

CANADA / JUDGMENT

Radacina v. Aquino

2020 BCSC 1143

COURT

Supreme Court of British Columbia

DECIDED

5 August 2020

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

2020 BCSC 1143 Radacina v. Aquino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Radacina v. Aquino,

2020 BCSC 1143

Date: 20200805

Docket: M152299

Registry: Vancouver

Between:

Irina-Maria Radacina

Plaintiff

And

Angelo Aquino

Defendant

- and -

Docket: M169455

Registry: Vancouver

Between:

Irina-Maria Radacina

Plaintiff

And

Hoai Vu and GM Financial Canada Leasing Ltd.

Defendants

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:

W.E. Derber

Counsel for the Defendants:

D.W. Shea

K. Cheung

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 24-28, 2020;

March 2-6, 9-12, 2020; and

May 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 5, 2020

Table of Contents

Background. 3

The Plaintiff 3

Pre-Accident #1 Health, Activities and Employment 3

Accident #1. 5

Injuries Sustained in Accident #1. 6

Period Between Accident #1 and Accident #2. 7

Accident #2. 8

Injuries Sustained in Accident #2. 11

Post-Accident #2. 11

Expert Evidence. 14

Credibility and Reliability. 21

Liability. 26

Accident #1. 26

Accident #2. 27

Findings of Fact on Causation and the Plaintiff's Condition. 28

Damages. 35

Non-Pecuniary Damages. 35

Loss of Past and Future Earning Capacity. 37

Cost of Future Care. 43

Loss of Housekeeping Capacity. 46

Special Damages. 48

Mitigation. 48

Conclusion. 49

- [1] The plaintiff, Irina Radacina, claims damages for personal injuries suffered in two motor vehicle accidents that occurred on April 2, 2013 ("Accident #1") and December 2, 2014 ("Accident #2"). Liability has been denied with respect to both accidents.
- [2] The defendants acknowledge that Ms. Radacina was injured in the accidents but they submit that those injuries were relatively minor, resolved in short order and do not warrant the quantum of damages claimed by Ms. Radacina.

Background

The Plaintiff

- [3] Ms. Radacina was born in Romania and came to Canada with her family in 1988 when she was six years old. She was 31 years old at the time of Accident #1 and 33 at the time of Accident #2. She is currently 38 years old.
- [4] In addition to her parents, Ms. Radacina has one brother. She remains particularly close to her parents.
- [5] After high school, she attended both Langara College and Douglas College, ultimately graduating from Douglas College in 2011 with a Certificate in Classroom Community Support, with a specialty in Behavioral Intervention.

Pre-Accident #1 Health, Activities and Employment

- [6] Ms. Radacina testified that she had a happy and active childhood. She enjoyed high school and was involved in numerous activities.
- [7] In the years after graduating high school, Ms. Radacina developed a strong interest in working with individuals with autism. This interest stemmed in part from interactions she had with a boy with autism who she met at the pool in her apartment complex. She later pursued this interest further through her education at Douglas College.
- [8] Commencing in or around October 2012, Ms. Radacina began working as a support worker for a young man with developmental challenges. Her work involved accompanying the young man on outings, for example to the local community centre gym and to the pool. It is apparent that Ms. Radacina developed a close relationship with the young man and that she was passionate about this work. Throughout her testimony, Ms. Radacina referred to the young man as her "client", and I will do the same.
- [9] Ms. Radacina also had a history of working in the service industry. At the time of Accident #1, she was working as a server at a restaurant called Mandalay Lounge in Richmond and she said she had just been promoted to a management position. She was also working in her support person role.
- [10] In 2012, the year before Accident #1, Ms. Radacina reported employment income of \$11,126.82 on her income tax return. That comprised \$7,926.82 in income earned in her serving position and \$3,200 earned as a support person.
- [11] Ms. Radacina testified that in the years preceding Accident #1, she continued to be physically active. She enjoyed swimming and spent considerable time at the pool in her apartment complex as well as the pool in the complex that her father managed. She enjoyed going to the gym and playing music, particularly the guitar.
- [12] She continued to live with her parents until about a year and a half before Accident #1 when she moved in with Eden Goss, her then partner. Ms. Radacina testified that, prior to Accident #1, she did about 60% of the housework and the majority of the cooking at their shared apartment.
- [13] In terms of her health, Ms. Radacina has had a long history of pelvic pain issues, including a number of surgeries. However, she described the three years prior to Accident #1 as "three of the best years ever". While she continued to experience some pain, largely associated with her monthly cycle, it was a significant improvement over what she had gone through earlier in her life.
- [14] Ms. Radacina also had other previous medical issues. As a teenager, she was involved in a motor vehicle accident that resulted in her experiencing chronic pain for number of years. She also had periods in which she suffered from anxiety and depression, related in part to her pelvic pain. In 2011 and 2012, she reported left side upper back and neck pain which was

exacerbated by her work as a server. For many of the pain issues, she was prescribed opioid medications. Again however, by the time of Accident #1, Ms. Radacina said that she was in good health.

- [15] As will be seen, the defendants take the position that Ms. Radacina's medical history prior to Accident #1 is more significant than she admits.

Accident #1

- [16] Ms. Radacina described the circumstances of Accident #1, which again occurred on April 2, 2013. She was travelling from her home in Richmond to her serving job in Steveston. She was driving her car and was alone. It was a clear, sunny afternoon between approximately 3:00-3:30 p.m.
- [17] Ms. Radacina said that she was on a small side street, Mortfield Gate, intending to turn right onto Steveston Highway heading west. At that point, Steveston Highway has two lanes in each direction. Ms. Radacina came to a stop at the stop sign on the side street.
- [18] Across Steveston Highway, and slightly west of the intersection were Ms. Radacina was stopped, was a Buddhist Temple. A number of cars were lined up in the left hand lane facing west waiting to turn left into the Temple parking lot. The right or curb lane however was free and Ms. Radacina completed her turn into that lane. As she did, she saw a vehicle on her left side. She said the driver was looking over his shoulder as he changed from the left hand lane on Steveston Highway into her lane, apparently to go around the cars backed up for the Temple. Ms. Radacina thought the other vehicle was going to strike her door so she accelerated and the vehicle struck the rear portion of the driver's side of her car, causing her to fishtail.
- [19] Ms. Radacina said the two vehicles pulled over and both drivers got out. She said the other driver was very apologetic and said that it was his fault.
- [20] The driver of the other vehicle was the defendant Angelo Aquino. He said that he was travelling west on Steveston Highway in congested, start-stop traffic. He was in the left or centre lane and came to a stop to due to traffic. As he needed to turn right off Steveston Highway a short way ahead, he intended to move into the right lane. He said he turned on his signal light, checked his rear and side mirrors and did a shoulder check. There was no traffic in the right lane so he moved to enter the lane. Almost immediately on crossing the dividing line, the right front portion of his car struck the rear left side of Ms. Radacina's car. He described the force of the impact as being "very light" and he said his car sustained only minor scratches. According to Mr. Aquino, Ms. Radacina apologized to him and said she did not know why she had sped up.
- [21] In cross-examination, Mr. Aquino agreed that Ms. Radacina was fully in the right hand lane at the time of impact. He also acknowledged that, at the time, he felt responsible for the accident.

