
CANADA / JUDGMENT

Pasemko v. Kosolofski

2020 BCSC 246

COURT

Supreme Court of British Columbia

DECIDED

25 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 246 Pasemko v. Kosolofski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pasemko v. Kosolofski,

2020 BCSC 246

Date: 20200225

Docket: M54508

Registry: Vernon

Between:

Carol Pasemko

Plaintiff

And:

Megan Kosolofski, Katelyn Berube, Remi Berube

and Raymond Pasemko

Defendants

Before: The Honourable Mr. Justice G. C. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

R.D. Irving

D. Draht

Counsel for the Defendants:

R. LaGroix

Place and Dates of Trial:

Kelowna, B.C.

February 3-7, 2020

Place and Date of Judgment:

Vernon, B.C.

February 25, 2020

Table of Contents

Introduction.. 3

Evidence at Trial Tendered by the Plaintiff. 3

The Plaintiff 3

Raymond Pasemko. 10

Rachel Almaas ("Rachel") 12

Dr. Steven Helper 12

Nadia Hudon. 14

Curtis Peever 15

Evidence at Trial Tendered by the Defendants. 16

Sheila Branscombe. 16

Thomas Steigervald. 16

Credibility and Reliability. 17

Causation.. 17

Assessment of Damages. 19

Non-pecuniary Damages. 19

Past Loss of Earning Capacity. 23

Future Loss of Earning Capacity. 25

Future Care Costs. 28

Loss of Housekeeping Capacity. 31

Special Damages. 33

Mitigation.. 33

Conclusion.. 35

INTRODUCTION

- [1] The plaintiff claims damages for chronic pain injuries arising out of two motor vehicle accidents (collectively the "Accidents"). Liability has been admitted in respect of each accident. Counsel for the defendants has confirmed that an apportionment of damages amongst the various defendants is not required.
- [2] The first of the two collisions (MVA #1) occurred on November 11, 2015 when the vehicle the plaintiff was driving was rear-ended at low velocity while stopped at an intersection by a vehicle driven by the defendant, Megan Kosolofski. The resulting damage to the plaintiff's vehicle was minimal.
- [3] The second collision (MVA #2) occurred on December 28, 2016 when a vehicle being driven by the plaintiff's husband, Raymond Pasemko ("Raymond"), in which she was a passenger was struck in a shopping mall parking lot, again at low velocity and with minimal resulting damage to the plaintiff's vehicle.
- [4] The plaintiff's action against Raymond has been discontinued.

EVIDENCE AT TRIAL TENDERED BY THE PLAINTIFF

The Plaintiff

- [5] The plaintiff is 56 years old. She was 52 at the time of MVA #1 and 53 at the time of MVA #2.
- [6] The plaintiff has resided in and around Enderby, British Columbia, since she was 10 years old. In October 1981 she married Raymond. They have been married for over 38 years. They have two children, a son Cameron born in 1983 and a daughter Rachel born in 1987. The plaintiff and Raymond have five grandchildren.
- [7] Over the years, Raymond has owned and operated a small sawmill and wood flooring business as well as gravel trucks. The plaintiff worked with him doing physically demanding jobs in his businesses and obtained numerous industry-related certifications, certificates and licences, including for the operation dump trucks, articulated rock trucks and school buses.
- [8] In approximately 2001, the plaintiff and Raymond purchased approximately 65 acres of bare land along Old Salmon Arm Road, Enderby. The land was selectively logged and, eventually, they built their permanent home on it where they raised their children. They created approximately 2 ½ acres of lawns, vegetable gardens, berry gardens, flower gardens, shrubs and flowers. The plaintiff spent hours each day tending these gardens. She planted hundreds of flower bulbs each fall and flats of bedding plants each spring. She testified that she loved

her gardening and it was her "whole life". It became her passion.

- [9] In addition to working in her gardens the plaintiff enjoyed biking (on occasion), daily walking, light running and attending the gym. She described herself immediately prior to MVA #1 as having been in good health and fitness. She testified that, although she had had four previous surgeries, one in 1984 to remove her gall bladder, one in 1992 to remove a growth on her knee, a hysterectomy in 2002, and surgery on her back in 2002 for a L5 compressed disc, she had no significant ongoing issues or limitations with any of them.
- [10] In June 2007, the plaintiff began working for School District #83 on the "spare list" as a bus driver. On October 29, 2008, she was placed on the School District's regular union seniority list (seniority back-dated to May 11, 2008). From 2012 to 2014, the plaintiff worked as both a custodian and bus driver with the School District. She also worked additional hours on snow shovelling shifts during the winter months. Her seniority within the union built up.
- [11] On February 19, 2014, the plaintiff began working as a custodian at a school called "Al Fortune", 31 hours per week.
- [12] On January 30, 2015, the plaintiff began work in a temporary bus driver posting for 33.75 hours per week. Her position as a custodian at Al Fortune was posted as temporary until she returned.
- [13] On June 26, 2015, the plaintiff was "bumped" from her custodian position at Al Fortune by a union member with higher seniority. On July 10, 2015, the plaintiff in turn "bumped" to a custodian position at MV Beattie Elementary School working 20 hours per week. On September 8, 2015, the plaintiff also began working as a bus driver on "Route #30" for 20 hours per week, thus being paid for a total of 40 hours per week.
- [14] The plaintiff testified that her union pension plan is based upon a percentage of the number of hours worked over her career. Her plan was to work as many hours as were available to her in order to build up her pension entitlement. Typically, she successfully bid full-time, lucrative custodial work during the summer months. This work was physically demanding as it entailed cleaning and sanitizing the school and its furniture and equipment "top to bottom". She typically worked and was paid for approximately 400 hours during the summer months.
- [15] The plaintiff testified that she enjoyed her work as a bus driver and custodian, and planned to continue "for as long as possible".
- [16] On October 15, 2015, the plaintiff withdrew from her custodian position at MV Beattie Elementary School and returned to the custodial call-out list. She did so because she was earning approximately \$5 per hour more as a bus driver and, due to her seniority, she was confident the 20 hours lost working as a custodian would be made up through call outs as a bus driver.

