
CANADA / JUDGMENT

Palani v. Lin

2021 BCSC 59

COURT

Supreme Court of British Columbia

DECIDED

14 January 2021

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2021 BCSC 59 Palani v. Lin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Palani v. Lin,

2021 BCSC 59

Date: 20210114

Docket: M163711

Registry: Vancouver

Between:

Golzar Palani

Plaintiff

And

Gideon Lin

Defendant

Before: The Honourable Mr. Justice Brundrett

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

June 22-26, 29-30, and

July 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 14, 2021

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Introduction

- [1] These reasons address the appropriate quantum of damages in a personal injury action. The plaintiff, Ms. Palani, was a passenger in a vehicle involved in an accident on a sunny evening on June 5, 2014 at the intersection of Granville Street and West 6th Avenue, Vancouver, BC (the "accident"). She seeks compensation under the usual heads of damages for chronic pain and psychological injuries.
- [2] The driver of the defendant's vehicle, Mr. Lin, has admitted liability for the collision. The action has been discontinued against the driver of Ms. Palani's vehicle, her husband, Moshin Palani. Liability is therefore not in issue.
- [3] The defendant concedes that the plaintiff suffered injuries in the accident, including soft-tissue or whiplash-type injuries to her neck, shoulders, and back. The parties disagree as to the precise extent of the plaintiff's injuries and the impact of the injuries on the damages assessment.
- [4] The plaintiff submits that her physical and psychological injuries resulting from the accident are chronic and likely to endure. However, the defendant submits that the preponderance of expert medical evidence supports the plaintiff enjoying improved functioning in the future, possibly through physical conditioning or further pharmacological intervention.
- [5] In total, the plaintiff seeks a judgment in her favour in the amount of \$1,528,071.04. Counsel are in agreement on the appropriate award for special damages. However, the defendant disputes the awards under the other heads of damages and suggests a much more modest award for the cost of future care and future loss of earning capacity.

Credibility of Plaintiff and Other Lay Witnesses

- [6] I found the plaintiff to be very credible. The plaintiff seemed genuine, earnest, and sincere. In testifying, the plaintiff was emotional at times, particularly when recounting the impact of her injuries upon her ability to care for her children and be a loving spouse to her husband. She was also emotional when discussing how the family pressured her to marry her cousin in her teen years. However, nothing in her demeanour on the stand undermined her credibility.
- [7] The plaintiff's evidence as to her injuries was largely corroborated by other lay witnesses whose evidence I accept and who were able to observe the plaintiff's behaviour. The defendant, Mr. Lin, the other driver in the collision, observed the plaintiff to be clearly in pain after the accident. Her family members and her employer testified as to the limiting impact of her accident-related injuries, consistent with the plaintiff's evidence. Her evidence as to her physical and psychological difficulties after the accident fit with the medical evidence that I accept. The plaintiff's testimony about her career goals was logical and made sense. Her evidence was largely internally and externally consistent. She has been consistent in her complaints of soft-tissue injuries and did not show signs of exaggeration or embellishment. I cannot find anything in the plaintiff's evidence that would undermine the credibility or reliability of the plaintiff's evidence.
- [8] The other lay witnesses included the following: Moshin Palani, the plaintiff's husband; Sanaa Palani, the plaintiff's niece; Munire Muradi, the plaintiff's sister-in-law; Hajar Palani, the plaintiff's mother; and Mohammed Ahmed, the plaintiff's boss and a family friend. While I am alive to the possibility of bias, these witnesses were generally consistent in their portrayal of the limits upon the plaintiff's capacity to engage in housework, cleaning, childcare, and recreational activities. Overall, I also found these witnesses to be very credible.

Background

- [9] The plaintiff was born in the Kurdish region of Iraq on January 25, 1987. She was 27 years old at the time of the accident and 33 years old at trial. She is married and has three daughters aged 8, 3, and 10 months at trial. They live together in Surrey.
- [10] The plaintiff's father passed away when her mother was pregnant with her. Wanting a better life for the family, the plaintiff's mother emigrated from Iraq to Canada in 2001 as a refugee, along with the then 14-year-old plaintiff and her four older brothers.
- [11] The plaintiff is the only daughter in the family. Some of the plaintiff's independence and assertiveness may be due to her losing her father and watching her mother struggle to raise her and her brothers. The plaintiff testified, and I accept, that her mother instilled in the plaintiff the desire to go to school and develop her own career so that she could more independently support herself and her family.

- [12] The plaintiff was pressured in her teen years by the men in her family, which was extreme at times, to marry an Iraqi cousin. After some difficulty, she successfully resisted the pressure and met her present husband, Mr. Palani, whom her family eventually accepted.
- [13] The plaintiff's eldest daughter was born in April of 2012 and is now eight years old and in grade three. The plaintiff has two other children who were born after the accident in November of 2016 and August of 2019 respectively.
- [14] It appears that the plaintiff developed a strong work ethic early on in life. After she immigrated to Canada, she was employed from an early age, continuously until the birth of her eldest daughter in 2012. While still in high school, the plaintiff worked at a fast food restaurant and then on an assembly line at a tile warehouse in the evenings and on weekends. She worked 40 hours a week in grades 11 and 12 in work that required her to stand on her feet handling tiles throughout the duration of her shifts.
- [15] The plaintiff graduated from high school in 2007. After that, she worked full-time at a telephone call centre for about a year but had to leave when the call centre shut down. The plaintiff then did commission work selling knives from the fall of 2007 through the fall of 2008.
- [16] The plaintiff wanted to have a career and to be independent. Her dream was to become a licenced practical nurse ("LPN").
- [17] After taking English courses to improve her language ability, the plaintiff enrolled in the LPN program at Vancouver Career College. From January 2010 through June 2010, she attended the LPN program there. At the time, it was a 12-month program, though I understand it is now an 18-month program. Her progress was mixed in that she did well in some of her courses but failed others and had to retake them. It appears that this was an option available to her. Nevertheless, the plaintiff had trouble affording the tuition. By June of 2010, she was forced to abandon the LPN program for financial reasons.
- [18] The plaintiff did seasonal berry picking for three months in the summer and did fruit packing work for two months in the winter from 2008 onward until the summer of 2013. She also did berry picking after the birth of her first child. She would have returned to that work in the summer of 2014 but for her accident in June 2014.

Pre-Accident Health and Lifestyle of the Plaintiff

- [19] The plaintiff had no history of pre-accident physical injuries. Indeed, she was capable of handling the physically demanding work and long shifts of berry picking five to six days a week in the warm summer months.