Injuries Sustained in Accident #1

- [22] Ms. Radacina said that following Accident #1, she was in a daze and felt nauseous. She went to work at the restaurant but did not stay. Ms. Goss drove her to the hospital where she was given a neck brace.
- [23] Ms. Radacina went to see her family doctor, Dr. Jason Leung, on April 3, 2013, the day after Accident #1. His clinical record notes Ms. Radacina experiencing pain in her right neck/trapezius/shoulder region along with her mid and low back. His assessment was "multiple soft tissue injuries".
- [24] Ms. Radacina described feeling "pretty terrible" for the first few days post-accident. She had pain in the right side of her neck, shoulder and upper body, radiating down the right side of her body, including her right arm, and into her lower back, hip, thigh and down to her heel. She had headaches and felt nauseous and dizzy. She said she experienced uncontrollable shaking or trembling in her right arm.

Period Between Accident #1 and Accident #2

- [25] Ms. Radacina said that there was no improvement in her symptoms between Accident #1 and Accident #2, if anything they got worse.
- [26] She said she experienced constant nausea, which was largely confirmed by Ms. Goss. She had difficulty sleeping and was often irritated and frustrated. She became largely housebound and was unable to participate in many of the activities she previously enjoyed. Ms. Goss also testified that Ms. Radacina was limited in what she could do, both recreationally and around their home. According to Ms. Goss, their roles switched somewhat with her taking on approximately 60% of the household duties. Ms. Goss also testified about the impact on their relationship. She said it started to feel like she had a dependent rather than a partner.
- [27] Ms. Radacina's parents both testified that they noticed her physical limitations. For example, Ms. Radacina's home was not as clean as it had been so her parents helped with various household chores. Her parents also said that they were worried about Ms. Radacina's mental state during this period.
- [28] In contrast, the defendants point to various entries in the clinical records of Ms. Radacina's family doctor, Dr. Leung, that suggest improvement in the months following Accident #1. For example, on May 16, 2013, Dr. Leung recorded Ms. Radacina's pain complaints as "intermittent" and that the range of motion in her neck and back was normal. Dr. Leung's records note no accident-related visits by Ms. Radacina between May 16 and August 6, 2013, however when she did see him in August 2013, she complained of constant right side neck and back pain. Other records in early to mid 2014 record Ms. Radacina as swimming and exercising regularly.

- [29] With respect to her employment, according to Ms. Radacina, following Accident #1, she missed "quite a few" days working with her client, although she did continue in that job. However, she said she was unable to return to serving. She could not handle the physical aspects of the job, such as lifting platters of food. She tried one shift as a hostess but that did not last.
- [30] In terms of income, in 2013, the year of Accident #1, Ms. Radacina reported total employment income of \$15,603.53, comprising \$2,344.04 from her serving job and \$13,259.49 from her work as a support person. The latter figure is a net amount after deduction of business expenses from her gross revenue of \$23,150.00.
- [31] In 2014, the year leading up to Accident #2, Ms. Radacina reported income of \$11,015.37. Ms. Radacina's sole source of income that year was her work as a support person and the income amount claimed is net of business expenses claimed against gross revenue of \$15,296.60. This is consistent with her evidence that she was unable to return to serving following Accident #1.

Accident #2

- [32] Accident #2 happened on December 2, 2014, about 20 months after Accident #1. The accident occurred between approximately 10:30-11:00 p.m. Ms. Radacina was driving, with her father in the front passenger seat and Ms. Goss in the rear driver side seat. They were heading from her father's workplace in Richmond to his home in Burnaby. The route took them north over the Knight Street Bridge, onto Marine Drive and then north on Boundary Road.
- [33] As they were driving east on Marine Drive toward Boundary Road, Ms. Radacina noticed a car ahead of them driving erratically. It was speeding up and slowing down and changing lanes without signalling.
- [34] Ms. Radacina was intending to turn left off Marine Drive to head north on Boundary. At Marine and Boundary, there are two left turning lanes. The other vehicle that had been driving erratically was also turning left and was in the inside or left hand turning lane, so Ms. Radacina took the outside or right hand lane. When the light turned green, she waited for the other vehicle to move, hoping it would go ahead of her. It did not move so she started her turn. She said she looked over and saw the driver smiling and looking down at his passenger seat.
- [35] According to Ms. Radacina, the other vehicle then started to move as well but rather than making the turn in the inside lane, it crossed over into her lane and drove straight into her. The other vehicle started to push her into the third, curbside, lane that was the merge lane for vehicles that had turned right onto Boundary from the opposing direction of Marine Drive. Ms. Radacina said she had to accelerate to avoid striking vehicles in the merge lane. She then pulled over.

- [36] Before she was able to get out of her car, the other driver started honking at her. He then got out of his car and approached her, waving his hands and yelling obscenities at her. Ms. Radacina got out of her car and tried to calm him down, but he continued to yell at her. Her father got out of the car and stepped between them. She went to walk back to her car, but she said the other driver grabbed her by the arm and continued swearing at her.
- [37] Ms. Radacina managed to break free and she retrieved her phone and called 911. An officer arrived and, according to Ms. Radacina, he had to stop the other driver from coming at her again. Ultimately, the officer told her to leave the scene. Ms. Radacina said she was crying and shaking uncontrollably so Ms. Goss had to drive.
- [38] Ms. Radacina's father, Petre, and Ms. Goss also testified about Accident #2. Mr. Radacina said that Ms. Radacina was driving him from his workplace in Richmond to his home in Burnaby and he was in the front passenger seat. They were in the right side turning lane on Marine Drive at Boundary, waiting to make a left turn. When the light turned green, their car moved forward and the car in the turning lane to their left made, what Mr. Radacina described as, "a very large turn". He said he saw the other car cross the centre line into their lane. Prior to this point, Mr. Radacina said he had seen this vehicle on Marine Drive "driving funny" and moving back and forth over the centre line.
- [39] The cars pulled over and, according to Mr. Radacina, the other driver got out of his car and started yelling at them, saying it was their fault. He said the other driver put his hands on Ms. Radacina. Mr. Radacina told her to call the police. A police officer arrived, they explained what happened and he told them to leave.
- [40] Ms. Goss gave similar evidence. She testified that she was in the rear driver side seat. As they were driving on Marine Drive towards Boundary, she could see the other vehicle swerving ahead. When they stopped at Boundary, the other vehicle was in the left or inside turning lane. When the light turned green and they started to turn, the nose of the other vehicle crossed into their lane and struck their vehicle. Ms. Goss said once the vehicles pulled over, the other driver got out of his car and walked towards them. She said he was aggravated and accusing them of hitting him. She did not get out of the vehicle and does not remember much else about any altercation.
- [41] The other driver in Accident #2, the defendant Hoai Vu, testified that he was driving from Richmond to Burnaby on December 2, 2014. He crossed the Knight Street Bridge and merged onto Marine Drive intending to turn left onto Boundary. He said he was in the inside or left turn lane. He stopped at the light at Boundary behind a jeep. When the light turned green, the jeep moved ahead and he commenced his turn. In the middle of his turn, he heard a scratching sound and realized that he had been struck by another vehicle. He saw a vehicle pass beside him and keep going. He said he followed that vehicle for one or two blocks before it pulled over.