- [17] MVA #1 occurred less than one month later. The plaintiff testified that she was stopped at a traffic light, reaching to turn down the volume on the car radio when she was rear-ended without warning. Within hours, pain developed in her neck and across and down her right shoulder and arm.
- [18] In the days, weeks and months that followed the plaintiff was able to drive her school bus but declined custodial work and snow shovelling jobs except on a few occasions when the school board was desperate for her help. On those occasions she limited her assistance to light work. She testified that there was ample opportunity for her to have worked an additional 40 hours every two weeks as a custodian and that she would have done so but for her neck and shoulder pain which increased as a result of custodial work.
- [19] The plaintiff's neck and shoulder pain persisted. She began physiotherapy in mid-December 2015 but by February, 2016 any relief she was deriving from those treatments had plateaued. She testified that she felt confident she would be able to do the recommended exercises at home without further assistance from the physiotherapist.
- [20] The plaintiff resumed physiotherapy treatments in June 2016. She declined full time summer custodial work in order to give her neck a chance to heal, although she did perform 151 hours of lighter custodial work during that summer. She also declined an opportunity to work for two weeks as a carpenter's assistant, which have paid her an additional \$320. On cross-examination she conceded having advised her physiotherapist on August 18, 2016 that her neck that day was "minimally sore" and that she had good range of motion.
- [21] On September 9, 2016, the plaintiff injured her low back lifting and moving a rug at while at work. It appears from the evidence that she reinjured her L5. She conceded that the injury was unrelated to MVA #1. She went on medical leave and was off work for the entire school year as a result of this injury.
- [22] The plaintiff testified that, by December 2016, her neck and shoulder were feeling much better. She attributed the improvement to the several months of relative inactivity due to being off work for her back injury.
- [23] MVA #2 occurred on December 28, 2016. She testified that MVA #2 did not exacerbate her low back pain symptoms but, during the collision she felt her neck "go from side to side" and that the progress she had made to that point recovering from her neck and shoulder pain was erased.
- [24] During the spring of 2017, the plaintiff saw a kinesiologist for her back pain and described her neck pain as low and her neck as "feeling good".
- [25] Through WorkSafeBC, it was determined that the plaintiff's low back pain left her with a permanent restriction such that she could no longer work as a school bus driver. From June 21, 2017 to July 15, 2017, the plaintiff participated in a graduated return to work program as a custodian. From July 16, 2017 to September 4, 2017, she was on the custodial spare list. On September 5, 2017, she returned to work as a custodian at Al Fortune School, working 37

hours per week. She testified that her neck pain flared up as a result of performing some custodial tasks, such as cleaning windows and desks.

- [26] The plaintiff has been fully compensated by WorkSafeBC for the differential in pay between her previous job as a bus driver and her current job as a custodian.
- [27] On May 30, 2018, the plaintiff's custodian work hours increased from 37 to 38 per week.
- [28] The plaintiff did not bid on any custodial work for the summer of 2018 due to her low back pain. She has been fully compensated by WorkSafeBC for that loss as well. She testified that her neck pain symptoms improved from resting during the summers.
- [29] On September 4, 2018, the plaintiff began working as a custodian at South Canoe Elementary School for 28 hours per week. She did so because she felt that she needed to reduce the strain on her neck and find ways to accommodate and manage her neck pain, and had determined that her neck pain symptoms would improve if she worked fewer hours.
- [30] On September 5, 2019, her hours at that school were increased to 30 hours per week. She testified that she is not able to perform her custodial tasks as quickly as she once did. On cross-examination she agreed that she continues to take on spare work, but testified that she cannot do it to the extent that she did prior to the Accidents. The plaintiff conceded on cross-examination that her neck pain symptoms have not improved with her reduced work hours at South Canoe Elementary. She also conceded that she has not missed any of her shifts there due to neck pain.
- [31] The plaintiff testified that most of her custodial tasks impact both her neck and low back pain symptoms. She agreed that she curtailed her snow shovelling tasks solely because of her low back pain.
- [32] On October 28, 2019, the plaintiff re-injured her low back and was off work for the entire month of November. During that time her neck pain symptoms improved. She has since returned to her full-time work.
- [33] The plaintiff testified that, as was the case prior to the Accidents, her plan is to continue to work as much as she can for as long as she can so as maximize her pension entitlement. She testified that, prior to the Accidents, she worked hard at her employment and liked what she did. As a result of the Accidents, and her unrelated low back injury, she is limited in the work and other activities she can perform and tries not to do too much for fear of aggravating her pain, which may cause her to miss work.
- [34] The plaintiff agreed on cross-examination that she considers herself to be competent at her job and has no plans to change employment. She is willing to try bidding a custodial position with more hours if such a position comes available and better suits her needs and circumstances.

- [35] The plaintiff described her current neck pain as 3 out of 10 but that it increases to 5 out of 10 by the end of the work week. She conceded on cross-examination that she may have advised her physiatrist, Dr. Helper, during his assessment of her in November 2017, that her "limits at work are mild", but was steadfast in her evidence that this is currently not the case.
- [36] The plaintiff testified that the biggest impact the Accidents and resulting low back pain have had on her life is her inability to work in her garden as she had proudly done prior to the Accidents. She has had to pace and disperse many of the heavier housekeeping tasks that she did with ease prior to the Accidents. In the summer of 2019, she and Raymond purchased a garden tractor for the sum of \$18,414. It has a lift and a trailer and it allows her to do much of the work that she would otherwise be unable to do.
- [37] The plaintiff agreed on cross-examination that she is not yet prepared to acknowledge she needs help with yard work or housekeeping and that she has not yet had to hire anyone to assist with these tasks. However she is not opposed to having occasional assistance with heavy, seasonal gardening and housekeeping tasks, such as yard cleanup, washing walls and cleaning under the stove and refrigerator. She would, however, consider this to be a sign of weakness on her part.
- [38] The plaintiff testified that she does not spend as much time with her grandchildren, or derive as much enjoyment with them, as she would like due to her pain symptoms. Her pain has led her to discourage family dinners with her children and grandchildren, as well.
- [39] The plaintiff testified that she does exercises at home and has started a walking program in an effort to build her upper body strength. In 2017 she participated in a "pool program" to help both her neck and her low back, at a cost of \$65.75 for 10 sessions. A 6 month and 12 month pool program currently costs \$450 and \$800, respectively. Once the plaintiff turns 60 years old, the cost reduces to \$320 and \$640, respectively. She is reluctant to attend a multidisciplinary pain program due to the cost and travel that would be involved but is open to it if her neck pain does not improve. She testified that she would not likely participate in kinesiology because she feels she has learned enough from previous treatments and internet research she has done on her own to be able to get the benefit through self-help. She is comfortable doing Pilates at home. She is open to ongoing physiotherapy for both her neck and low back pain.
- [40] The plaintiff testified that she continues to suffer significant anxiety when travelling in a vehicle. She is open to attending psychological counselling to help with this anxiety. On cross-examination she agreed that she had episodes of anxiety prior to the Accidents but was steadfast in her testimony that her anxiety is now significantly greater and she finds ways to avoid travelling in vehicles if possible.
- [41] The plaintiff experiences interrupted sleep which she attributes to her ongoing neck and low back pain. She uses a heating pad most nights for both her neck and her back. She is open to but unlikely to participate in occupational therapy sessions for her sleep issues.