- [20] Prior to her first child being born, the plaintiff and her husband enjoyed hiking, visiting parks, and going out to movies and dinners. They regularly socialized with family members and hosted large gatherings in their home. After the birth of her first child, the plaintiff was an active and doting mother, taking her child on outings, playing games with her, recreating, hiking, and going for walks.
- [21] The plaintiff gave evidence that the expectation in their traditional Kurdish community is for women to take care of the family, prepare meals, and host social gatherings on a regular basis. Indeed, the plaintiff's energies were largely devoted to working in the home after marriage.
- [22] However, I also find that the plaintiff has more progressive beliefs than those of her more traditional family members. She has maintained her desire to work outside the home to achieve financial security, most likely as a licenced practical nurse or a care aid. Her husband was very clear in that he supported his wife in this regard. In addition, it appears that his night shift work and the support of her family would have complemented the opportunity for the plaintiff to seek and maintain employment while balancing childcare responsibilities among family members.

The Accident

- [23] On June 5, 2014, at approximately 7 p.m., the plaintiff was a back seat passenger in her family's sedan driven by Mr. Palani. The couple's daughter was secured in a rear-facing child seat in the back seat. The family was returning home after visiting a friend in the hospital and taking a drive through English Bay.
- [24] As the plaintiff's vehicle passed southbound on Granville Street through the intersection with West 6th Avenue in Vancouver, her vehicle was struck by an oncoming vehicle driven by the defendant. The defendant's northbound sedan had commenced a left turn westbound onto West 6th Avenue into the path of the plaintiff's vehicle. The left front end of the plaintiff's vehicle collided with the passenger right-side doors and rear quarter panel of the defendant's vehicle. The collision was sudden and violent and resulted in the airbags in the plaintiff's vehicle being deployed. The plaintiff was hit in the face by one of the airbags. Both vehicles involved in the collision sustained material damage on the order of \$13,000 and were not roadworthy.
- [25] Bystanders helped the plaintiff out of the car, and paramedics assessed her at the scene. Her stomach hurt "a lot," which she attributed to the force of the seatbelt upon her. The plaintiff testified that she felt "ok" at the time, though I find that she was probably preoccupied with the welfare of her daughter in the back seat rather than herself. They decided to go home by taxi, but on the way, they rerouted to Surrey Memorial Hospital.

Post-Accident Health of the Plaintiff

- [26] The plaintiff was admitted, assessed, and discharged on the evening of the accident. When she arrived back home, her neck and shoulder started hurting. She had a bruise on her chest. During the first post-accident week, she developed pain in her lower back, neck, and shoulder, as well as headaches and difficulty sleeping.
- [27] The plaintiff followed up with her general practitioner, Dr. Sheik, soon after the collision. She reported ongoing stomach, neck, shoulder, and back pain. Initially, after the collision, her left shoulder was worse than her right. However, her left shoulder improved over time, and her right shoulder is now more symptomatic.
- [28] The plaintiff's physical pain in her neck, shoulders, and back has persisted and is now chronic. She cannot stand for too long. Lifting and bending aggravate her back pain.
- [29] Her sleep continues to be disrupted. She also regularly experiences headaches, which are worsened by a lack of sleep.
- [30] The plaintiff's ability to participate in activities with her children and husband has been impaired. She does not have the stamina, endurance or strength to play with her children in the same way she did prior to the accident. Her childcare activities have been impaired, and I accept that the plaintiff's ability to perform housework has also been impaired.
- [31] Following her accident, the plaintiff attempted to return to work at a tailor shop and later at a flower shop, both at Seven Oaks Mall in Abbotsford. The plaintiff's injuries inhibited her performance at both locations. She lasted only a day-and-a-half at the tailor shop and a mere few hours at the flower shop.
- [32] Mr. Ahmed, the owner of both shops, testified that the plaintiff was in obvious pain after a short time at each position. She demonstrated obvious signs of pain within a short time of starting work, needed to take frequent breaks, and was unable to complete tasks. Although sympathetic and understanding of her limited abilities, he was forced to send her home despite her potential high value as an employee due to her fluency in both English and Kurdish.
- [33] This evidence fits with that of Mr. Palani, who described the plaintiff demonstrating pain when lifting, having to take breaks, using supports such as the sofa arm or kitchen counter for support, stretching, and requesting frequent massages.
- [34] The plaintiff's niece, Saana Palani, confirmed that the accident dramatically altered the plaintiff's ability to clean, do laundry, cook, socialize, and look after her children. She also confirmed changes in the plaintiff's mood, energy levels, and temperament occurred after the accident. The plaintiff's mother and sister-in-law gave evidence to a similar effect.

- [35] In addition to physical injuries, the accident has also disrupted the plaintiff's mood. She feels increased stress, as well as shame and embarrassment over her impaired abilities as a mother, spouse, and daughter. The plaintiff is quieter than she used to be and feels she is not living up to her duties as a wife, mother, and daughter. It is apparent that the plaintiff suffers from depressive symptoms, anxiety, increased stress and negative mood changes associated with the impact of the accident on her physical functioning.

Expert Evidence

Dr. Uzair Sheik

- [36] Dr. Sheik has been the plaintiff's family practitioner since 2014. He prepared a medical-legal report filed in evidence and testified in his capacity as an expert and as the plaintiff's treating physician.
- [37] Dr. Sheik first saw the plaintiff on June 13, 2014, and has continued to see her up until the present. Generally, Dr. Sheik thought that the plaintiff had seen partial improvement with physiotherapy, active rehabilitation, and massage therapy, though her improvements had plateaued in his view. Dr. Sheik was primarily concerned with the plaintiff's physical health. Her mental health was not the subject of consultation with her, though he accepted that there could be a psychological overlay to her impaired level of functioning.
- [38] Dr. Sheik has attempted various interventions with the plaintiff, including prescribing various medications, referring her to rehabilitation, massage therapy and physiotherapy, and conducting trigger point injections. He had discouraged the plaintiff from using pharmacological treatments during her two pregnancies after the accident.

Dr. Paul Janke

- [39] Dr. Janke is an experienced forensic psychiatrist. He assessed the plaintiff on October 16, 2018 and again on April 8, 2020.
- [40] In Dr. Janke's opinion, the plaintiff meets the diagnostic criteria for adjustment disorder with depressed and anxious mood. She also meets the criteria for somatic symptom disorder, without meaningful improvement in her symptomology in the years since the accident. He confirmed that the plaintiff's symptoms did not represent post-partum depression and that her overall prognosis was guarded.
- [41] Following his first report, Dr. Janke prepared a responsive report dated March 25, 2020 and a follow-up report dated April 23, 2020. In his April 23, 2020 report, he opined that the plaintiff had not experienced any meaningful improvement in her symptomology since his last assessment of her. Dr. Janke described the plaintiff's condition as remaining guarded, meaning that treatment of her physical limitations was necessary in order for her mood to improve. He also raised the possibility that if the plaintiff was unable to engage meaningfully with her children, her condition could be expected to worsen.