- [42] When both vehicles pulled over, Mr. Vu said he got out of his car. A man from the other car approached and Mr. Vu asked him "why did you hit me?" He said the other man immediately got aggressive with him. The man's daughter was also there and she was crying. Mr. Vu said he did not understand why they were so upset. His car had minimal damage and he did not see any damage to the other car.
- [43] Mr. Vu said that a policeman arrived and the man and woman "made up lies about him". He said he was angry about that, but he denies any physical contact with either the man or the woman.
- [44] In cross-examination, Mr. Vu said he did not remember seeing a far right merge lane on Boundary for traffic turning right onto Boundary off Marine Drive. Despite saying that the other vehicle travelled for one or two blocks before pulling over, he could not remember if they travelled through an intersection. Mr. Vu was unable to say who was driving the other vehicle. He said he did not see the other car cross the dividing line and, in fact, he did not see it at all before the impact.
- [45] Ms. Radacina entered into evidence the recording of her 911 telephone call. During the call, she can be heard describing the conduct of Mr. Vu. Some of what she describes is consistent with what she said in her evidence at trial. Prior consistent statements of this nature are not normally admissible: *Regina v. Campbell* (1977), 17 O.R. (2d) 673 at 685 (C.A.). An exception to the exclusionary rule exists where the evidence is led to rebut an allegation of recent fabrication: *Fox v. General Medical Council*, [1960] 3 All E.R. 225 at 230 (P.C.). The recording was admitted for this limited purpose. I do not intend to dwell on the recording other than to note that it reflects a relatively highly charged and emotional incident.

Injuries Sustained in Accident #2

- [46] Ms. Radacina says that, essentially, all of the injuries sustained in Accident #1 were exacerbated by Accident #2. She said that she immediately felt pain in the right side of her neck, like it was on fire. Her head felt like she had been "stabbed with an ice pick". Her whole right side felt "weird" and the pain radiated down her back to her hip and through her glute. Her right arm was tingling and trembling. That night, she was in so much pain she could not sleep.

Post-Accident #2

- [47] Ms. Radacina testified that following Accident #2, her headaches "hugely intensified" and she regularly experienced stabbing pain in her skull which made her nausea worse. She had trouble with basic activities like washing dishes because she could not move her right arm away from her body. She described her right arm as "completely useless to me".

- [48] Her neck pain was "crazy exacerbated", "relentless" and "unbearable" and radiated down her entire right side. Her upper back was "incredibly" painful as was her shoulder and right arm. The tremor in her right arm "went crazy" after Accident #2. Her right lower body also felt "super horrible" as the pain radiated down through her back and into her groin, hip, thigh and knee. She felt numbness and tingling in her toes and had trouble walking.
- [49] According to Ms. Radacina, her mental state disintegrated after Accident #2. She felt "completely defeated" and unable to cope.
- [50] Ms. Radacina said she did experience some improvement as a result of her treatment by a pain specialist, Dr. Pamela Squire. For example, Dr. Squire gave her Botox injections that helped with her headaches. Dr. Squire also administered other injection therapies that helped to manage Ms. Radacina's soft tissue pain. According to Ms. Radacina, Dr. Squire has also helped to educate her about her pain and the role her brain plays and she is getting better at managing the pain.
- [51] Ms. Radacina suffered other injuries in the period after Accident #2 that were not directly related to the accidents, but which she attributes to their lingering effects. For example, she broke her left thumb while lifting a hinged cabinet lid on a boat. She said she was using her left hand because she was unable to use her right arm due to the pain. She also spilled boiling water on herself. Again, she said she was trying to pour the water with her left hand due to the problems with her right arm.
- [52] In May 2016, Ms. Radacina fractured her nose when she struck the left side of her face while bungee jumping.
- [53] In 2016, Ms. Radacina had a recurrence of pelvic pain and in March of that year she underwent an oophorectomy from which she had a difficult recovery.
- [54] Ms. Radacina described the impact of her injuries as devastating in all aspects of her life, including her relationships, social and recreational activities and employment.
- [55] With respect to her relationships, Ms. Radacina and Ms. Goss broke up in late 2015 and Ms. Radacina moved out of their shared apartment. Ms. Radacina attributes the deterioration of the relationship to the physical and psychological impacts of her injuries. She said that Ms. Goss took on the majority of household tasks and was paying most of the rent, along with caring for Ms. Radacina. According to Ms. Radacina, she had "nothing to offer" Ms. Goss in return. Ms. Radacina said she also lost most of her other friends because she rarely left her house and was always depressed.

- [56] In 2016, she met Katrina Roylance at the gym where Ms. Radacina was supervising her client. They developed a relationship that continued until 2018 and then resumed again in 2019. While Ms. Roylance lives with her family, she regularly stays at Ms. Radacina's apartment where she does most of the household tasks. Even though Ms. Roylance does not live with Ms. Radacina full-time, she pays for much of the rent, groceries and other expenses.
- [57] Both Ms. Radacina and her parents described the challenges they have faced in their relationship. Her parents have continued to support her financially as well as by helping around her home and running errands for her. Both parents continue to be worried about Ms. Radacina and what the future holds for her.
- [58] In terms of activities, Ms. Radacina testified that she is unable to do many of the things that she could before the accidents, such as roller blading, throwing a ball around with friends, climbing trees and other physical activities. She had always been an avid swimmer but she does that much less frequently now. She struggles with household tasks. At one point her apartment became what she described as a "hoarder's paradise".
- [59] With respect to her employment, Ms. Radacina continued to work with her client after Accident #2, although she said the work was more challenging for her. For example, she was not able to assist him in the same way at the gym. She found herself losing patience with him more frequently. She said that she often had to miss work which created problems for her client's family. She ultimately left that job after her oophorectomy in March 2016.
- [60] She resumed working as a server in 2015, at an establishment called the Buck and Ear. Ms. Radacina testified that she found the work very difficult given her pain and physical limitations. She continued with this work until December 2016 when she said she could no longer handle it. She tried to return to serving briefly in 2017, but it did not work.
- [61] Ms. Radacina testified that she had an opportunity to work with a friend who was starting a business which, although her evidence was vague, seemed to involve presenting displays at conventions. Ms. Radacina said she attended a couple of conventions but then told her friend that she was unable to continue. She has had no meaningful or sustained employment since 2016.
- [62] In the years after Accident #2, Ms. Radacina reported the following income on her income tax returns:
- a) 2015: \$13,942.43 comprising \$6,095.59 as a server and \$7,846.84 as a support worker (net amount on \$15,172.50 gross revenue);
 - b) 2016: \$10,329.76 comprising \$5,211.20 as a server and \$5,118.56 as a support worker (net amount on \$10,175.00 gross revenue);
 - c) 2017: \$1,463.00; and

d) 2018: \$2,000.00.

Expert Evidence

[63] A number of expert witnesses testified, including:

- a) Dr. Jason Leung, Ms. Radacina's treating general practitioner;
- b) Dr. Pamela Squire, an expert in pain medicine who has treated Ms. Radacina since June 2017;
- c) Dr. Soma Ganesan, a psychiatrist who assessed Ms. Radacina at the request of her counsel;
- d) Sharon Singh, a kinesiologist who conducted a functional capacity evaluation of Ms. Radacina on May 9, 2017, at the request of her counsel;
- e) Stephanie Kaczmarek, an occupational therapist who prepared a cost of future care report;
- f) Dr. Barry Vaisler, an orthopaedic specialist who examined Ms. Radacina at the request of the defendants' counsel;
- g) Dr. William Craig, an expert in physical medicine and rehabilitation (physiatrist) who examined Ms. Radacina at the request of the defendants' counsel;
- h) Dr. Robert Tarzwell, a psychiatrist who assessed Ms. Radacina at the request of the defendants' counsel; and,
- i) Raph Kowalik, a kinesiologist who conducted a functional capacity evaluation of Ms. Radacina at the request of the defendants' counsel.