[42] The plaintiff's hourly wage is set in accordance with the Collective Agreement between the School District and Local 523 of the Canadian Union of Public Employees and Affiliated with the Canadian Labour Congress. Her wages during the material times were:

July 1/14

July 1/15

July 1/16

May 1/17

July 1/17

May 1/18

July 1/18

May 1/19

Custodian

19.74

19.94

20.04

20.24

20.34

20.54

20.64

20.85

Bus Driver

24.54

24.79

24.91

-

-

-

-

-

[43] The plaintiff's income for the past nine years was:

2012

2013

2014

2015

2016

2017

2018

2019

\$31,738

\$30,414

\$33,701

\$40,903

\$35,244

\$25,362

\$32,721

\$20,158

Raymond Pasemko

[44] As already mentioned, Raymond is the plaintiff's husband. They have been married for over 38 years.

[45] Raymond owns and operates a rock quarry. He works 12 hour days.

[46] Raymond testified that, prior to the Accidents, he and the plaintiff had a normal married life. He described the plaintiff as having been physically active and fit. She did by far the majority of the domestic tasks and gardening at their home. He described the plaintiff as timid, generous, caring, energetic, honest and hardworking. She was a family oriented person who put the family first. She had no physical limitations and loved her work and her garden. Indeed, Raymond called it "her yard" quite obviously without knowing he had said it. He testified that the plaintiff essentially created all of the gardens and did all of the work associated with it. He described the gardens and lawns as "park-like".

[47] Raymond testified that the plaintiff was a good housekeeper.

- [48] Raymond testified that the Accidents had a noticeable impact on the plaintiff. Although in the days following MVA #1 the plaintiff was in discomfort, he was unable to describe any initial specific impact it had on her. However, over time, the plaintiff did less and less around the home and gardens and he noticed a progressive, gradual deterioration in the condition of both. The garden became unkempt and overgrown. The house became somewhat cluttered. The traditional Sunday family dinners tapered off because the plaintiff was not up to hosting them.
- [49] Raymond readily acknowledged that the plaintiff's low back injury in September 2016 left her very restricted and in a lot of pain.
- [50] Raymond described the plaintiff's current physical health as "okay" with the exception of her neck. He testified that she tends to avoid turning her head. He has seen a noticeable decrease in the plaintiff's energy and drive.
- [51] Raymond testified that, psychologically, the plaintiff has become short tempered, moody, less tolerant and impatient. She is easily frightened when in a vehicle.
- [52] Raymond testified that, overall, the plaintiff is "a different person" now as compared to what she was like prior to the Accidents. He conceded on cross-examination that he is prepared to assist the plaintiff with the more heavy work associated with gardening and housekeeping if asked.

Rachel Almaas ("Rachel")

- [53] Rachel is the plaintiff's daughter. She is 32-years old and married with two children aged 4 and 2.
- [54] She described the plaintiff pre-MVA #1 as happy, very active and in love with the outdoors. She corroborated the plaintiff's and Raymond's evidence that it was the plaintiff who, over the years preceding MVA #1, created a beautiful, park-like setting around their family home comprised of large gardens and lawns and that it was her mother's pride and joy.
- [55] Rachel testified that she knew the plaintiff was in pain after MVA #1 but did not notice any particular change in the way she lived day-to-day. However, MVA #2 seemed to "rattle" the plaintiff and, since then, she has become nervous, easily agitated, on edge and difficult to be with in a vehicle.
- [56] After the Accidents, Rachel described her mother as no longer moving fluidly. She frequently takes breaks from her activities and is not as able to perform day-to-day as she did before MVA #1. Her physical fitness has deteriorated. Her garden has become overgrown with weeds and the house is not as tidy.

- [57] Rachel testified that the biggest change she has observed in her mother is that she is much more tired and unhappy compared to her mood prior to the Accidents. She tends to spend much more time inside watching television whereas, before the Accidents, she was typically either working in the garden or baking in the kitchen.
- [58] Finally, Rachel testified that her children are too much for the plaintiff to handle on her own.

Dr. Steven Helper

- [59] Dr. Helper is a physiatrist who was qualified without objection as an expert in the field of physical medicine and rehabilitation, with a subspecialty in interventional spine pain management. He interviewed and conducted a physical examination of the plaintiff on November 3, 2017. He also reviewed various clinical records and other documents relating to the plaintiff's medical history. His expert report is dated November 7, 2017.
- [60] Although his examination of the plaintiff resulted in a collection of abnormalities that, when added up, led to an incomplete diagnosis, he testified that these "non-specific findings", together with the lack of historical evidence of any age-related degenerative changes in the plaintiff's neck, and his experience with patients like the plaintiff, led to his opinion that MVA #1 caused the plaintiff to suffer soft tissue injury to her neck with an additional underlying component of mechanical neck pain.
- [61] Dr. Helper clarified the comment in his report that "Ms. Pasemko states that her limits at work are mild" as a reference to what she was able to do at work relative to her pre-Accidents norm, not as a reference to her pain.
- [62] Overall Dr. Helper's prognosis was that the plaintiff will not achieve a full resolution of her neck pain complaints if she continues with her current work/lifestyle balance. His prognosis at the time he examined her was negatively influenced by the persistence of her neck pain without a trend towards resolution for more than two years after MVA #1. His prognosis was positively influenced by his observations of postural deficits that may respond to further rehabilitation. He stressed, however, that this is not a guaranteed outcome, and that improved posture and muscle imbalance can potentially lead to improved pain symptoms.
- [63] Dr. Helper recommended that the plaintiff commit to an appropriate course of rehabilitation with qualified guidance, such as a kinesiologist, in which case he would have expected a mild-to-moderate partial improvement in her neck, upper back and right shoulder symptoms over the course of six months of training. He also recommended that the plaintiff participate in beginner classes of Pilates or yoga with a respectable studio. He advised against self-training from DVDs or programs offered over the internet because they are not individualized and lack professional feedback regarding whether or not the user is performing the exercises properly. He testified that the treatment modality the plaintiff should employ depends upon what works best for her, and that the determination of the best treatment is typically a matter of "trial and error" based upon the encouragement and

advice of professionals to try available options.

- [64] On cross-examination, Dr. Helper agreed that, had the plaintiff followed the recommendations he set out in his report in November 2017, he would have expected her to have shown improvement in her pain symptoms by now. However, he noted that the plaintiff did not have a positive experience with her physiotherapy treatments after MVA #1 and that her reluctance to continue thereafter with such treatments was understandable given her tainted experience.
- [65] Dr. Helper also agreed on cross-examination that the efficacy of treatment modalities is likely reduced if they are not undertaken for five years after injury.