- [42] Dr. Janke testified that the plaintiff had a disability in terms of carrying out the activities in the home and in her role as a wife and a mother. Her depressive symptoms were a significant contributing factor to her impaired functioning.
- [43] Dr. Janke queried the plaintiff about significant trauma that predated or postdated the accident, and the plaintiff denied any such trauma. The plaintiff was aware of the need to be truthful with the physicians assessing her, but she did not disclose the threats and violence she suffered at the hands of her family in her late teens and 20s. She explained that for her, this was a sensitive family matter that her mother had always told her to keep to herself. She thought she would be bringing shame to the family by disclosing it or that it might get her brothers in trouble. It was also stressful to talk about and scarred her emotionally. She explained that it was not easy for her to talk about it "to a doctor I just met." While the plaintiff did not disclose this history to Dr. Janke or Dr. Solomons, she did disclose her history of familial abuse at trial.
- [44] Does this failure to disclose historical traumatic family experiences impact the conclusions of Dr. Janke? Dr. Janke indicated that it would be significant to understand a background of family violence, and it could impact his diagnosis, as those events could lead to a diagnosis of chronic post-traumatic stress disorder as a pre-existing condition. He also stated that such non-disclosure could raise red flags, presumably about her credibility and the accuracy of her personal narrative, though Dr. Janke thought the plaintiff was not a "psychologically minded" person. Further, I have found that the plaintiff to have been truthful in her evidence at trial.
- [45] Dr. Janke testified that past trauma such as family pressure culminating in threats and violence could inform vulnerability. He explained that an individual with a history of trauma in childhood would be more likely to develop the prolonged pain response of somatic symptom disorder as an adult. He confirmed that, if the reported violence and threats occurred, the plaintiff would have this vulnerability prior to the collision. Dr. Janke testified that if the information about family abuse was true, it "would represent a pre-existing vulnerability to the effects of trauma." He explained that individuals with a history of trauma are more likely than others to develop this prolonged pain response to trauma in their more recent past.
- [46] As for treatment possibilities, Dr. Janke testified that if the plaintiff was appropriately treated, he would expect to see a reduction in her depressive symptomology and feelings of anxiety and guilt, with an associated decrease in the perception of pain and an increase in her ability to function. However, while there was room for "some degree of improvement," this would represent her "feeling better about herself but not better."
- [47] Given her current presentation and the lack of improvement of her condition over time, Dr. Janke did not expect a good outcome regarding the plaintiff's somatic symptom disorder and her depression. In his April 23, 2020 report, Dr. Janke stated that "there does not appear to be any expectation that her physical pains will resolve completely" and that "[o]ngoing pain

will result in ongoing anxiety and depressive symptomology." He testified that restoring the plaintiff to her condition when he first assessed her in October 2018 would represent a "very, very good outcome" and not one that he expected.

- [48] Overall, I found Dr. Janke's assessment of the plaintiff to be informed, logical, explanatory of her enduring pain, and compelling.

Dr. Todd Bentley

- [49] Dr. Bentley is an expert physiatrist who assessed the plaintiff on April 2, 2020. His report dated April 7, 2020 was filed at trial, and he testified at trial as well.
- [50] Dr. Bentley has significant experience in assessing and treating individuals with musculoskeletal injuries and chronic pain, as well as the psychological component of pain.
- [51] Dr. Bentley found that the plaintiff had a heightened amount of subjective pain due to having chronic pain for a long period of time. He described her body as experiencing "sensitization," which is the "up-regulation of neurotransmitters."
- [52] During his examination, Dr. Bentley did not find any significant impairment or restriction in the plaintiff's range of motion. The plaintiff was able to sit in one position without expressed discomfort and transfer positions without functional difficulty.
- [53] Dr. Bentley thought that a psychological component was complicating the plaintiff's recovery and contributing to a poor prognosis for recovery. He deferred to psychiatrists to make a formal diagnosis. However, he thought a psychological diagnosis would explain her reported low energy levels, perception of disability, and high pain levels.
- [54] Dr. Bentley saw the plaintiff within a year of her last pregnancy. He opined that the plaintiff's pregnancies following the collision had caused her to become deconditioned and necessitated her ceasing certain treatment modalities. Deconditioning during the COVID-19 pandemic also complicated the plaintiff's picture.
- [55] In his view, the plaintiff had a persisting, partial disability in terms of functional restrictions in the areas of housekeeping, caregiving, and physical activity. Her limitations included challenges with deep bending and carrying heavy objects. While she was able to do lighter housework, such as washing dishes, she was unable to handle more vigorous tasks, such as scrubbing the floor.
- [56] Dr. Bentley thought the plaintiff's persisting pain could be better managed. However, her pain and disability, along with the guarded psychological prognosis of Dr. Janke, would prevent her from being competitively employable. He did not think the plaintiff was capable of tolerating more than sedentary to light work demands, and she would have to avoid static postures as well.

- [57] In terms of treatability, Dr. Bentley thought that even with the treatment he recommended, there was no expectation that the plaintiff would return to her pre-injury state or level of functioning. Further, some improvement in her pain would not directly correlate with a corresponding improvement in her function. He could not quantify her degree of potential improvement.

Simone Szarkiewicz

- [58] Ms. Szarkiewicz is a licensed occupational therapist with experience assessing clients with musculoskeletal injuries, chronic pain, and psychological injuries. Ms. Szarkiewicz is trained to look at limitations on function in the performance of day-to-day tasks and to make recommendations to increase function or prevent further deterioration.
- [59] Ms. Szarkiewicz conducted an in-home assessment of the plaintiff on January 22, 2019. At that time, the plaintiff lived in a much smaller home. Her expert report and addendum were filed at trial, and she testified at trial as well.
- [60] Ms. Szarkiewicz reviewed the plaintiff's medical records and provided costs of treatment in accordance with future care recommendations. She did not conduct functional capacity testing on the plaintiff.

