more than inform the plaintiff of risk she was already aware of, namely that when the ramp and the boardwalk were wet, it could be slippery. It points to the plaintiff's evidence that she visually checked the ramp to determine if it was wet before proceeding. It argues that because she had not realized it was wet before her fall, even if there had been a sign informing her to exercise caution on the ramp and the boardwalk as it could be slippery depending on the weather conditions, the sign would not have changed her behaviour or prevented the Incident.

Analysis

- [105] The issue for this court is whether the defendant is liable under the OLA for the Incident, and, consequently, for the damages suffered by the plaintiff as a result. This requires, first, a determination as to whether the defendant breached its duty to take reasonable care in the circumstances to ensure the plaintiff would be reasonably safe using the ramp. The fact of the plaintiff's fall does not create a presumption of liability; the burden rests with the plaintiff to establish a breach of the defendant's duty of care, being some act or omission on the part of the defendant that caused her injury: Khoury at para. 43. The standard of care inquiry, therefore, requires a determination as to what caused the plaintiff to fall. The identification of that cause enables the court to assess whether there was a recognizable

risk of injury, the gravity of the risk, the ease or difficulty with which the risk could have been avoided, and the burden or cost of eliminating the risk.

- [106] Although her evidence on how she came to fall is imprecise, I find that it is more likely than not that she fell on the boardwalk because it was wet. There were no witnesses to the fall, however, the plaintiff was credible in her evidence generally, and I found her description of what occurred leading up to and after the fall to be reliable. I accept her evidence that neither the wooden planks of the boardwalk nor of the ramp appeared to be wet from a visual scan, but that she noticed the boardwalk was wet while lying on its surface after her fall. As a matter of common sense, I find that the wetness made the boardwalk more slippery than it would have been if dry. Counsel for the defendant, as part of its submissions, makes this very point when arguing that the "Plaintiff knows that wood can be slippery" and this was therefore an inherent risk.
- [107] Nonetheless, as the defendant aptly argues, the mere presence of water on a surface is not, in itself, evidence of negligence on the part of the defendant. The issue of the defendant's liability turns on reasonableness. The defendant's duty is not to achieve perfection; it is only to take reasonable care in the circumstances to make the premises safe. The defendant submits that, regardless of whether the boardwalk was wet, this standard was satisfied, relying, in particular, on *Khoury* and *Zary*. It argues that the occupier in *Zary* was not held liable due to water on the floor, and that, as was the case in *Khoury*, given the nature of the ramp and the boardwalk, being that it is outdoor and made of wood, the standard applicable to the defendant should be lower than it was in *Zary*. It submits, therefore, that the fact that the boardwalk was wet did not constitute an unreasonable risk of harm.
- [108] Unlike the case of *Khoury* summarized above, here, the plaintiff was not familiar with this part of the boardwalk. Similarly, in *Zary*, the plaintiff was aware that the washroom floor was often damp, unlike the situation in the case at bar. I accept the plaintiff's evidence in that regard that she had looked. She was unaware the wood was wet. She was not aware of the characteristics of the ramp or the boardwalk, or that the wooden planks may have been slippery given the weather conditions at that time.
- [109] Furthermore, I accept her evidence that while she was alive to the risk that the boardwalk or ramp might have been wet, since it was outside, by the water, and made out of wood, that she did look to determine if it was wet. I accept that it did not appear wet to her.
- [110] I find that the risk respecting the boardwalk was unreasonable. The defendant has a positive duty to take reasonable care to make the boardwalk safe to be walked on. Although evidence of local practice is not determinative, having considered that occupiers for the neighbouring boardwalks had mounted signs warning of the potential slipping hazard, I am persuaded that the facts that the boardwalk could be slippery when wet and that this wetness would not always be visually noticeable to visitors, amounts to a recognizable risk that required some positive action on the part of the defendant.