Nadia Hudon

- [66] Ms. Hudon is an occupational therapist. The defendants raised no issue as to her qualifications to provide opinion evidence in her field of expertise. Her expert report was introduced in evidence without Ms. Hudon being required to testify.
- [67] Ms. Hudon conducted a functional capacity evaluation of the plaintiff on March 19, 2019. Her expert report is dated September 13, 2019. It details the plaintiff's functional limitations.
- [68] Ms. Hudon opined that the plaintiff provided her best effort throughout the evaluation and that her subjective reports of pain and disability were reliable. Moreover, the plaintiff's subjective reports of functional capacity were consistent with Ms. Hudon's objective findings.
- [69] Ms. Hudon found that the plaintiff had limited tolerances for sustained or repetitive upper extremity reaching due to pain in her neck and right shoulder. She found that the plaintiff can work effectively with both hands in a coordinated manner but has difficulty completing tasks requiring sustained or repetitive forward reaching due to pain in her neck and right shoulder. Ms. Hudon opined that the plaintiff can complete work related material handling in a limited capacity but that the "mismatch between her demonstrated abilities and her job requirements [as a custodian] result in symptom exacerbation, delayed recovery and could translate into a lower-than-expected work life expectancy".
- [70] Regarding the ability to perform activities of daily living, Ms. Hudon opined that the plaintiff will likely experience functionally limited pain/discomfort in her right shoulder with above-shoulder tasks and leisure activities which involve sustained or repetitive forward reaching, such as gardening, yard work (raking, pruning, planting, weeding, edge trimming), cleaning windows, vacuuming and washing floors.
- [71] Ms. Hudon's unchallenged assessment is that the plaintiff does not currently meet the strength requirements for work as a custodian. Ms. Hudon also opined that the plaintiff should avoid heavy seasonal activities such as cleaning under furniture and appliances.

[72] Ms. Hudon, like Dr. Helper, opined that "ongoing rehabilitation intervention will be necessary to promote and maintain [the plaintiff's] function". She recommends that the plaintiff participate in a pain management program.

[73] Ms. Hudon also prepared a cost of future care plan.

Curtis Peever

[74] Mr. Peever is an economist who prepared a report dated November 6, 2019 setting out present values for future care costs. He prepared a second report dated November 7, 2019 setting out income loss multipliers and the future losses of employer pension contributions.

[75] Mr. Peever's reports were introduced in evidence without objection. He too was not required to testify.

EVIDENCE AT TRIAL TENDERED BY THE DEFENDANTS

Sheila Branscombe

[76] Ms. Branscombe is an occupational therapist who prepared a rebuttal report to that of Ms. Hudon. The report dated December 19, 2019 was introduced in evidence without the need for Ms. Branscombe to testify.

[77] Ms. Branscombe's report is essentially a critique of that of Ms. Hudon. Ms. Branscombe did not conduct her own functional capacity evaluation of the plaintiff because she was instructed not to do so. Her opinions are based solely on the reports that were provided to her.

[78] Ms. Branscombe recommends that, instead of attending a multidisciplinary pain clinic, the plaintiff attend either a free pain management course or a 10- week Progressive Goal Attainment Program at substantially reduced cost.

[79] Many of the concerns expressed by Ms. Branscombe about Ms. Hudon's opinions relate to insufficient evidence to support them. However, a close reading of Ms. Hudon's report reveals that her opinions were not based merely on questionnaire results as suggested by Ms. Branscombe, but also on her interview and observations of the plaintiff. It appears that Ms. Branscombe may have overlooked the information obtained by Ms. Hudon during her interview of the plaintiff.

[80] To the extent that there is disagreement between the opinions of Ms. Branscombe and Ms. Hudon, I prefer those of Ms. Hudon, primarily because she conducted a full interview and functional capacity evaluation of the plaintiff, while Ms. Branscombe did not.

Thomas Steigervald

[81] Mr. Steigervald is an economist. His report dated December 19, 2019 was also introduced in evidence without the need for him to testify.

- [82] He noted that the average retirement age for members of the plaintiff's union is between 61 and 62 years of age, with average service of between 17 and 20 years.

CREDIBILITY AND RELIABILITY

- [83] The plaintiff, Raymond and Rachel were honest, forthright, forthcoming, genuine and reliable witnesses who I found to be sincere in giving their respective testimonies. If anything, I find that their evidence was understated. None of them was prone to exaggeration. Their evidence was not undermined during cross-examination. The plaintiff, in particular, readily conceded points that were potentially detrimental to her case, especially with respect to her attribution of many of her limitations to her unrelated low back pain. Each of them was a very good witness and I have no hesitation accepting their collective evidence in its entirety.
- [84] Dr. Helper was an impressive witness. Indeed, he was the epitome of an objective expert who both understands and objectively carries out his role in the proceedings, namely to assist the court rather than to advocate for one party or the other. I accept his opinion evidence, as supplemented by his oral testimony, without qualification.
- [85] Counsel for the defendants conceded during her submissions that credibility is not an issue in this case. Rather she focused on the need to disentangle the plaintiff's neck and shoulder pain symptoms from her low back pain and the difficulty each of the witnesses would naturally have differentiating one from the other.

CAUSATION

- [86] The legal test for causation is the "but for" test--the plaintiff must prove on a balance of probabilities that, but for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8-10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28-29; and *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [87] The classic statement of the law of causation was stated by Mr. Justice Sopinka in *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328: "causation need not be determined by scientific precision". It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff need only establish a "substantial connection between the injury and the defendant's conduct" in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.

- [88] The evidence in this case is overwhelming and uncontroverted that the Accidents caused or contributed to the deterioration in the plaintiff's physical health and outlook on life. I find that MVA #1 was the primary cause of the plaintiff's neck and shoulder soft tissue injuries and resulting pain complaints. MVA #2 was a contributing factor to those complains but a primary cause of the plaintiff's driving anxiety.
- [89] The defendants concede that the plaintiff suffered a soft tissue injury to her neck and right shoulder but maintain that the injury was "mild".
- [90] Prior to the Accidents, the plaintiff was an energetic, hard-working, diligent and conscientious person who was dedicated to her employment and passionate about her family life, her home and her garden. The impact of the Accident-related injuries on her day-to-day living, and in particular her ability to take care of and enjoy her garden and home, was significant.
- [91] While I agree with defendants' counsel that it is difficult to separate the plaintiff's mental, physical and emotional condition attributable to the Accidents from that caused by her unrelated low back pain, the plaintiff gave cogent evidence from which the court can do so.