[64] I will not review the expert evidence in detail, but will summarize the key points and then will discuss the evidence in greater depth as needed when making findings of fact about Ms. Radacina's condition and when assessing her claims for damages.

[65] The medical evidence is relatively uniform that in Accident #1, Ms. Radacina suffered soft tissue injuries to her neck, shoulder, mid and low back, largely centered on the right side of her body, and that those injuries were exacerbated by Accident #2.

[66] Those are the principal injuries noted by Dr. Leung, her long time family doctor. In his report dated December 27, 2016, Dr. Leung suggested that Ms. Radacina's prognosis for full recovery was guarded given the length of time that she has continued to experience symptoms. Subsequent to the date of his report, Dr. Leung continued to see Ms. Radacina through until the end of 2018. He reported minimal change to her symptoms in that period.

[67] Drs. Vaisler and Craig both examined Ms. Radacina at the request of the defendants' counsel. Dr. Vaisler, who is an orthopaedic surgeon, examined Ms. Radacina on April 11, 2017. He prepared a report dated April 25, 2017, in which he opined that Ms. Radacina probably sustained a soft tissue injury to her neck and low back and developed right shoulder pain as a result of Accident #1. He states that she probably sustained a repeat soft

tissue injury to her neck and low back as a result of Accident #2. Dr. Vaisler noted that Ms. Radacina's complaints of pain were out of proportion to her physical injuries which suggested non-anatomic causes, however he acknowledged that he is not an expert in chronic pain.

- [68] Dr. Vaisler prepared a brief, second report dated June 5, 2017, which I declined to admit into evidence because Dr. Vaisler purported to comment on the credibility of Ms. Radacina's complaints. Such an opinion is beyond the proper scope of expert evidence.
- [69] Dr. Craig, a physiatrist, examined Ms. Radacina on May 25, 2017, and prepared a report dated May 29, 2017. His opinion is that Ms. Radacina likely suffered a mild soft tissue injury to her neck and right shoulder girdle as a result of Accident #1, which exacerbated a pre-existing neck condition. His "impression" is that she likely recovered quickly from those injuries but started reporting increased generalized body pain after she fractured her thumb. In his view, she similarly suffered a soft tissue injury to her neck and low back as a result of Accident #2.
- [70] Dr. Craig described the two accidents likely contributing to her ongoing complaints, but not in a major way. Rather, in his opinion, "much of her present presentation likely relates to drug-seeking behaviours, mood issues, and pre-existing pain conditions."
- [71] I found the most thorough and helpful medical evidence to be that of Dr. Squire, the pain medicine expert. Dr. Squire initially assessed Ms. Radacina on April 5, 2017, at her lawyer's request, however Dr. Squire then took Ms. Radacina on as a patient and has treated her since June of 2017.
- [72] Dr. Squire prepared a report dated May 15, 2017, following her initial assessment of Ms. Radacina. She subsequently prepared two additional reports dated November 24, 2018 and November 10, 2019.
- [73] In her first report, Dr. Squire diagnosed Ms. Radacina as suffering from chronic neck, upper back and shoulder pain, which appeared to be related to a "combination of myofascial pain and central sensitization." Dr. Squire also suggested that Ms. Radacina's right neck, shoulder and arm pain was consistent with a diagnosis of right neurogenic thoracic outlet syndrome. Dr. Squire noted other complaints identified by Ms. Radacina including headaches, right hand tremor, chronic pelvic pain and a major depressive disorder.
- [74] In terms of causation, Dr. Squire opined:

Ms. Radacina had a previous history of left-sided neck pain from May 2011 until approximately October 2, 2012. It appeared to be precipitated by [her] working as a server in the restaurant. This likely represents myofascial pain. She appeared to have 6 months of pain resolution prior to experiencing a recurrence of her left-sided neck pain and developing new right-sided neck pain directly after the first motor vehicle accident. Her neck pain was aggravated by the second motor vehicle accident. I would consider that but for the first motor vehicle accident and exacerbated by the second motor vehicle accident, she would not have experienced recurrent neck, upper

back and shoulder pain. The degree of pain in these areas appeared to be aggravated by her work as a server however she was able to return to work full time from July 2015 until March 11, 2016 when she developed an exacerbation of her pelvic pain that prevented her from returning to work until December 2016.

[75] In her second report dated November 24, 2018, Dr. Squire noted that over the previous year, Ms. Radacina had experienced either a significant improvement or a resolution of neurological symptoms in her right arm and leg, reduced range of motion in her right shoulder and neck and her central sensitization affecting her right neck, shoulder, hip and leg. Dr. Squire also noted improvement, but some ongoing problems, with Ms. Radacina's cervicogenic headaches, chronic neck and upper back pain, right hip pain, low back pain, insomnia and fatigue, nausea and right arm tremor.

[76] Dr. Squire stated:

I agree with Dr. Craig that Ms. Radacina does experience pain exacerbation and has poor coping skills as a result of her mood disorders, tendency to catastrophize, lack of pain education, prior pain experience and a difficult childhood. Consider that her continued difficulties are likely related to some of these conditions.

There are multiple factors contributing to her multiple complaints but the fact that she has had a good resolution of many of the symptoms with physical treatments suggests that many of her painful conditions were in fact caused by treatable mechanical conditions.

[77] Further:

I reviewed the chart notes again and agree with Dr. Craig's assertion that it was more likely than not that her neck, right shoulder pain and headaches were initiated by the April 2, 2013 MVA but settled down and became intermittent until the thumb fracture as directly after that there is a flurry of visits and need for opioid medication. I also agree with Dr. Craig (and stated this in my previous letter) that her flare of pelvic pain also contributed to her ongoing disability.

[78] As of Dr. Squire's most recent report dated November 10, 2019, Ms. Radacina continued to report chronic pain in her neck, upper back, lower back and right hip as well as persistent headaches, fatigue and nausea. Dr. Squire noted that "a large component of pain is related to her emotional distress (anxiety and depression) and is tied in with her negative mindset around pain".

[79] In her testimony, Dr. Squire described Ms. Radacina as one of the most complex patients she has dealt with in that there are both physical and psychological components to her pain. Physically, she suffers from myofascial pain and psychologically, she processes pain in an abnormal manner. That said, Dr. Squire noted that Ms. Radacina's physical injuries have largely recovered and that her ongoing problems are largely due to her psychological issues, some of which pre-dated the accidents.

- [80] As noted, Ms. Radacina was assessed by two psychiatrists, Dr. Ganesan and Dr. Tarzwell. Dr. Ganesan saw Ms. Radacina on March 31, 2017, at the request of her counsel and prepared an expert report dated April 20, 2017. Dr. Tarzwell saw Ms. Radacina on April 10, 2017, at the request of defence counsel and prepared a report dated April 20, 2017.
- [81] It was Dr. Ganesan's opinion that Ms. Radacina suffers from Post-Traumatic Stress Disorder ("PTSD") as a result of the trauma she experienced in Accident #1 that then became more intense after Accident #2. The emotional trauma from Accident #2 resulted from both the accident itself and the behaviour of the other driver. In his view, she also has symptoms of Major Depressive Disorder along with "overwhelming" symptoms of anxiety. He recommends treatment by way of cognitive behavioural therapy and appropriate medication. Dr. Ganesan also noted that effective management of Ms. Radacina's pain will assist in reducing her emotional distress.
- [82] Dr. Tarzwell agreed that Ms. Radacina suffers from PTSD. With respect to her physical injuries, he acknowledged that she likely suffered soft tissue injuries to her neck, shoulders and back as a result of the two accidents. However, he was of the view that her ongoing complaints had minimal connection to the accidents. Specifically, he stated:

I find it much more likely that Ms. Radacina's neck and back pains at present relate to a mix of opioid-induced hyperalgesia, as likely proven by the presence of Narcotic Bowel Syndrome, chronic muscle strain from her work as a server, and central sensitization, with a very high score on the Central Sensitization Inventory, than to the lingering effects of the accident.