- [111] I do not accept the defendant's characterization that wetness was an "inherent risk" of such a nature that the plaintiff should have been aware of it being slippery, given she had considered this potential and indeed looked for evidence of that risk. Given no visual clues arise from the wood itself I find that a sign should have been erected at the top of the ramp to warn that it could be slippery given the variable weather conditions at the site.
- [112] There was ease in avoiding the risk by either putting a frictional surface such as a metal grate on the boardwalk to reduce the slipperiness that wetness would cause, or even erecting a sign, warning visitors of the invisible danger. The costs of reducing the risk of slipperiness would have been minimal. As such, in all the circumstances, I find that the defendant breached its duty under the OLA to the plaintiff in failing to take any steps to reduce or eliminate the risk posed by the boardwalk becoming slippery when wet.
- [113] Based on the legal test as set out above and the cases I have noted, I find that the plaintiff has also established, on a balance of probabilities, that but for the defendant's negligent act, the injuries would not have occurred.
- [114] I accept the plaintiff's evidence that had there been a sign warning that the ramp and the boardwalk surfaces could be slippery, she would not have gone down the ramp that day. She testified "If there had been a sign, I either would have grabbed Rodger's arm to go down the ramp or we would have turned and gone a different direction."
- [115] Relying on *Simmons*, the defendant argues that a sign would have made no difference here, and therefore causation is not met. I do not accept this argument. In *Simmons*, the Court of Appeal indicated that despite the fact that a sign warning of a tripping hazard was faded, there was no liability. Given that the plaintiff in *Simmons* had not been looking in the direction of the sign at all, the court found a properly maintained warning sign would not have made any difference.
- [116] In the present case, the parties agree there was no sign warning of the potential slipping hazard with respect to the boardwalk ramp that would have been visible to someone entering from where the plaintiff did. The question, however, is whether a sign would have changed the plaintiff's behaviour, preventing her fall; namely whether, but for the absence of a sign, the Incident would not have occurred.
- [117] I accept the plaintiff's evidence that before proceeding on the ramp she had looked for such a sign and other indicators as to the safety of taking the ramp, including checking for whether it was wet. I find her evidence on this point to be credible and reliable. I accept that she was cautious and worried about falling. I accept that the presence of a sign indicating there was a risk of slipping would have dissuaded her from taking the ramp or prompted her to take additional precautions. The plaintiff was adamant in her evidence on this point.
- [118] The defendant submits this evidence is not credible or reliable. Its position is that, due to the fact the plaintiff's conclusion that the ramp was not wet, a sign would have had no impact. The defendant's argument appears to rely on the assumption that had there been a

sign erected in the relevant area, it would have said something along the lines of "slippery when wet"; its position being that, since she did not believe the ramp was wet, there was no reason for her, even if there had been a sign, to act on it. With due respect, I do not accede to this argument.

[119] There is no evidence before the court that a sign that says "slippery when wet" was erected in the area, nor was the plaintiff cross-examined on the wording of such a sign. There is no basis for this court to conclude this would have been the particular language of the sign had one existed. It is equally likely that the sign might have said "CAUTION. FLOAT & RAMP DECK MAY BE SLIPPERY. USE AT OWN RISK" or "CAUTION. BOARDWALK MAY BE SLIPPERY DUE TO VARIABLE WEATHER", as it did in other areas which had similar boardwalks, including a neighbouring boardwalk, for which Steveston Harbour Authority is the occupier. In any event, while there are many possibilities as to what a caution sign warning of slipperiness might have said, the plaintiff was not questioned on any of them and how, if at all, the particular wording might have changed her behaviour. Specifically, I have no basis to conclude that depending on the language of the particular sign before her, her response as to whether or not to take extra precaution in walking on the ramp or avoid the ramp would have differed.

[120] The plaintiff's evidence, I find, is not that she had seen a sign and believed the boardwalk was wet, she would have turned around. It is simply that had she seen any warning sign, she would have turned around. I find her evidence in this respect is credible and reliable, given that, even without any external indicators of risk, she had been cautious in going down the ramp and walking on the boardwalk. She had not even kept up with her husband and had lagged behind. This was because she had been taking care while going down the ramp, despite have no reason to believe there was any particular or identifiable risk. This, and her evidence as a whole, supports the conclusion that she was a generally cautious person and supports her evidence that a warning sign about the ramp would have changed her behaviour. She may have avoided the ramp and the boardwalk altogether, in which case I accept that the Incident would not have occurred. She testified that, alternatively, she may have held onto her husband's arm.

[121] The breach of duty by the defendant, accordingly, is its failure to put up a caution sign. But for there being a sign visible to someone approaching the boardwalk, the Incident would not have occurred. Therefore, I find the plaintiff has established on a balance of probabilities that the defendant is liable for any damages flowing from the Incident.

Damages

Non-pecuniary damages

[122] The plaintiff claims non-pecuniary damages. In the case *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal set out a list of factors to be considered in respect of non-pecuniary damages:

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

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

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

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

[Emphasis in original.]

[123] In case at bar, plaintiff's counsel submits an appropriate range of non-pecuniary damages given the plaintiff's injuries is \$80,000 to \$120,000. The plaintiff relies on *French v. Fort St. John Curling Club*, 2003 BCSC 932 and *Sohal v. Singh*, 2017 BCSC 734 for this range.

[124] The defence submits an appropriate amount is \$80,000, also citing *Sohal* in support of its position. *Sohal* concerns a plaintiff who was involved in a motor vehicle accident and fractured her patella. The plaintiff was 47 years of age at the time and had no pre-existing conditions. Much like the plaintiff in the case at bar, while the plaintiff's knee fracture healed within a few months, she continued to suffer pain and this was likely to continue. She was awarded \$80,000.

[125] The defence also cites *Tenhunen v. Tenhunen*, 2015 BCSC 26, which involved a plaintiff who slipped and fell coming down a painted wooden ramp, causing her to fracture her tibial plateau, injury and pain in her knee and hip, tendonitis in her hip, and sleep disturbance. She was 65 years of age at the time of trial. The court assess non-pecuniary damages at \$80,000, before reducing the award due to the plaintiff's contributory negligence.