ASSESSMENT OF DAMAGES

Non-pecuniary Damages

- [92] The assessment of non-pecuniary damages takes into account the well-established factors from *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. An award under this head is intended to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. Factors commonly taken into account include the age of the plaintiff, nature of the injury, severity and duration of pain, extent of any disability, extent of emotional suffering and impairments to the plaintiff's life, including impairments to family, marital, and social relationships, physical and mental abilities, and loss of lifestyle.
- [93] Each plaintiff must be assessed individually, although reference to previous similar cases can be helpful: *Boyd v. Harris*, 2004 BCCA 146; *Zamora v. Lapointe*, 2019 BCSC 1053, at para. 56.
- [94] Counsel for the plaintiff seeks a non-pecuniary award of \$100,000, relying on the decisions of this court in *Kelly v. Kalra* 2019 BCSC 1305; *Merko v. Plummer* 2016 BCSC 1403 and *Lewis v. Wang*, 2020 BCSC 16, each involving a similarly aged plaintiff and parallel facts:
- a) The decision in *Kelly* involved a 54-year old woman who suffered constant pain in her neck, shoulders and back as a result of a motor vehicle accident. Prior to the accident she was an energetic homemaker with full time employment as a licenced practical nurse with a fulfilling life involving much physical and social activity. She performed the bulk of the housework, although her husband lent some assistance. She mowed the lawn on their substantial property and kept a garden. Following the accident she gave up most of her physical activities, including the housework and gardening she enjoyed. Her husband took

over most of the household, lawn and garden tasks after her injury but the garden became largely neglected. Her employment was exhausting for her. Her confidence was adversely affected. Her sleep became brief and disrupted. She experienced depression and anxiety. The evidence was that these conditions were chronic. The court awarded \$120,000 in non-pecuniary damages.

- b) *Merko v. Plummer* involved a highly productive person who was happiest when she was busy with multiple tasks to complete, whether at work or with her numerous crafts and hobbies. She took pride in these activities. She suffered chronic neck and shoulder pain as a result of an accident. Most of her pre-accident activities were diminished and she lost her passion for them. The court found that her life had been drastically altered by her injuries and awarded \$95,000 for non-pecuniary damages.
- c) *Lewis v. Wang* involved a woman who sustained a neck injury in an accident which became chronic. The accident also aggravated pre-existing problems she had with her right shoulder and her back. She endured ongoing pain from the accident with some frequency but she was stoic and did not let her pain detract from her work performance. The court awarded \$90,000 in non-pecuniary damages.

[95] Counsel for the defendants submits that an award of \$60,000 is appropriate. She relies on the decisions of this court in *Dupuis v. Tomczak*, 2016 BCSC 2225; *Olson v. Yelland* 2016 BCSC 216 and *Dennison v. Jensen*, 2019 BCSC 725:

- a) In *Dupuis*, a woman in her mid-fifties was injured in two motor vehicle accidents. She suffered neck, shoulder, low back, and right hip pain. Her participation in treatment was limited. She had to give up recreational activities and the more demanding aspects of housekeeping. She had a substantial prospect of recovery with appropriate treatment. The court awarded \$65,000 in non-pecuniary damages. While the court did not find that she failed to mitigate her damages, it did find that her passive approach to obtaining treatment and her decision not to pursue certain treatment modalities suggested her pain was less severe, thus weighing in favour of more modest damages;
- b) In *Olson*, the 44-year old plaintiff was employed as a store manager. She had a pre-existing knee injury. A month prior to the accident she suffered a torn disc in her low back in the work place and was off work. She suffered neck, left shoulder and mid-back pain in a motor vehicle accident and aggravated her pre-existing knee pain. She participated in an occupational rehabilitation program through WCB. The court found that her pre-existing conditions would have significantly impacted her function at home and work in any event and awarded non-pecuniary damages of \$60,000 inclusive of loss of housekeeping capacity;
- c) *Dennison* involved a 40 year-old plaintiff who worked full time as a catering manager in the hospitality industry. Prior to the accident she routinely hosted large gatherings for family and friends, which involved planning, moving furniture and cooking. She suffered pain and stiffness in her neck, right shoulder and lower back as a result of an accident. She participated in appropriate treatment modalities. Her injuries caused sleep problems and

weight gain. Her pre-accident recreational and hosting activities were curtailed. She did not miss any time at work. She was awarded \$50,000 in non-pecuniary damages.

- [96] The uncontroverted evidence, which I accept, is that the plaintiff always was and continues to be a person with a strong work ethic and selfless sense of loyalty and dedication to her employer and her family. She was never one to shy away from hard work. Prior to the Accidents she was an active, outdoors-oriented individual who enjoyed working in her yard and gardens. Her stoic struggle after the Accidents to continue working is praiseworthy but has come at a cost to her previous happy mood, her love of gardening, her energy and her family. She is fatigued at the end of her work week. Her passion for the outdoors and her gardens, which were a source pride and accomplishment for her, has been eroded or at least significantly curtailed by the Accidents.
- [97] The defendants concede the plaintiff's diminished enjoyment of these activities but submit that these facets of her life would have suffered regardless of the Accidents because of her low back pain.
- [98] While the plaintiff's neck and shoulder pain waxes and wanes to some degree, it is aggravated by daily tasks. Ms. Hudon's opinion is that the plaintiff does not meet the strength requirements of her job, yet the plaintiff continues to work as a custodian despite Ms. Hudon's opinion that she should not. In my view, this is a testament to the plaintiff's work ethic and loyalty to her employer.
- [99] The plaintiff now distrusts other drivers on the roads and is very anxious as an occupant in a moving vehicle.
- [100] Dr. Helper's prognosis is unchallenged. While it would have been helpful to have had the benefit of an updated report from Dr. Helper, the court does have the benefit of Ms. Hudon's more recent functional capacity evaluation. I accept the respective opinions of Dr. Helper and Ms. Hudon that the plaintiff's neck and shoulder pain will likely improve if she commits to an appropriate course of rehabilitation with qualified guidance as well as beginner classes of Pilates or yoga. Although the plaintiff has engaged in Pilates at home based upon guidance she has received from friends and internet research, she has been reluctant to engage in formal rehabilitation with the assistance of a kinesiologist and Pilates/yoga instructor. Her reluctance to do so to date must be taken into consideration in the assessment of her damages. I will do so under the heading "Mitigation" below.
- [101] Although the facts in *Kelly v. Kalra* were strikingly similar to those of the case at bar, the psychological injuries suffered by the plaintiff in *Kelly* were substantially more severe than those suffered by the plaintiff.
- [102] Having considered the factors set out in *Stapley* and the evidence as a whole, I award non-pecuniary damages of \$90,000, subject to a reduction for the plaintiff's failure to mitigate (see below).