- [83] He went on to say:

It seems to me most likely that, even in the complete absence of the accidents, Ms. Radacina would at present be suffering from chronic neck and back pain of an essentially similar character to that which she suffers now.

- [84] Ms. Radacina was also seen by two occupational therapists for the purpose of functional capacity evaluations ("FCE"). At the request of Ms. Radacina's counsel, Ms. Singh assessed her on May 9, 2017, and prepared a report dated May 18, 2017, as well as a rebuttal report dated December 21, 2018. Ms. Radacina then saw Mr. Kowalik on October 10, 2018. For reasons I will describe below, Mr. Kowalik did not complete an FCE of Ms. Radacina, however he did prepare two reports dated November 15, 2018 and January 29, 2019.
- [85] Ms. Singh's assessment of Ms. Radacina involved an initial interview followed by a battery of physical tests that are intended to determine the extent of any physical limitations that may impact her functioning, principally with respect to her employment. Ms. Singh's testing revealed that Ms. Radacina demonstrated some limitations in a number of functions including, stationary sitting, stationary standing, forward and overhead reaching, and grip strength. Ms. Singh opined that given these limitations, Ms. Radacina does not meet all of the job requirements as a manager/server or as an applied behaviour therapist.

- [86] In his January 29, 2019 report, Mr. Kowalik indicated that he was unable to objectively identify any physical limitations due to Ms. Radacina's conduct during the assessment. He described her as "providing a variable level of physical effort" and said she displayed inconsistent behaviour throughout the assessment. In his testimony, Mr. Kowalik described Ms. Radacina as difficult, uncooperative and disruptive to the whole office. He described his attempted assessment of Ms. Radacina as the most challenging of his career, given her behaviour. Based on the testing that he was able to complete, his opinion was that she "appears to consider herself more disabled" than what was observed during the assessment and that she is "capable of higher function and strength level" than she reports. He offered this opinion notwithstanding his acknowledgement that he did not complete a full assessment of Ms. Radacina.
- [87] Lastly, Ms. Radacina relies on a cost of future care report dated May 18, 2017 by Ms. Kaczmarek, who is an occupational therapist. She assessed Ms. Radacina at her home with a view to determining any functional limitations and making recommendations about future care requirements or accommodations. Ms. Kaczmarek also provides cost estimates for those requirements as well as for future care recommendations made by the medical specialists. I will discuss her evidence in more detail when considering the cost of future care claim.

Credibility and Reliability

- [88] This is a case, not unlike many that are litigated in this Court, in which the alleged impacts of a car accident (or accidents) are significantly out of proportion to the seriousness of the accident and the injuries sustained. This invariably leads to the defendant challenging both the credibility of the plaintiff's complaints and the existence of a causal link between the accident and those complaints.
- [89] In this case, both accidents were relatively minor in terms of the damage sustained by the vehicles involved. There was only vague evidence about any damage to Ms. Radacina's car and both defendants testified that the damage to their vehicles was minimal.
- [90] The case law prohibits making assumptions about a person's injuries based solely on the force of impact or degree of vehicle damage in an accident: *Greenway-Brown v. MacKenzie*, 2019 BCCA 137 at paras. 26-27, 30; *Gordon v. Palmer* (1993), 78 B.C.L.R. (2d) 236 at para. 4 (S.C.). However, the disconnect here between the severity of the accidents and Ms. Radacina's ongoing complaints is relevant to the issue of credibility and requires that her complaints be carefully scrutinized: *Hoy v. Harvey*, 2012 BCSC 1076 at paras. 45-46; *Yeh v. Ford Credit Canada Ltd.* (1996), 25 B.C.L.R. (3d) 318 at para. 7 (S.C.).

- [91] In this regard, the defendants challenge Ms. Radacina's credibility. They submit that throughout her testimony she revealed herself to be a vague and unreliable historian, something noted by many of the medical practitioners who assessed her. Further, the defendants submit that Ms. Radacina consistently understated her past medical problems and overstated her ongoing problems and related limitations. They say that her evidence must be approached with considerable caution.
- [92] Numerous authorities have discussed the principles governing the assessment of credibility: see in particular *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 356-357 (B.C.C.A.); *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-87, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392. In *Bradshaw*, Madam Justice Dillon held that conflicting testimony should be assessed in light of the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Q.B.)).
- [93] In addition to the approach advanced by Justice Dillon in *Bradshaw*, Justice Abrioux, as he then was, in *Karim v. Li*, 2015 BCSC 498 at para. 89, identified a number of principles that may inform the court's approach in cases in which there is an absence of objective medical findings or where those findings are out of proportion to the symptoms claimed:
- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
 - every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
 - where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
 - it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
 - in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

[94] It is important to distinguish between credibility and reliability, which are different concepts. Credibility refers to the veracity of a witness's testimony whereas reliability is concerned with the accuracy of the testimony: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526 (C.A.).

[95] The distinction is well summarized by the Ontario Court of Appeal in *R. v. H.C.*, 2009 ONCA 56 at para. 41:

Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately

i. observe;

ii. recall; and

iii. recount

events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).

[96] Credibility and reliability are not all or nothing propositions. A trier of fact may believe all, part or none of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 at para. 44 (Ont. C.A.).

[97] Much of the defendants' attack on Ms. Radacina's credibility is based upon discrepancies in her testimony and entries that appeared in the clinical records of her family doctor, Dr. Leung. However, in my view, caution must be exercised when using clinical records for this purpose.

[98] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, Justice Smith provided a thorough review of the principles governing the use of clinical records at trial and their limited evidentiary value. Specifically, he observed:

- a) Limited weight should be placed on minor inconsistencies in statements recorded in clinical records and attributed to the plaintiff given that such records are not intended to be a verbatim record of everything said during the visit (at para. 32);
- b) Because the clinical record contains only a brief summary or often a paraphrase of what was discussed, there is no record of anything else that might have been said that might explain or expand upon a particular entry. Moreover, it is usually the case that neither the plaintiff nor the doctor has any independent recollection of the visit and what was discussed (at para. 34);

- c) Inconsistencies are almost inevitable because few people will describe their condition in exactly the same way on multiple occasions (at para. 35);
- d) The absence of a reference to a particular symptom in a clinical record is not evidence of anything, including the existence or non-existence of that symptom. It simply indicates that the symptom was not the focus of discussion on that occasion (at para. 36); and
- e) Similarly, the complete absence of a clinical record is also, generally, not evidence of anything. A plaintiff whose condition has neither deteriorated or improved is not obliged to constantly check in with their physician, particularly if there is no reason to believe that the physician will have anything new to offer (at para. 37).

[99] This is not to say that clinical records are never of any value. As Justice Smith notes in Edmondson at para. 37, there may be cases in which a plaintiff's description of his or her injuries is inconsistent with a failure to seek treatment, thus permitting the court to draw adverse conclusions about the plaintiff's credibility. However, a forensic dissection of the clinical records to identify apparent inconsistencies between those records and a plaintiff's testimony at trial will, in most cases, be of minimal assistance to the court.