Dr. Kevin Solomons

- [61] Dr. Solomons, a psychiatrist with 33 years of experience, was called by the defence. Dr. Solomons' practice in recent years has been heavily devoted to ICBC defence work. He interviewed the plaintiff on April 18, 2018 and authored a report dated May 25, 2018 and a rebuttal opinion dated February 11, 2019.
- [62] Dr. Solomons was of the opinion that the plaintiff did not develop any psychiatric difficulties, disorders or impairments as a result of the accident. The plaintiff strongly disputes this opinion.
- [63] Dr. Solomons also opined that the plaintiff did not meet the diagnostic criteria of adjustment disorder or somatic symptom disorder, as Dr. Janke suggested. However, Dr. Solomons did agree that the plaintiff had chronic pain and impaired functioning. He also agreed that pain is a somatic symptom and can elicit a stress reaction.
- [64] I have some difficulty with Dr. Solomons' opinions and his seemingly narrow focus. It appears to me that he may have discounted the importance of some indications of emotional issues or mood concerns in the plaintiff's clinical records. Because he conducted a records review after his clinical interview, Dr. Solomons did not have a chance to ask the plaintiff during his assessment to expand on psychologically-relevant symptoms reported to treating physicians.

- [65] Most importantly, Dr. Solomons' opinion is contrary to the tenor of evidence from trial that I accept. That wider evidence before me at trial establishes that the plaintiff's pain symptoms have had a significant negative impact upon her mood, daily routine, relations with others, stress levels, emotions, and enjoyment of life. In addition, I find Dr. Solomons' inability to label the plaintiff with a classified diagnosis less important than the existence of the symptoms themselves, a fact which I accept.
- [66] I therefore prefer Dr. Janke's evidence where it conflicts with that of Dr. Solomons. Overall, I am inclined to give Dr. Solomons's conclusions no weight in my assessment.

Dr. O.M. Sovio

- [67] Dr. Sovio is an orthopedic surgeon who has been in practice since 1986. He has extensive experience in orthopedic consultation and orthopedic surgery.
- [68] At the request of the defence, Dr. Sovio assessed the plaintiff on June 13, 2018. His report was tendered at trial, and he attended for cross-examination on his report.
- [69] Dr. Sovio diagnosed the plaintiff as suffering from mild soft-tissue type complaints that consisted of subjective discomfort in her neck, trapezia region and low back. He agreed the plaintiff met the medical definition of chronic pain. His report indicates that he had difficulty in quantifying the plaintiff's subjective symptomatology because he found that the plaintiff did not have any loss of range of motion or neurological abnormalities.
- [70] Dr. Sovio agreed that the plaintiff met a diagnosis of Whiplash Associated Disorder - I. He thought "one could argue" the plaintiff's injuries could be classified as grade 2 (indicating pain and restriction of motion), but that would be a "bit of stretch."
- [71] Dr. Sovio thought the plaintiff did not need to limit her recreational or work activities, and if she wished to return to the workforce "there would be no contraindication to that." He did agree that she was limited in her ability to do housekeeping and that it would be challenging for the plaintiff to return to work as a berry picker.
- [72] He recommended that the plaintiff undertake an exercise program to strengthen her neck muscles, a program of core strengthening, and a generalized exercise program. Dr. Sovio did not favour more passive forms of treatment.
- [73] I would hesitate to give Dr. Sovio's opinion any significant weight. I found that Dr. Sovio's opinions suffered from too narrow a focus on his inability to reproduce physical markers of the plaintiff's injuries when her decline in function due to pain-related symptoms clearly has a psychological component to it, and evidence from real-world observations of others confirms that she remains limited. I find that Dr. Sovio's opinion did not sufficiently account for complicating psychological factors, which I accept are present in this case.

[74] In terms of his methodology, Dr. Sovio did not probe the plaintiff for information about the impact of her chronic pain upon her functioning at home, the impact of her injuries upon her childcare responsibilities, and her ability to return to work. While this may perhaps not be necessary from a medical point of view, these are relevant considerations at trial. I found the body of factual evidence relied upon by Dr. Sovio to be out of step with the broader array of information presented at trial that demonstrates a more significant impact of the plaintiff's injuries upon her lifestyle and physical functioning. Further, I found his one-time physical assessment of the plaintiff to be less helpful than opinions from others such as Dr. Sheik, who saw the plaintiff on multiple occasions, and Dr. Bentley, who offered a more fulsome explanation of the connection between the physical and psychological components of the plaintiff's chronic pain.

Summary of the Expert Evidence

- [75] In general, I accept the evidence that the plaintiff suffered soft-tissue injuries to her neck, shoulders, and back in her accident. She also experiences headaches, sometimes with dizziness. The plaintiff's sleep is disturbed by her pain and headaches. These problems have not resolved, and they are now chronic.
- [76] I accept the diagnoses of somatic symptom disorder, mood disorder, and depression as a result of the accident. I also accept that the plaintiff's pain has disrupted her mood, relationships, her ability to function with her family and her earning capacity. I further accept that there is a psychological component to the plaintiff's ongoing accident-related pain that reinforces the chronicity of her symptoms. As well, I find that the plaintiff had a pre-existing vulnerability to the prolonged pain responses of somatic symptom disorder due to her past traumatic experiences informing her psychological makeup.
- [77] The outlook for the plaintiff's recovery is guarded, though I accept that there are treatment options such as improved conditioning of her core and cognitive behavioural therapy that have yet to be fully explored. However, I accept Dr. Bentley's opinion that, even with treatment, there is no expectation the plaintiff will soon return to her pre-injury state or level of functioning.

Non-Pecuniary Damages

- [78] The plaintiff is entitled to damages for non-pecuniary loss to compensate her for pain, suffering, loss of enjoyment of life, and loss of amenities.
- [79] In assessing the quantum of the plaintiff's loss, I have considered the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