[126] As noted, I find that the plaintiff is a credible and reliable witness. I accept her evidence that the Incident has caused her ongoing pain and suffering. This is demonstrated in several ways--she is no longer able to enjoy intimacy with her husband in the way she did before the Incident; she cannot enjoy walking the greens on the golf course and must take a golf cart; in her retirement, she cannot take up new activities such as yoga because the

injury disables her from assuming certain yoga positions; she is afraid to take baths because she cannot get into the right position to get out of the bathtub.

[127] Of the cases cited by counsel, which also includes *Crudo v. Westfair Foods Ltd.*, 2005 BCSC 320 and *Scarfe v. Fernco Developments Ltd.*, 2015 BCSC 2310, I find that Sohal and Tenhunen are the most similar to the case at bar and I award non-pecuniary damages to the plaintiff in the amount of \$80,000.

Past Income Loss and Special Damages

[128] It is agreed between the parties that past income loss and special damages for the costs of the plaintiff's health care services are to be in the amount of \$10,450 and \$1,101.32, respectively.

In-Trust Claim for Mr. Owens

[129] The plaintiff advanced an in-trust claim of \$5,000 for the labour and care her husband, Mr. Owens, provided to her and their household following the Incident. This consisted of personal care for Ms. Owens, which included assisting with her showering and toileting, and additional household chores, including cleaning and doing the dishes. During the approximately five-month period following the Incident until her return to work, the plaintiff submits that Mr. Owens's additional labour amounted to about 5 to 10 hours per week. During the period from her return to work until their move to Tsawwassen, she estimates his labour amounted to approximately 2 to 5 hours per week more than he would have done but for the Incident.

[130] The plaintiff relies on *Dykeman v. Porohowski*, 2010 BCCA 36 and *Wright v. Mistry*, 2017 BCSC 239. An in-trust award may be made to the plaintiff in trust for her husband as compensation for additional pre-trial work performed by him as a result of her impaired capacity to perform housekeeping chores or to care for herself: *Wright* at para. 89, citing *Bradley v. Bath*, 2010 BCCA 10 at para. 43. Mr. Owens can only recover for care or housekeeping services that went beyond what would normally be expected in a marital or familial relationship: *Wright* at para. 90. As stated in *Wright* at para. 91, citing *Frankson v. Myre*, 2008 BCSC 795 at para. 51, the court considers the following factors to assess an in-trust claim:

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

[131] I accept the evidence from the plaintiff and Mr. Owens concerning the personal care and housekeeping services he performed following the Incident. Considering the level of care and assistance and additional work Mr. Owens has provided as a result of the Incident, I grant an in-trust award of \$2,500 to Mr. Owens.

Loss of Housekeeping Capacity

[132] The plaintiff sought \$10,000 for the loss of housekeeping capacity to compensate the loss or impairment of her ability to perform domestic services, relying on *O'Connell v. Yung*, 2012 BCCA 57, *Liu v. Bains*, 2016 BCCA 374, and *Shongu v. Jing*, 2016 BCSC 901. A plaintiff whose ability to perform housekeeping services is diminished in part or in whole due to another's tortious conduct is entitled to be compensated for that loss.

[133] Here there are tangible indications that the plaintiff had previously been performing services in the home that she no longer can. Following the Incident, some of these services were performed gratuitously by Mr. Owens, and more recently, the Owens have hired the service of cleaners to assist with household chores that, prior to the Incident, the plaintiff had performed. As a result of her injuries, she is no longer as able to perform these services.

[134] Dr. Tarazi confirms that she is able to do her regular weekly household cleaning, with pain and some modifications, including avoiding kneeling and squatting. He opines his support for her decision to hire the service of cleaners for deep cleaning and seasonal cleaning for the foreseeable future. He does leave open the possibility that she may require even further household help if she develops "severe enough osteoarthritis" in the future, and suggests that osteoarthritis will likely develop and progress over the next ten to twelve years.

[135] Considering the extent to which the plaintiff will likely continue to require help for certain household chores, the plaintiff's age, and the possibility and the extent to which her housekeeping capacity might have become impaired, even if the Incident had not occurred, I award the plaintiff \$5,000 for the loss of housekeeping capacity.

Cost of Future Care

[136] The plaintiff claims \$10,000 in damages for the cost of future care.

[137] It is noted in Dr. Tarazi's report that the plaintiff is at increased risk of developing osteoarthritis of her right knee due to the Incident and will highly likely require a knee replacement surgery in the future as a result. I find, in accordance with *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), that there may be some medical justification for cost of future care claims.

[138] However, I find that the plaintiff has not specified or attempted to quantify the future care costs she anticipates. Accordingly, I have no basis to quantify her damages in this regard, therefore, I decline to make an award with respect to cost of future care.

Summary of Award

[139] In summary, the plaintiff is awarded \$99,051.32 with breakdown as follows:

Non-pecuniary Damages:

\$80,000

Past Loss of Income:

\$10,450

Special Damages:

\$1,101.32

In-trust Claim:

\$2,500

Loss of Housekeeping Capacity:

\$5,000

Cost of Future Care:

\$0

Total:

\$99,051.32

Costs

[140] In the event that counsel are unable to reach an agreement respecting costs, they may, within 60 days of the release of this judgment, arrange to address costs by contacting the Registry.

"Maisonville J."

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