[100] I do agree with the defendants that there are numerous inconsistencies or discrepancies between Ms. Radacina's testimony at trial and entries in Dr. Leung's clinical records. Many of these inconsistencies are not terribly surprising for the reasons outlined by Justice Smith in Edmondson, although I also agree with the defendants that the clinical notes, and the medical evidence generally, suggest that Ms. Radacina's injuries and related symptoms are not as severe as she portrayed them at trial.

[101] More troubling is the fact that Ms. Radacina sought to characterize many of the entries that did not align with her testimony as errors on the part of Dr. Leung. This response was not limited to Dr. Leung's records. Throughout her cross-examination, she was often defensive and argumentative when presented with information or views that appeared to differ from her own beliefs about her injuries and ongoing symptoms. She presented as someone highly invested in her condition and unyielding in her belief about the nature and extent of her injuries and their impact upon her.

[102] This gives rise to concerns about aspects of Ms. Radacina's testimony that are not based so much on credibility issues but rather on reliability. Specifically, her single-minded focus on her condition interferes with her ability to objectively and accurately "observe, recall and recount" events in issue (H.C. at para. 41). In other words, her understanding and interpretation of various facts and events is often coloured by her subjective belief about her condition. I also found Ms. Radacina to be a vague and somewhat unreliable historian, a fact again noted by various medical practitioners. For these reasons, I agree with the defendants that her evidence must be approached with caution.

- [103] I would add that an additional challenge with Ms. Radacina's evidence is that her testimony was spread over a number of days and was interrupted several times by other witnesses. That was due in part to scheduling issues as well as issues concerning Ms. Radacina's health. The result was that Ms. Radacina's evidence was disjointed and often difficult to follow.
- [104] While counsel are free to run their cases as they see fit and logistical issues sometimes require that accommodations be made, I endorse the comments made in cases like *Firman v. Asadi*, 2019 BCSC 270 at paras. 261-263, 266-268, and *Gustafson v. Davis*, 2012 BCSC 1576 at paras. 112-116, about the importance of having the plaintiff in a personal injury action testify first.

Liability

Accident #1

- [105] Both parties cite sections of the Motor Vehicle Act, R.S.B.C. 1996, c. 318. In addition to the general duty to drive with due care and attention found in s. 144(1)(a), Ms. Radacina relies on s. 151:

A driver who is driving a vehicle on a laned roadway

- (a) must not drive it from one lane to another when a broken line only exists between the lanes, unless the driver has ascertained that movement can be made with safety and will in no way affect the travel of another vehicle,
- (c) must not drive it from one lane to another without first signalling his or her intention to do so by hand and arm or approved mechanical device in the manner prescribed by sections 171 and 172,

- [106] The defendants cite s. 175:

- (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,
 - (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
 - (b) having yielded, the driver may proceed with caution.
- (2) If a vehicle is entering a through highway in compliance with subsection (1), traffic approaching the intersection on the highway must yield the right of way to the entering vehicle while it is proceeding into or across the highway.

- [107] Section 175 has minimal application given Mr. Aquino's evidence that the accident occurred past the intersection of Steveston Highway and Mortfield Gate, the side street from which Ms. Radacina entered onto Steveston Highway. It is apparent from Mr. Aquino's evidence that Ms. Radacina was fully in the right hand lane on Steveston Highway when his vehicle struck the rear portion of her vehicle. The fact that Ms. Radacina was ahead of Mr. Aquino, and again fully in the right hand lane, indicates that she was there to be seen.
- [108] In my view, the evidence establishes that Mr. Aquino changed lanes when it was unsafe to do so and, as a result, he struck Ms. Radacina's vehicle. I find that Mr. Aquino was 100% liable for Accident #1.

Accident #2

- [109] As set out above, each of Ms. Radacina, Mr. Radacina and Ms. Goss gave relatively similar evidence about Accident #2. All testified that the other vehicle was being driven erratically before arriving at the intersection of Marine Drive and Boundary and all described Mr. Vu's vehicle moving into their lane when the light turned green and striking Ms. Radacina's vehicle.
- [110] Mr. Vu described the accident differently. He said that he remained in his lane while commencing his turn onto Boundary from Marine Drive and that the other vehicle struck him.
- [111] Mr. Vu was not a good witness. He was vague about many details, for example how far up Boundary Road the two vehicles allegedly travelled after they came into contact and whether there was a third lane on Boundary for vehicles merging from the west bound lanes on Marine Drive. He speculated that the other vehicle must have crossed into his lane, but he did not see it do so. He also denied being angry or aggressive with Ms. Radacina and her father, despite getting rather agitated in the witness stand when describing the events.
- [112] Determining fault for Accident #2 is not simply a numbers game, i.e. three witnesses pointing at Mr. Vu and only one alleging fault on the part of Ms. Radacina. Consideration must be given to the weight to be attached to each person's evidence.
- [113] For the reasons set out above, I put little weight on Mr. Vu's evidence. I have also expressed concern about the reliability of Ms. Radacina's evidence. However, I found both Mr. Radacina and Ms. Goss to be credible witnesses. Both testified in a straight forward manner and neither appeared to tailor their evidence to support Ms. Radacina. Further, unlike Mr. Vu, their evidence was not seriously challenged on cross-examination.
- [114] I accept the evidence of Mr. Radacina and Ms. Goss that Mr. Vu's vehicle crossed over the dividing line and struck Ms. Radacina's vehicle. I therefore find that Mr. Vu is 100% liable for Accident #2.

[115] I would add that I am satisfied on the evidence that there was a confrontation between Ms. Radacina and Mr. Vu following Accident #2. As noted above at para. 45, it was clearly a highly charged incident.

Findings of Fact on Causation and the Plaintiff's Condition

[116] As discussed above, the medical evidence is relatively uniform that in Accident #1, Ms. Radacina suffered soft tissue injuries to her neck, right shoulder and back that were subsequently exacerbated by Accident #2. At trial, she continued to complain of pain resulting from these injuries, as well as right hip pain, daily headaches which are intermittently severe, recurrent numbness in her right arm, insomnia, chronic fatigue, chronic nausea and anxiety and depression.

[117] The central issue in dispute between the parties is whether the injuries sustained in the accidents caused Ms. Radacina's myriad of ongoing problems which she claims have rendered her virtually entirely disabled. Ms. Radacina says yes, whereas the defendants take the position that her ongoing complaints are a manifestation of long-standing, pre-existing physical and psychological conditions.

[118] The burden is on Ms. Radacina to prove on a balance of probabilities that the defendants' negligence caused or contributed to her injuries. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14, 16-20.

[119] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the losses claimed? The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the plaintiff's injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23; *Clements v. Clements*, 2012 SCC 32 at para. 8.

[120] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C.J.C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

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

[121] As is also noted in *Clements* at para. 9, the "but for" test must be applied in a robust common sense fashion. For a recent helpful and concise summary of the causation principles, see *Wiseman v. Wang*, 2019 BCSC 1320 at paras. 278-298.

[122] In *Blackwater*, McLachlin C.J.C. held that a plaintiff's "original position" is relevant to the assessment of damages once causation has been determined. Where a pre-existing condition exists, the case law has often distinguished between a "thin skull" plaintiff and a "crumbling skull" plaintiff. The difference between the two approaches is described in *Athey* at paras. 34-35:

34 The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

35 The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

[123] Here, Ms. Radacina argues that she meets the definition of a thin skull plaintiff in that her principal post accident complaints are different from and unrelated to her past medical issues. She submits that even if she was more susceptible to experiencing pain which resulted in unexpectedly severe symptoms, it was nonetheless the injuries sustained in the accidents that caused her ongoing pain.