- [80] I find here that the plaintiff has sustained physical and psychological injuries that have significantly impacted the quality of her life. Indeed, the defendant did not dispute that the plaintiff's symptoms have affected her physically and emotionally. Physically, the plaintiff continues to experience chronic pain in her neck, shoulder, and back as she has over the last six years. She also continues to suffer from headaches and disturbed sleep as a result of her accident.
- [81] However, as the defendant points out, the plaintiff is not completely disabled. She remains able to complete some physical and social activities, albeit to a diminished degree than she had prior to the accident.
- [82] Much of the medical evidence suggests a psychological component to the plaintiff's subjective physical pain and limitations. Psychologically, I have accepted the diagnoses of somatic symptom disorder, mood disorder, and depression.
- [83] I accept that the plaintiff's injuries have impacted her quality of life, her ability to work and recreate, her family life, and the quality of her social interactions with others including her children. In addition, her resulting psychological injuries have had and will have a tangible effect on her quality and enjoyment of life. She has become more withdrawn, less social, and more anxious. The accident has also negatively affected her mood, pain levels, and energy.
- [84] The defendant concedes that the plaintiff has made reasonable efforts to follow medical treatment recommendations but submits that some of the constraints on her activities are due to domestic responsibilities and her being the mother of three young children.
- [85] The defendant does not argue that the plaintiff has failed to mitigate her damages but submits that the plaintiff has not yet followed certain treatment suggestions for her to better heal her psychological and emotional injuries. In other words, the defendant argues that the plaintiff has room for further improvement. I agree with this submission but to a lesser extent than that urged upon me.
- [86] The plaintiff seeks an award of \$175,000 for non-pecuniary damages. In support of her suggested figure, the plaintiff relies on the following decisions:
- *Flomo v. Hanna*, 2019 BCSC 2024 (\$175,000);
 - *Sebaa v. Ricci*, 2015 BCSC 1492 (\$180,000);
 - *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000); and
 - *Myers v. Gallo*, 2017 BCSC 2291 (\$175,000).
- [87] The defendant submits that a fair award for non-pecuniary damages is in the range of \$53,000 to \$66,000. In support of this range, the defendant relies on the following decisions:
- *Thorson v. Vandop*, 2016 BCSC 221 (\$50,000);

- Mezo v. Malcolm, 2013 BCSC 1793 (\$60,000);
- Suthakar v. Humble, 2016 BCSC 155 (\$70,000); and
- Hale v. Keyes, 2020 BCSC 559 (\$75,000).

[88] I have reviewed the cases relied upon by the parties. Invariably, the details and circumstances of these cases vary in different aspects. Compared to the case at bar, the cases relied upon by the plaintiff all involved relatively serious physical injuries, extending beyond soft-tissue injuries in the neck, shoulders, and back. On the other hand, the plaintiffs in the defendant's cases typically did not suffer from diagnosed psychological injuries as a result of their accidents, which I have found to be a significant component of the plaintiff's injuries here.

[89] As noted, the plaintiff did experience significant emotional disturbance and occasional violence at an early age at the hands of some of her family members. There is some support in the medical evidence that these early experiences may have left her with pre-existing vulnerability to developing prolonged pain in response to more recent trauma. In other words, the thin skull doctrine may apply in that the plaintiff may have had a latent susceptibility to the effects of further trauma.

[90] However, I cannot find that this is a case where the crumbling skull doctrine applies, in the form of the accident-related trauma aggravating already existing pre-existing conditions: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at 473; *Zacharias v. Leys*, 2005 BCCA 560 at para. 13. Hence, I would not reduce damages on the basis that the pre-existing condition was already manifest and disabling or one that would have become so without the defendant's tortious conduct.

[91] Having regard to the plaintiff's injuries and the principles in *Stapley*, I view a fair and reasonable award for non-pecuniary damages in this case to be \$150,000.

Loss of Earning Capacity

Legal Principles

[92] In *Grewal v. Naumann*, 2017 BCCA 158, Mr. Justice Goepel, writing in dissent (with the majority agreeing with his analysis), summarized the proper analysis of past and future diminished earning capacity at paras. 44-50:

[44] With respect, I cannot agree. 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] 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] 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), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 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. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [Emphasis added.]
- [93] In *Hoy v. Williams*, 2014 BCSC 234 at paras. 156-60, Mr. Justice Kent described the two approaches to assessing loss of earning capacity as follows:
- [156] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos [v. Insurance Corp. of British Columbia]* (1995), 100 B.C.L.R. (2d) 260 (C.A.), and the "capital asset approach" in *Brown [v. Golaiy]* (1985), 26 B.C.L.R. (3d) 353 (S.C.). Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Where the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren* at para. 12.
- [157] The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [158] The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) whether the plaintiff is less marketable or attractive as a potential employee; iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985),

26 B.C.L.R. (3d) 353 (S.C.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53 & 56.

[159] Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[160] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, *supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, *supra*, at 79.

[94] In *Perren v. Larlari*, 2010 BCCA 140 at para. 12, Garson J.A. noted the capital asset approach may be more appropriate for a young plaintiff whose career path is uncertain. Additionally, in *Knapp v. O'Neill*, 2017 YKCA 10 at paras. 17-21, the Yukon Court of Appeal discussed the two approaches to assessing loss of earning capacity:

[17] Both the capital asset and earnings approaches are valid methods of assessing the loss of earning capacity. However, in my view, even where a judge determines the capital asset approach is indicated on the record, the court should ground itself as much as possible in factual and mathematical anchors. Adopting the capital asset approach does not justify an undisciplined approach.

[18] It can be helpful under either approach for the judge to consider the quantum of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case. . . .

[19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre-accident employment history, training, and capabilities. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors.

...

[21] In my view, it is generally preferable to first assess past income loss, then move on to assess loss of future earning capacity. Although assessing either [sic] involves hypotheticals, proceeding in this manner involves moving from something generally better known and understood (i.e., historical income loss) to something generally less well known and understood (i.e., loss of future earning capacity).

[Citations omitted; emphasis added.]

[95] Finally, I repeat and adopt the summary of the legal principles applicable to the assessment of lost earning capacity set out by Justice Voith (as he then was) in *Pololos* at para. 133:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.

- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para. 11.

Past Wage Loss

- [96] The plaintiff claims a net figure of \$60,000 for past wage loss. In support of her claim for past wage loss, the plaintiff submits that wage loss is an estimate based on reason and evidence to restore the plaintiff to where she would have been but for the accident: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141.
- [97] The plaintiff's submission for past wage loss is that, absent the collision, she would have earned income by working various hours in different positions of employment, notwithstanding her pregnancies, for the period of June 5, 2014 to the date of the trial. The plaintiff points out that:
- a) physically, the plaintiff was fit, strong, and available for work;
 - b) the plaintiff wanted to work outside the home;
 - c) after the birth of her first child, the plaintiff returned to berry picking in 2013;
 - d) there is no evidence of complications in the plaintiff's pregnancies that would have impaired her income-earning capacity;
 - e) the plaintiff had opportunities to pursue paid work; and
 - f) Mr. Palani testified that the family's financial situation was such that it was desirable to have two incomes, and he would have supported the plaintiff's return to work.
- [98] Prior to the collision, the plaintiff worked historically during and after high school. She worked more recently as a seasonal berry picker at Purewal Blueberry Farms. That work involved working up to seven days a week, on 12-hour shifts, from June to September each year. The plaintiff would also work for the same company in the December to January period packing and unpacking oranges.
- [99] The defendant submits that the plaintiff has not established a past loss of income attributable to the accident on the requisite "real and substantial possibility" standard. In support of this position, the defendant notes that the plaintiff was not working at the time of the accident in June 2014 and had been off work since December 2013 when her seasonal fruit picking job came to an end. He says it is unclear whether the plaintiff was actively pursuing a return to seasonal employment around the time of her accident.