Past Loss of Earning Capacity

- [103] Compensation for past wage loss is based on the value of the work that the plaintiff would have, not merely could have, earned, but for the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Mills v. Graham*, 2019 BCSC 641, at para. 82.
- [104] An assessment of past wage loss requires that the plaintiff demonstrate a real and substantial possibility that the income would have been earned: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27; *Mills v. Graham*, at para. 82.
- [105] The overall fairness and reasonableness of the award must be considered taking into account all the evidence. It requires an assessment of the plaintiff's past loss of earning capacity, not a calculation according to some mathematical formula: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19.
- [106] A host of factors in this case enter into the required analysis, including the impact of the plaintiff's low back injury she sustained in September 2016 and the extent to which the plaintiff's union seniority would have affected her ability to secure additional work hours, for example during the period between October 15, 2015 when she withdrew from her part-time custodian position and November 11, 2015, the date of MVA #1.
- [107] The plaintiff's time records suggest that the plaintiff's prediction that she would have picked up spare work as a bus driver sufficient to cover the 20 hours per week she gave up as a custodian would likely have been accurate.
- [108] A reasonable calculation of the plaintiff's lost income between MVA #1 and September 9, 2016 (when she injured her low back) can be performed based upon her average of 30.2 work hours/week prior to MVA #1 verses an average of 24.0 hours/week afterwards as follows:
- 44 weeks x 6.2 hours/week x \$20/hr = \$5,456.
- [109] In addition, the uncontroverted evidence is that the plaintiff lost \$320 during the summer of 2016 as a result of the Accidents.
- [110] Finally, the plaintiff's move to South Canoe School resulted in a 10 hr/week reduction in her pay between September 2018 and August 2019. The defendants submit that there is no evidence of a medical justification for the plaintiff working these reduced hours and that she could have continued to work the hours she had worked previously. The defendants point to the evidence that the plaintiff rarely, if ever, took the sick days to which she was entitled under her union contract. In my view, the plaintiff's disinclination to take advantage of her 6-day per year sick day entitlement speaks more to her dedication, loyalty and stoicism than to anything else. Regardless, I find that medical justification did exist in the form of Dr. Helper's opinion expressed in November 2017 that the plaintiff was unlikely to achieve a full resolution of her neck pain complaints if she continued with her current

work/lifestyle balance. She changed her work lifestyle after receipt of that opinion.

[111] The plaintiff's loss can be calculated as follows:

$$38 \text{ weeks} \times 10 \text{ hrs/week} \times \$20.70/\text{hr} = \$7,866$$

For the period from September 2019 to the date of trial, she worked two additional hours per week. The calculation is:

$$14 \text{ weeks} \times 9 \text{ hrs/week} \times \$20.85/\text{hr} = \$2,335$$

[112] The total of the foregoing calculations is \$15,933. Any reduction in the plaintiff's earning also reduced her employer's pension contribution. Blending the variable rate in evidence, the School District would have matched approximately 11% of the plaintiff's earnings. Accordingly, the plaintiff's loss should be increased by 11% to \$17,686 (\$15,933 x 1.11).

[113] This calculation likely underestimates the plaintiff's past wage loss given the upwards trajectory of her earnings and the nearly full time hours she worked in the weeks leading up to MVA #1.

[114] Having considered all of the evidence, I assess the plaintiff's damages for past loss of income earning capacity at \$20,000.

Future Loss of Earning Capacity

[115] An award for future loss of earning capacity recognizes that a plaintiff's capacity to earn income is an asset that has been taken away. If a plaintiff's permanent injury limits her capacity to perform certain activities and consequently impairs her income-earning capacity, she is entitled to compensation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 8. The plaintiff must demonstrate both impairment to her earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss. The standard of proof is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

[116] Once that threshold is met, the plaintiff may prove the amount of loss by one of two calculation approaches, as set out by the British Columbia Court of Appeal in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:

[32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward v. Berezan*, 2007 BCCA 150, by Bauman J. in *Chang v. Feng*, 2008 BCSC 49, and by Tysoe J.A. in *Romanchych v. Vallianatos*, 2010 BCCA 20, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.), or a capital asset approach, as in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily

measurable, as in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa v. Wickware*, 1999 BCCA 88. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

See also *Mills v. Graham* 2019 BCSC 641 at para. 87.

[117] As is the case with past loss of earning capacity, the task of the court is to assess the future loss of income-earning capacity, not attempt to calculate it mathematically. Since the course of the 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. The proper deduction (usually a percentage) will depend on the facts of each case, including the plaintiff's occupation, but generally it will be small: *Brewster v. Li*, 2013 BCSC 774 at para. 142, quoting *Reilly v. Lynn*, 2003 BCCA 49 at para. 101; *Raikou v. Spencer*, 2014 BCSC 1 at para. 83.

[118] Where an award of damages based upon the permanency of an injury or functional incapacity is sought, it is incumbent upon the plaintiff to demonstrate the permanency of her injuries with cogent evidence. The court is entitled to rely on common sense to determine if there is a real and substantial possibility of future loss of income: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41:

41. In my view, it was open to the trial judge to find - essentially as a matter of common sense - that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what accommodations an employer is prepared to make.

[119] These principles were applied by this court in *Merko v. Plummer*, *supra*, at para. 99:

[99] When I consider the totality of the evidence, the fact that Mrs. Merko's pain is chronic and as severe as it is, and the fact that her job is as intense as it is, I conclude that there is a real and substantial possibility her injuries will lead to her having to reduce the hours or years that she works in the future. This is so even though to date she has carried on full-time. This has been based on pure force of will, but there is a real possibility that will diminish as she ages and as the cost to the rest of her personal life becomes more and more pronounced.
[Emphasis added]

[120] The plaintiff bears the burden of proving that:

- a) her accident-related injuries have impaired her capacity to earn income;
- b) those injuries are likely to persist into the future; and
- c) there is a real and substantial possibility she will suffer a loss of income as a result.