[124] The defendants submit that Ms. Radacina is a classic crumbling skull plaintiff. They submit that she suffered from pre-existing chronic pain and central sensitization that would have caused her to experience debilitating pain even if the accidents had not occurred. They emphasize the point made in *Athey* (at para. 35) that a defendant need not put a plaintiff in a position better than her original position.

[125] In *Wiseman* at paras. 295-298, Justice Davies noted that characterizing a plaintiff as thin skull or crumbling skull is rarely determinative. He cited the Court of Appeal decision in *Gordon v. Ahn*, 2017 BCCA 221 at paras. 33, 35-36, where the court ordered a new trial in circumstances in which the trial judge had awarded limited damages based on his finding that the plaintiff fell within the crumbling skull category. In *Gordon*, Justice Groberman said at para. 33:

The use of the phrase "crumbling skull" to describe a plaintiff's condition is, in any event, rarely helpful. As Major J. explained in *Athey*, there are no special rules or analyses that apply to claims made by plaintiffs who, before becoming victims of a tort, are affected by conditions that may deteriorate in the future. Damages are always to be assessed by reference to the situation that the plaintiff would be in but for the wrongdoing. Describing a plaintiff as coming within the "crumbling skull doctrine" does not eliminate the need for a complete analysis of the pain and suffering caused by the accident.

[126] According to Justice Groberman, a proper analysis requires a detailed consideration of the plaintiff's pre and post accident condition as well as an assessment of the likelihood that she would have suffered similar losses even in the absence of the accident (at para. 36).

[127] It is clear on the evidence that Ms. Radacina had a significant medical history pre-dating Accident #1. That history includes recurrent pelvic pain beginning when she was about 14 years old, which occasionally required surgery to address, chronic pain following a previous motor vehicle accident when she was 16 years old, extensive use of opioids, and periods of anxiety and depression.

[128] As noted above, it is the defendants' position that Ms. Radacina recovered from the relatively minor soft tissue injuries sustained in the two accidents and that any ongoing problems are caused by her pre-existing conditions. They rely heavily on the opinions of Dr. Craig (paras. 69-70, above) and Dr. Tarzwell (paras. 82-83, above) that Ms. Radacina would suffer from chronic pain even absent the accidents.

[129] Certain of the opinions offered by Dr. Craig and Dr. Tarzwell were based in part on facts not established at trial or that were inconsistent with the evidence adduced at trial. For example, Dr. Craig put considerable emphasis on historical problems experienced by Ms. Radacina, many in her teenage years, but he failed to critically examine her condition in the months leading up to Accident #1. Dr. Tarzwell, in his assessment of Ms. Radacina's psychological issues, noted significant childhood adversity as a contributing factor to her ongoing depression and anxiety, yet the facts of any such adversity were not canvassed with Ms. Radacina and not established.

[130] Both Dr. Craig and Dr. Tarzwell focussed on Ms. Radacina's history of opioid use as another significant factor. Dr. Craig opined that Ms. Radacina's ongoing problems related in part to her "drug-seeking behaviours" and Dr. Tarzwell diagnoses her as suffering from an opioid use disorder. Again however, I found Dr. Squire's assessment and analysis more thorough and more accurate. While not dismissing Ms. Radacina's opioid use, she characterized Ms.

Radacina as a "chemical coper" rather than someone with an opioid addiction. According to Dr. Squire, a chemical coper is someone who is particularly susceptible to pain and who turns to medications when other coping mechanisms are not effective. I would add that Dr. Leung, Ms. Radacina's family doctor who prescribed many of the opioid medications, was alive to the concern about possible over use but he did not consider her to have an opioid addiction.

[131] Dr. Squire agrees with various aspects of Dr. Craig's opinion, as well as that of Dr. Vaisler (she does not comment on Dr. Tarzwell's report). However, for the reasons set out above, where Dr. Squire diverges from the opinions of the defendants' experts, I prefer the evidence of Dr. Squire who has treated Ms. Radacina since 2017 and who has a more developed understanding of Ms. Radacina's condition. While concerns are occasionally raised about the objectivity of treating physicians given that one of their roles is to advocate for their patients (see Edmondson at para. 80; Sangha v. Inverter Technologies Ltd., 2019 BCSC 466 at paras. 21-22; but see Greenway-Brown at para. 35), that was not the case with Dr. Squire. Dr. Squire was thorough in her assessment of Ms. Radacina and objective in her assessment of Ms. Radacina's condition, including the challenges she encountered in treating Ms. Radacina.

[132] In particular, I accept Dr. Squire's opinion that the soft tissue injuries sustained by Ms. Radacina in the two accidents were a trigger for her ongoing pain. This is sufficient to establish causation in accordance with the test in Blackwater which requires a plaintiff to establish that a defendant's tortious conduct is a cause of her damage, even if not the sole cause.

[133] That is only part of the equation however. The next question to be asked is what position Ms. Radacina would have been in had the accidents not occurred: Gordon at para. 36; Athey at para. 35.

[134] On this issue, as set out above (para. 70), Dr. Craig opined that while the accidents are a minor contributing factor to her ongoing symptoms, most of her problems are related to other, pre-existing conditions. Dr. Squire did not disagree with Dr. Craig on this point. Rather, she stated in her second report (see para. 76, above):

I agree with Dr. Craig that Ms. Radacina does experience pain exacerbation and has poor coping skills as a result of her mood disorders, tendency to catastrophize, lack of pain education, prior pain experience and a difficult childhood. Consider that her continued difficulties are likely related to some of these conditions.

[135] She also notes later in the same report that Ms. Radacina's inability to engage in certain activities is "partially as a result of" the accidents (emphasis added).

- [136] Neither Dr. Craig nor Dr. Squire go so far as to say that Ms. Radacina would be suffering some or all of the same symptoms had the accidents not occurred. However, a fair inference to be drawn from the evidence is that Ms. Radacina would indeed have experienced some degree of ongoing pain regardless of the accidents. Of particular note:
- a) Dr. Craig, Dr. Squire and Dr. Tarzwell all found that Ms. Radacina experienced central sensitization that pre-dated Accident #1 which caused her to experience pain from the accident-caused injuries out of proportion to the relatively minor nature of the injuries;
 - b) As described by Dr. Squire in her second report (see para. 77, above), Ms. Radacina experienced significant increases in her pain as a result of a thumb fracture and a flare up of her pelvic pain. These instances illustrate how susceptible Ms. Radacina is to pain resulting from non-tortious, non-accident related events; and
 - c) This is consistent with Dr. Squire's testimony at trial where she confirmed that the accidents were another trigger for her ongoing pain, on top of her various pre-existing conditions.
- [137] In the circumstances, I am satisfied that there "is a measurable risk that the pre-existing condition would have detrimentally affected [Ms. Radacina] in the future" (Athey at para. 35) such that the measure of damages must be adjusted so as not to place her in a better position than she would have been in but for the accidents.
- [138] Ms. Radacina seeks to draw a distinction between the pain she experienced before Accident #1, which was predominantly in her left shoulder and her pelvic region, from the right side pain she has suffered after the accidents. She submits that there is no relationship between the different types of pain and, as such, no basis for suggesting that the previous pain is a contributing factor to her ongoing condition.
- [139] I do not accept this submission. None of the medical experts draw such a distinction, rather they note that Ms. Radacina's complex pain and psychological history are contributing factors to her ongoing pain generally. Further, the focus of the analysis is the nature of the damage or loss experienced by the plaintiff relating to her pre-existing condition(s) and whether that would have detrimentally affected her in the future. In this case, the evidence does not support a distinction that focusses on a specific injury.
- [140] The defendants cite a number of authorities in which damages were reduced to reflect the likelihood that a pre-existing condition would have manifested in any event, including: Ghani v. Umran, 2008 BCSC 585 (25% reduction); Randhawa v. Hwang, 2008 BCSC 435 (40% reduction); and Sanders v. Janze, 2009 BCSC 1059 (40% reduction). They submit that a more significant reduction is warranted in this case.
- [141] That position ignores the fact that in addition to her ongoing pain, Ms. Radacina has been diagnosed by both Dr. Tarzwell and Dr. Ganesan as suffering from PTSD resulting from Accident #2, and that this psychological condition is a contributing factor to her condition.