- [100] Respecting the plaintiff's unsuccessful attempts to work for Mr. Ahmed in December 2017 and February 2020, the defendant submits that it has not been established that the plaintiff had a reasonable plan to accommodate childcare in order to pursue employment. Overall, given the plaintiff's work history, the defendant submits that the plaintiff has fallen short of establishing a real and substantial possibility that she has sustained income loss due to her accident.
- [101] The defendant submits that if the Court finds a loss under this head of damages, then the plaintiff at most would have worked seasonally as a berry picker before becoming pregnant with her second child in early 2016. The defendant submits that if the Court finds a past wage loss award is warranted, an award in the range of \$8,128.57 to \$16,257.14 is appropriate (less 1.9% to yield a net income figure).
- [102] In assessing what the plaintiff likely would have earned if she had not sustained her injuries, I turn to what is reliably known about the circumstances of the plaintiff at the time of her accident.
- [103] Although the plaintiff more recently had stretches where she did not work, and often engaged in seasonal work when she did, she had a history of working regularly from a young age.
- [104] In 2011, the plaintiff earned \$11,408.40 from Purewal Blueberry Farms.
- [105] In 2013, the year following the birth of her first child, the plaintiff earned \$8,286 from Purewal Blueberry Farms.
- [106] In 2017, Mr. Ahmed offered Ms. Palani an opportunity to work at his sewing and tailoring shop. She was offered 35 hours per week at \$13.75 per hour.
- [107] Later, in 2020, she was offered employment at Mr. Ahmed's flower shop. Both were promising employment opportunities for the plaintiff. However, because of her injuries, she was not successful in maintaining either employment opportunity.
- [108] I find that in the plaintiff's case, she has demonstrated a real and substantial possibility of employment loss due to her accident-related injuries. However, as the plaintiff acknowledges, there also would have been periods where she would not have worked due to a variety of circumstances, including maternity leave, later stages of pregnancy, or other family-related circumstances.
- [109] Taking the entire picture into account, I find a fair and reasonable award for past wage loss, taking into account positive and negative contingencies, is a net award of \$36,000. This figure approximates a net income of \$6,000 per year since the accident.

Future Loss of Earning Capacity

a) The Positions of the Parties

[110] The parties are far apart on this issue.

[111] The plaintiff argues for an award of \$700,000 for future loss earning capacity based upon a range of \$678,634 to \$835,257. In support of her suggested range, the plaintiff points to certain general factors:

- her demonstrated history of working from a young age;
- her tolerance of sitting and standing for long periods berry picking;
- her fitness and strength prior to the accident;
- her desire to work outside the home;
- the role model of a working woman the plaintiff's mother had set for her;
- the plaintiff's unsuccessful attempts to return to work;
- her family support;
- her passion to be a nurse; and
- the family's desire for two incomes.

[112] The plaintiff's claim for loss of earning capacity does not turn on whether there was a real and substantial possibility the plaintiff would have pursued her LPN certification.

[113] The defendant disputes that there is a real and substantial possibility that the plaintiff will suffer a significant future loss of earning capacity as a result of the accident. The defendant submits that in all likelihood, the plaintiff was destined for minimum-wage work even absent the accident, consistent with her education level and past work experience.

[114] The defendant submits that there is no likelihood the plaintiff would have been employed as a practical nurse absent the accident. He points to her poor academic performance in college. She left the program for financial reasons and admits that she now understands the program to be even more demanding than when she was enrolled. The defendant submits that the mere fact that she could have continued to pay to repeat classes she performed poorly is an insufficient response.

[115] The defendant further submits that the extent to which the plaintiff could have put her limited education to alternative use as a care aide, while uncertain, is minimal and falls below the evidentiary threshold for hypothetical events. The defendant disputes that the plaintiff had a plan for a working career that passes the real and substantial possibility test.

[116] The defendant submits, in the alternative, if the Court is inclined to make a finding of lost earning capacity, that an award of between \$16,572 and \$33,144 based on the capital asset approach is appropriate. The defendant further submits that average negative contingencies ought to apply to any future earnings award and that a retirement age of 65 ought to be used for calculation purposes.

b) Finding as to Future Loss of Earning Capacity

- [117] In examining the real and substantial possibilities for the plaintiff's earning capacity, I return to what is reliably known about the plaintiff. The plaintiff has several personality characteristics and behaviours that affirm the idea that she has the willingness, interest, and intent to work outside the home over the long-term after her children are of school age.
- [118] The plaintiff defied the more traditional Kurdish cultural norms that her extended family attempted to impose upon her. The plaintiff also demonstrated high levels of resilience and perseverance. Her farming work demonstrates an ability to work long hours in difficult conditions at a proficient pace. She clearly wanted to work outside the home, at least some of the time, and to demonstrate independence and be a role model for her daughters in this regard. She may have pursued a career as an LPN, but given her past grades, an alternative career in health care was a more likely possibility.
- [119] The family's move into a larger and more expensive home likely would have provided additional incentive to do so had she been up to it. She has some family support with childcare that would make a transition to working outside the home a viable option when the children are at an appropriate age. I accept that she aspires to contribute financially to the family and has long wished to start a career for herself within the limits of her family responsibilities and her ability to upgrade her education.
- [120] The plaintiff was employed more or less continuously until the birth of her children. I find that she is dedicated to her young children, but she also has some support to obtain childcare. This family support could assist in accommodating her employment, though I would not find that such support is a pre-requisite for her ability to return to work outside the home.
- [121] Overall, I find that the plaintiff has been rendered less capable of earning income as a result of the accident. Specifically, I find that the plaintiff has demonstrated both an impairment to her earning capacity as a result of her accident and a "real and substantial" possibility that the impairment will result in pecuniary loss.

c) Analysis of Future Loss of Earning Capacity

- [122] The Court had the benefit of economic loss evidence from Mr. Peter Sheldon and Mr. Thomas Steigervald at trial. The plaintiff has provided various economic projections indicative of her future loss of earning capacity based upon the projections and assumptions outlined by the two economists.
- [123] For instance, in one scenario, the plaintiff outlines loss of income if she were to return to school in 2024 to complete an LPN program. All her children would be of school age at that time. Using a workforce re-entry date of 2025 or 2026, that scenario would result in the present value of lost earnings of between \$746,125 and \$835,437.