- [121] In my view, she has met that burden. Based upon his examination and assessment of the plaintiff more than 2 ½ years ago, Dr. Helper opined that the plaintiff would not likely achieve a full resolution of her neck pain complaints if she continued with her current work/lifestyle balance without an appropriate course of rehabilitation. As predicted, the plaintiff did not pursue the rehabilitation recommended by Dr. Helper and her pain has continued, unrelenting, over the course of those 2 ½ years with no end in sight. Dr. Helper's prophesy has been borne out. Accordingly, the costs awarded under this head of damages will be subject to a mitigation deduction to account for her failure to engage in the treatment modalities (including physiotherapy) recommended by Dr. Helper over two years ago.
- [122] Ms. Hudon's opinion is that the plaintiff does not currently meet the strength requirements for work as a custodian.
- [123] As at the time of MVA #1 the plaintiff had accrued only 0.81 years of pensionable service with her union. As of September 19, 2019, despite her injuries, she had accrued 6.4554 pensionable service years. Her evidence was that her plan, both before and after the Accidents, is to continue working for as long as possible. I decline to apply the union averages provided by Mr. Steigerveld to the plaintiff's case. By any measure, the plaintiff is not the average union worker with between 17 and 20 years of accrued service.
- [124] I find that it is more likely than not that the plaintiff will continue working as a custodian at South Canoe School at the current reduced hours (30 vs. 38 per week). However, I find that there is a real and substantial possibility that she will be forced to retire earlier than she otherwise would have had the Accidents not occurred. Common sense dictates that chronic pain takes its toll and, over time, erodes a person's ability to work.
- [125] Counsel for the plaintiff acknowledges there is a possibility that the plaintiff will lose income in the future due to her low back pain. Indeed she recently lost one month of work for that very reason, in November 2019.
- [126] In my view, this is a case where the capital asset approach should be applied. That is because the plaintiff's loss of earning capacity is not easily measurable. There is no doubt that she has been rendered less capable overall of earning income from all types of employment, she is less attractive as an employee to potential employers, she has lost the ability to take advantage of job opportunities that might otherwise have been available to her and, importantly, she is now less valuable to herself as a person capable of earning income in a competitive labour market: *Moreira v. Crichton*, 2018 BCSC 1281 at para. 117, citing from *Brown v. Golaiy*, (1985) 26 B.C.L.R. (3d) 353.
- [127] Having considered all of the evidence in this case, I assess the plaintiff's future loss of earning capacity at \$100,000. From that amount, a deduction must be made for the real and substantial contingency that she may lose income due to her low back condition. In my view an appropriate deduction in this case is 20%.

[128] Accordingly, I award the plaintiff the sum of \$80,000 under this head of damages, but subject to a further reduction for her failure to mitigate (see below).

Future Care Costs

[129] The purpose of an award for costs of future care is to restore, as best as possible with a monetary award, the plaintiff to the position she would have been in had the Accidents not occurred: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. Any award should reflect the reasonable or normal expectations of what the plaintiff will require: *Spehar v. Beazley*, 2004 BCCA 290 at para. 19; *Peters v. Ortner*, 2013 BCSC 1861 at paras. 141-144.

[130] The plaintiff must demonstrate an evidentiary link between her pain symptoms and the recommended treatment and care. The level of care should reflect the reasonable expectations of what the plaintiff will require: *Spehar v. Beazley*, 2004 BCCA 290 at para. 19.

[131] In *Gignac* at para. 54, the court declined to award the plaintiff counselling fees despite evidence that it would be of considerable assistance because the plaintiff was only "considering" going to counselling.

[132] The plaintiff submits that the following categories of future care costs are justified in this case:

a) Multidisciplinary pain program: Ms. Hudon described the potential benefit as follows:

In participating in a pain management program, [the plaintiff] will be better positioned to address psychosocial factors which influence her experience of pain. Although a pain management program will not completely eliminate her pain, it will provide her with invaluable tools to successfully live with chronic pain, manage flare-ups, and lead an active lifestyle.

The plaintiff's evidence was that she is unlikely to participate in a pain management program given its duration and cost, but would pursue a Progressive Goal Attainment Program as recommended by Ms. Branscombe, at a cost of between \$1,500 and \$2,000. I am persuaded that \$1,500 is an appropriate award.

b) Fitness centre membership/recreational instruction class: Ms. Hudon and Ms. Branscombe are in agreement that a fitness membership for the plaintiff is appropriate. The cumulative value of the multipliers provided by Mr. Peever amounts to \$2,825 (3.532 x \$800) for the adult rate and \$9,021 (14.096 x \$640) for the seniors rate, for a total of \$11,846. The defendants argue that a recreational instructional class for two years at a cost of \$1,700 is sufficient. Given Dr. Helper's opinion that he would expect the plaintiff's pain symptoms to improve after six months of treatment, but that the efficacy of that treatment has been reduced given the time since the Accidents, I am persuaded that the two year program proposed by the defendants is appropriate in this case.

In addition, the defendants concede that a kinesiology program for one year at a cost of \$2,260 is appropriate. The total award for these will be \$3,960.

- c) **Physiotherapy:** Both Dr. Helper and Ms. Hudon recommend that the plaintiff have further physiotherapy. The plaintiff's evidence was that she found a physiotherapist in Vernon whose treatments have been very beneficial to her. Ms. Hudon recommends a series of 6-10 sessions annually, at a cost of \$65-\$70 per treatment. Using Mr. Peever's multipliers, the present value of these treatments is \$15,709.
- d) **Psychological counselling:** Ms. Hudon recommends that the plaintiff be provided with counselling to address her low mood due to her chronic pain. The plaintiff's evidence was that, while she is open to counselling, it is not something she is particularly interested in. I am not persuaded there is a real and substantial possibility that the plaintiff would participate in such counselling.
- e) **Sleep restoration education and support:** Ms. Hudon opined that the plaintiff would benefit from seeing an occupational therapist with expertise in sleep restoration for a minimum of five sessions. I am not persuaded there is a real and substantial possibility that the plaintiff would attend such therapy.
- f) **Seasonal housekeeping assistance:** Ms. Hudon opined that:

[The plaintiff] would be expected to experience functionally limiting pain in her neck and right shoulder/trapezius area with tasks involving heavy material handling, repetitive movement of the right shoulder, and above-shoulder work (for example cleaning the windows, vacuuming, washing the floors).

Ms. Hudon estimates that the plaintiff should have approximately 8-12 hours of seasonal housekeeping assistance at an estimated cost of \$31.50 to \$33.50 per hour. Once again using Mr. Peever's tables at the low end of the hourly wage range, the present value of these services is \$4,419.

- g) **Yard maintenance:** Ms. Hudon estimates that seasonal yard assistance for 8-12 hours, twice per year would cost in the range of \$42 to \$73.50 per hour, plus travel costs to Enderby. While I am persuaded that the plaintiff is entitled to seasonal yard assistance, I am not persuaded that such assistance would be remotely as expensive as Ms. Hudon's high end of the range. I am prepared to award an allowance under this head of damages at the low end of the range. Using Mr. Peever's multipliers to age 80 on the basis of the low cost estimates, I award $\$6,813 \times 2 = \$13,626$.
- h) **Assistive devices:** Although the plaintiff's evidence was that she uses her heating pad almost every night for her neck and back, I am not persuaded that there is a real and substantial possibility she will incur future expense in respect of a heating pad for her neck. Rather, I find that it is likely any future expense in this regard will be primarily, if not entirely, for relief of her lower back pain.