- [124] In another scenario, using the average earnings of a female high school graduate, average contingencies, and a return to work on January 1, 2025, the present value of lost earnings would be in the range of \$678,634 to \$684,500, assuming a retirement age of 70.
- [125] The plaintiff's figures are based upon the assumption of her being permanently unemployable and never returning to employment after the accident with her ongoing injuries. This is an overly pessimistic view of the plaintiff, and I would instead make some allowance for some residual capacity and a partial return to work in the future.
- [126] As well, while I accept that the plaintiff will have a much-shortened working career as a result of her accident-related injuries and that there is a real and substantial possibility of her retiring early as a result, I have no evidence that the plaintiff wished to keep working until the age of 70. Accordingly, I would also adopt an assumption of retirement at 65 years of age, as suggested by the defendant, rather than the 70-year retirement age suggested by the plaintiff.
- [127] The plaintiff's relatively young age and her lack of a clear path forward in her working life introduce some uncertainty into the projections of her loss of future earnings. Here, while I am assisted by the economic projections, I would also rely on a capital asset approach in assessing damages because the evidence does not allow for easy measurement of the plaintiff's career path or future employment earnings.
- [128] Given everything that is known about the plaintiff, I am satisfied that but for her injuries, the plaintiff would have returned to work after her children were all in school and that her injuries have substantially impaired her earning capacity. I find the chronicity and the added psychological component to the plaintiff's injuries are likely to have a significant impact on the plaintiff's earning capacity over the remainder of her potential working career, even with the possibility of better management of her symptoms and proper treatment.
- [129] I accept that the plaintiff has been rendered less capable overall from earning income from all types of employment, she is less marketable and attractive to potential employers, she has lost a significant portion of her ability to take advantage of job opportunities, and she has been rendered less valuable as a person capable of earning income in a competitive labour market.
- [130] I must also account for the potential negative contingencies suggested by the defendant, including the potential of part-time or reduced hours of work, short term work, job loss, and withdrawal from the workforce. I take those considerations into account, as well as potential positive contingencies.
- [131] My task is to assess the plaintiff's damages, not to calculate them with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.) at para. 43.

[132] If Mr. Sheldon's projection for a female high school graduate is modified to assume a retirement age of 65 and a workforce re-entry in 2025 when the plaintiff's children are of school age, the present value of lost earnings would be \$638,840. I view this figure as being based upon reasonable assumptions, though the lost income figures may be somewhat understated given that her stated desire to upgrade her education would likely lead to higher income-earning potential. Using these relatively conservative assumptions, if the plaintiff retained approximately half of her earning capacity, the present value of her lost earnings would be approximately \$320,000 based upon average contingencies.

[133] This figure matches what I would project on a capital asset approach having regard to the nature and extent of the plaintiff's injuries, her relatively young age, her level of education, and her work history.

[134] Having regard to the authorities cited above, I find that a fair and reasonable award for future loss of earning capacity for this plaintiff to be \$320,000.

Cost of Future Care

[135] The plaintiff seeks a large award for the cost of future care, but the defendant is strongly opposed. This aspect of the plaintiff's claim is based upon the following:

- \$36,716.00 for physiotherapy, kinesiology/active rehabilitation, occupational therapy, and psychological intervention for the plaintiff and couples counselling;
- \$26,702.00 for medications and supplements;
- \$261,629.26 for regular household cleaning;
- \$50,313.38 for seasonal household cleaning;
- \$25,565.60 for future childcare;
- \$2,614.00 for a gym membership; and
- \$4,455.00 for a functional capacity evaluation.

[136] The plaintiff's total cost of future care claim is \$407,995. A significant component of the claim is for regular and seasonal house cleaning. These items are based upon the recommendations of Ms. Szarkiewicz for household cleaning and take into account the larger size of the plaintiff's current home. The plaintiff says she has included these items under the cost of future care because they were recommended in Ms. Szarkiewicz's cost of future care report. However, I prefer to deal with these items as a separate head of damages, so I would leave them aside for the moment.

[137] The defendant suggests the following allowances should be made for future care:

- physiotherapy for one year following trial (\$1,773.00 to \$1,802.00);
- kinesiology and active rehabilitation (\$1,897.00 to \$3,767.00);

- oral medications (\$9,563.98);
- Diclofenac topical cream over three years (\$446.39);
- childcare for three hours per week over three years in order to undertake various therapies (\$4,190.40);
- a gym membership for three to five years (\$1,600.32 to \$2,614.00); and
- a TENS machine (\$1,646.00).

[138] The defendant additionally suggests, if psychological intervention is appropriate, 12 to 20 sessions of cognitive behavioural therapy (\$2,851.00 to \$3,762.00) and pharmaceutical intervention (\$1,239.98). Altogether, the amounts suggested by the defendant total a future care award of between \$21,000 and \$27,000.

[139] Mr. Justice Voith (as he then was) conveniently summarized the principles applicable to an award for future care costs in *Brewster v. Li*, 2013 BCSC 774 at paras. 157-60:

[157] The test for determining the appropriate award for the costs of future care is an objective one based on medical evidence. For an award of future care: 1) there must be a medical justification for claims for costs of future care; and 2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, [2002] 1 S.C.R. 205, while addressing the assessment of costs of future care, Chief Justice McLachlin confirmed that courts rely on "evidence as to what care is likely to be in the injured person's best interest", and that the measure of such care is "objective, based on the evidence". That same test was recently reaffirmed in *Shapiro v. Dailey*, 2012 BCCA 128 at para. 51, 31 B.C.L.R. (5th) 78.

[158] The following additional legal principles govern an award for future care costs:

- a) Awards for costs of future care must be reasonable, both in the sense of being medically required and in the sense of being costs that, on the evidence, the plaintiff will be likely to incur; see *Loeppky v. Insurance Corporation of British Columbia*, 2012 BCSC 7 at para. 109.
- b) The weight to be given to an opinion on future care will depend on the extent to which recommendations for items like psychological counselling and physiotherapy are supported by the evidence of experts within the relevant field of expertise: see, for example, *Frers v. De Moulin*, 2002 BCSC 408 at para. 191, 1 B.C.L.R. (4th) 131; and *O'Connell v. Yung*, 2010 BCSC 1764 at para. 98, costs of future care award varied on appeal 2012 BCCA 57; the trial judge erred in concluding that "future care costs are payable whether or not they may be incurred in the future" (para. 68).
- c) An award of future care costs should be reasonable and the award must be moderate and fair to both parties; see *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241 - 242.

- d) Common sense should inform claims for the costs of future care, however much they may be recommended by experts in the field; see *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, 17 B.C.L.R. (5th) 244.
- e) In considering any particular item of future care, the test is whether a reasonable person of ample means would incur the expense; see *Brennan v. Singh*, 1999 CanLII 6932 at para. 78, [1999] B.C.J. No. 520 (S.C.).
- [159] There are numerous decisions of this court where, absent objective evidence of what future care items might cost, the court has declined to make any award, see *McGough v. Keuhn*, [1998] B.C.J. No. 1361 at para. 42 (S.C.); *Cumpstone v. Johnson*, 2012 BCSC 386 at para. 109, 7 C.C.L.I. (5th) 292; and *Chan v. Kao*, 2009 BCSC 626 at para. 85.
- [160] Notwithstanding the foregoing authorities, there are also some cases where, on being satisfied that some item was necessary for the future care of the plaintiff, the court was willing to "ball park" that figure or "do the best it can" see, e.g. *Chaban v. Chaban*, 2009 BCSC 87 at paras. 65-73; and, *Loewen v. Bernardi* (1994), 45 B.C.A.C. 190, 93 B.C.L.R. (2d) 242 at paras. 24-27.
- [140] The court must be satisfied only that the future care is medically justified as opposed to medically necessary. It is not necessary to have a medical opinion respecting each item claimed, but there should be some evidence that the expense claimed is directly related to the disability arising out of the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.
- [141] The standard of proof to establish a claim for the cost of future care is the same as for any future pecuniary loss: simple probability. The plaintiff must establish a real and substantial risk of pecuniary loss. It is not necessary for the plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur: *Athey* at para. 27.
- [142] On this head of damages, I view the plaintiff's claims as excessive, and the defendant's submissions on some of the items claimed as insufficient.
- [143] I would allow more reasonable amounts for physiotherapy and a kinesiology or active rehabilitation program for five to seven years. I also agree that a reasonable allowance for psychological intervention, occupational therapy, and couples counselling is appropriate. I would make allowances for medications and supplements, childcare to attend appointments, a gym membership, and a TENS machine. Finally, I agree that an award for a functional capacity evaluation is appropriate based upon the plaintiff having some residual earning capacity.
- [144] Allowing for positive and negative contingencies, and keeping in mind that this is an assessment and not a mathematical calculation, in my view a fair, just, and reasonable award under this head of damages, leaving aside the question of lost housekeeping capacity, is \$50,000.

Loss of Housekeeping and Childcare Capacity

- [145] Housekeeping and other domestic services have economic value, and the plaintiff needs to be compensated even where those services are replaced gratuitously by family members: *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.). I have the discretion to award damages for loss of homemaking capacity either as part of the non-pecuniary loss or as a separate pecuniary head of damages: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Kim v. Lin*, 2018 BCCA 77 at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100. I find it appropriate in this case to deal with this claim by way of a separate head of damages.
- [146] The plaintiff seeks an award of \$59,000 for past loss of housekeeping capacity and \$33,000 for past loss of childcare capacity.
- [147] In addition, the plaintiff seeks substantial awards for loss of future domestic capacities. In her cost of future care claim, these claims were framed as \$261,629.26 for loss of regular household cleaning, \$50,313.38 for seasonal household cleaning, and \$25,565.60 for childcare to attend treatments. Under a separate head of damages, the plaintiff claimed \$50,000 for future loss of housekeeping capacity and \$50,000 for future loss of childcare capacity. In my view, these claims overlap somewhat.
- [148] The defendant submits that no award is appropriate for loss of homemaking capacity; or in the alternative, a limited award. He points out that in *Liu v. Bains*, 2016 BCCA 374 at para. 33, the court endorsed the proposition that \$35,000 is at "the high end of the usual range" for loss of housekeeping capacity. Here, the defendant submits the award should be no more than half that amount, especially given the prospect of improved functioning through active exercise and perhaps therapy.
- [149] While the plaintiff did not frame her claim in terms of an in-trust claim for loss of housekeeping and childcare, the defendant would have allowed in the alternative a claim in the range of \$10,000 to \$15,000 in respect of the services provided by the plaintiff's niece and mother.
- [150] The evidence established the plaintiff has primary responsibility for housekeeping and childcare in relation to the three children. While the plaintiff's husband was well-intentioned, he often worked night shifts. In addition, cultural factors reinforce the notion that these responsibilities will continue to fall primarily upon the plaintiff's shoulders. Since the accident, the plaintiff's mother and her niece necessarily provided assistance with grocery shopping, childcare, cooking, and day-to-day cleaning. The amount of support increased after the plaintiff's move to a larger home and the addition of more children to the family.

[151] The opinions of Dr. Bentley and Dr. Janke, which I accept, support the plaintiff having a persisting partial disability well into the future and this disability impacting her ability to engage in housekeeping and childcare responsibilities over the long term. Overall, I have no doubt that the plaintiff's injuries will likely impair these aspects of her work inside the home. Nevertheless, in terms of the future claim, I find that the plaintiff will retain some residual capacity in these areas to do light domestic chores.

[152] The plaintiff's future estimates were based upon more comprehensive estimates of the loss of housekeeping and childcare capacity. As noted, I view these assumptions yield claims that are too high on the evidence.

[153] In all of the circumstances, I would award the plaintiff \$60,000 under this heading inclusive of past (\$15,000) and the present value of future (\$45,000) loss of housekeeping and childcare capacity.

Special Damages

[154] The parties agree on a figure for special damages of \$2,578.80.

Deductions

[155] The defendant pleads and relies on s. 83 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, concerning possible deductions to be made to any award of damages.

[156] If the parties cannot agree, I would grant leave to the parties to make additional submissions on the issue of deductions.

Conclusion

[157] In summary, I would make the following orders in accordance with the reasons above:

Non-pecuniary damages:

\$150,000.00

Past wage loss:

\$36,000.00

Future loss of earning capacity:

\$320,000.00

Cost of future care:

\$50,000.00

Loss of housekeeping and childcare capacity:

\$60,000.00

Special damages:

\$2,578.80

Total:

\$618,578.80

[158] Subject to submissions to the contrary, the plaintiff is entitled to costs.

"Brundrett J."

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Prepared on 27 October 2026 · Esheria