- i) Medications/equipment: Counsel for the defendants concedes that 50% of the cost of ibuprofen and Robaxacet that the plaintiff testified she uses for her neck and back is compensable in the amount claimed by the plaintiff: \$811. The defendants also concede that an award of \$500 for additional home exercise equipment is reasonable.

[133] I award the sum of \$40,525 for the plaintiff's costs of future care, comprised of:

Progressive Goal Attainment Program

\$ 1,500

Fitness membership/recreational class

\$ 1,700

Kinesiology program

\$ 2,260

Physiotherapy

\$15,709

Seasonal housekeeping assistance

\$13,626

Medications and exercise equipment

\$ 1,311

Total

\$40,525

Loss of Housekeeping Capacity

[134] Where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work - i.e. where the plaintiff has suffered a true loss of capacity - that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. It lies in the trial judge's discretion whether to address the claim as a part of the non-pecuniary loss or as a segregated pecuniary head of damages: *Kim v. Lin*, 2018 BCCA 77 at para. 33.

- [135] Whichever option is chosen, when valuing the different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by the plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place: *Kim v. Lin*, at para. 34.
- [136] The plaintiff is the person in her household who is responsible for virtually all of the housekeeping tasks. While she is now unable to perform those tasks in as timely and fulsome a manner as she did prior to the Accidents, she nevertheless continues to do them, albeit less frequently. Although Raymond reluctantly assists with the more physically demanding housekeeping tasks when asked, I am not satisfied that his participation in those activities is meaningfully different than it was prior to the Accidents.
- [137] I agree with counsel for the defendants that the plaintiff's ongoing work as a custodian establishes that she continues to have the capacity to perform the housekeeping duties she performed prior to the Accidents, albeit at a slower and less sustained pace. The evidence shows that, with the exception of the need for seasonal housekeeping assistance (addressed above), there is no demonstrated loss of capacity.
- [138] I am not persuaded that an award under this head of damages is justified in this case. Rather, I find that the plaintiff's loss is more in keeping with her loss of amenities and her pain and suffering, in respect of which, in my discretion, I have addressed as part of her non-pecuniary damages award.

Special Damages

- [139] The defendants concede that the plaintiff is entitled all of the amounts claimed under this head of damages with the exception of \$18,414.38 that the plaintiff claims for the cost of a John Deere mowing tractor ("Tractor"). The amount conceded by the defendants is \$649.50.
- [140] The plaintiff submits that the plaintiff's previous ride-on mower did not have power steering and that she found that, after 1 ½ hours of using it, the pain in her neck and shoulder was exacerbated. She testified that she uses the Tractor primarily as a lawn mower and "garden worker", as it has a bucket and trailer which aids her in her gardening tasks.
- [141] I am not persuaded that the cost of the Tractor is a reasonable expense incurred by the plaintiff in relation to the injuries she sustained in the Accidents. Rather, I find that it was a luxury multi-purpose item purchased by the plaintiff and Raymond for use in and around property.
- [142] I award the plaintiff special damages in the amount of \$649.50.

MITIGATION

[143] The onus is on the defendants to prove that the plaintiff would, on the balance of probabilities, have avoided all or a portion of her loss. In this regard, the defendant must prove (1) the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably: *Gill v. Lai*, 2019 BCCA 103 at para. 26; *Gregory v. ICBC*, 2011 BCCA 144.

[144] In determining the first prong of the test, the plaintiff's personal circumstances can be taken into account in terms of (a) whether the plaintiff understood, appreciated and was capable of following the advice given and (b) whether a reasonable person in the plaintiff's circumstances would have done so. The evidence in this case is clear that the plaintiff understood, appreciated and was capable of following Dr. Helper's advice. The plaintiff was aware of Dr. Helper's recommended treatment regimens in November 2017 but chose, instead to limit her rehabilitation to exercises she had been given by her physiotherapist over 18 months earlier as well as those she found doing her own internet research. Both of these rehabilitation modalities were expressly disapproved of by Dr. Helper in his report.

[145] Counsel for the plaintiff submits that it was not unreasonable for her to have forsaken Dr. Helper's recommendations and done what she did because:

- a) she had had previous physiotherapy appointments that she did not enjoy and that she was uncomfortable with her physiotherapist and his office environs;
- b) her physiotherapist had taught her exercises which she performed at home with, at least in her untrained mind, good technique such that there was no need for supervision;
- c) she took from Dr. Helper's recommendations that she should improve her posture and upper body strength which she endeavoured to do on her own; and
- d) kinesiology sessions would have been expensive and would have required her to miss work.

[146] I disagree. In my view a reasonable person in the plaintiff's shoes would have at least attempted the recommended treatment modalities.

[147] As to the second prong of the test, Plaintiff's counsel submits that, regardless, it is impossible to predict what benefit there would have been to the plaintiff had she followed the recommendations, given the "confounding" variable of her low back injury and, if there was some benefit, there is no evidence that it would have been "substantial".

[148] Dr. Helper's uncontroverted opinion is that he would have expected to have seen a mild-to-moderate partial improvement in the plaintiff's neck, upper back and right shoulder symptoms over the course of six months of training had his recommendations been followed. In my view, "mild-to-moderate" equates, at least in this case, to sizable or substantial.

[149] The defendants submit that, as a result, there ought to be a reduction of 30% in the awards for non-pecuniary damages, loss of future earning capacity and cost of future care. Counsel for the plaintiff submits that, at most, any reduction should be no more than 5%, relying on the recent decision of this court in *Saunders v. Rempel*, 2019 BCSC 2177.

[150] In my view, a reduction of 15% is appropriate in this case.

CONCLUSION

[151] The plaintiff is entitled to judgment against each of the remaining defendants, jointly and severally, in the total amount of \$200,000, calculated as follows:

Non-pecuniary Damages

\$90,000 less 15% = \$76,500

Past Loss of Earning Capacity

\$20,000

Future Loss of Earning Capacity

\$80,000 less 15% = \$68,000

Cost of Future Care

\$40,525 less 15% = \$34,446

Loss of Housekeeping Capacity

\$0

Special Damages

\$ 649.50

Total

\$199,595.50 (Rounded up to \$200,000)

[152] Subject to any submissions the parties wish to make, the plaintiff is entitled to her costs of the action at Scale B.

"G.C. Weatherill, J"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/02/2020BCSC0246.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/pasemko-v-kosolofski-2020>

Prepared on 27 October 2026 · Esheria