[142] Taking all of the evidence into account, I find that Ms. Radacina's damages should be adjusted or discounted by 40% to reflect the likelihood that her pre-existing conditions would have detrimentally affected her in the future regardless of the defendants' negligence.

Damages

[143] I will first assess Ms. Radacina's damages without reference to the 40% adjustment referred to above.

Non-Pecuniary Damages

[144] The factors that the court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, most notably by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.

[145] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by that specific plaintiff. Moreover, the compensation award must be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[146] Ms. Radacina seeks an award of non-pecuniary damages in the amount of \$240,000. She cites the following cases in support of her position:

- a) *Gill v. Apeldoorn*, 2019 BCSC 798 - the 49 year old plaintiff suffered from myofascial pain, major headaches and depression. He had transformed from a happy, social and engaged person prior to the accident to a "lonely, frustrated, and frightened individual." The court awarded \$200,000;
- b) *Anssari v. Alborzpour*, 2019 BCSC 512 - while the plaintiff suffered relatively minor physical injuries, she experienced depression, anxiety and PTSD that had a devastating impact on her life. She was awarded \$175,000;
- c) *Kim v. Lin*, 2016 BCSC 2405 - as a result of the accident, the plaintiff suffered from low back pain, fibromyalgia, chronic pain syndrome, major depression and concussion. The plaintiff was awarded \$175,000; and
- d) *Hans v. Volvo Trucks North America Inc.*, 2016 BCSC 1155 - one plaintiff suffered devastating psychological injuries following the accident that transformed his life, causing him to attempt suicide three times. He was awarded \$265,000.

[147] The defendants submit that an award of non-pecuniary damages in the range of \$70,000-100,000 is more appropriate. They cite the following cases:

- a) *Sangha v. Inverter Technologies Ltd.*, 2019 BCSC 466 - the plaintiff suffered soft tissue injuries to her back, neck and shoulder. She had a prior history of depression that was exacerbated by her injuries. She was awarded \$70,000 in non-pecuniary damages, which were reduced by 10% for a failure to mitigate;
- b) *LaRocque v. LaRocque*, 2019 BCSC 655 - the plaintiff suffered injuries to her cervical and thoracic spine, shoulder, arm, hand and wrist as well and psychological injuries and headaches. The court found that the accident aggravated pre-existing injuries and awarded \$90,000, reduced by 20% for a failure to mitigate;
- c) *Wiseman v Wang*, 2019 BCSC 1320 - the accident exacerbated the plaintiff's pre-existing chronic pain condition, however the court found that the period of exacerbation was relatively short and that even though she had a period of relatively good health before the accident, the pre-existing conditions would likely have manifested at some point in any event. The court awarded \$50,000; and
- d) *Matheos v. Scott*, 2019 BCSC 1738 - the plaintiff suffered soft tissue injuries that exacerbated pre-existing pain issues. She continued to experience problems at trial and her prognosis was said to be guarded. The court awarded \$80,000.

[148] Ms. Radacina's injuries have altered her life dramatically. Similar to the plaintiff in *Gill*, she has transformed from an active, happy, optimistic person into a sad and angry person who struggles to do many of the things that she could previously. Her father described the changes as "enormous".

[149] That said, I am not satisfied that the impacts of her injuries have been as constant, unrelenting and debilitating as Ms. Radacina claims. As submitted by the defendants, Dr. Leung's records note periods of improvement after both accidents. Dr. Squire in her second report dated November 24, 2018, again noted improvements in many of Ms. Radacina's conditions. Further, in 2015 and 2016, Ms. Radacina returned to work in both her serving and support person positions. In May 2016, she went bungee jumping which, as Dr. Vaisler testified, is an unusual activity for someone complaining of persistent neck, shoulder and back problems.

[150] Having considered the evidence, the submissions and authorities advanced by counsel, and the relevant factors as set out in cases like *Stapley*, I find that an appropriate award of non-pecuniary damages is \$200,000.00.

Loss of Past and Future Earning Capacity

[151] I will consider Ms. Radacina's claim for past and future loss of earnings together as both involve claims for loss of earning capacity.

[152] The Court of Appeal has discussed the principles governing claims for loss of earning capacity in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53, the court, citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge as follows:

in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach or the capital asset approach

[Emphasis in original.]

[153] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.); *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[154] The capital asset approach involves consideration of a number of factors such as whether the plaintiff:

- a) has been rendered less capable overall of earning income from all types of employment;
- b) is less marketable or attractive as a potential employee;
- c) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and
- d) is less valuable to him or herself as a person capable of earning income in a competitive labour market.

See: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); *Gilbert* at para. 233.

[155] Applying the capital asset approach, courts have often awarded the equivalent of one or more years of a plaintiff's salary as the measure of damages: see e.g. *Miller* at paras. 134-40; *Mackie v. Gruber*, 2010 BCCA 464 at paras. 14, 18-20.

[156] Ms. Radacina submits that she is unlikely to ever return to gainful employment. She notes Ms. Singh's FCE assessment that due to her limitations, Ms. Radacina does not meet all of the job requirements as a manager/server or as an applied behaviour therapist. I note that the weight I attach to Ms. Singh's opinion is undermined by the fact that her report contains minimal evaluation and discussion of what those requirements are. Further, there is no consideration of possible part time work or alternate types of employment.

[157] Dr. Squire also addressed the question of Ms. Radacina's return to work. In her second report, Dr. Squire said that she anticipated Ms. Radacina would be able to return to work as a child developmental worker where she could manage her environment and hours of work. Her ability to return to more physical work as a server was "guarded".

[158] In her third report, Dr. Squire was more pessimistic about Ms. Radacina's ability to return to work. She said:

At this point, statistically speaking, it is unlikely that Ms. Radacina will make a full recovery and return to work full time as a child development worker. She has not worked for the last 5 years, has moderate to severe anxiety and depression with little improvement despite access to medications and counselling, has a negative mindset and chronic pain. I would consider that the prognosis for recovery is guarded in light of this information. Her reliance on opioids, poor tolerance for medications in general and the effect of her mood disorders on her motivation, concentration, and energy level also make recovery unlikely.

It is possible that with successful treatment (and I would anticipate this would be a year after she starts a neuroplastic course) she could return to part-time work as a behavioural consultant but she has not been able to successfully achieve even volunteering on a part-time basis at this point and therefore I consider that the prognosis for partial recovery is also guarded.

I also consider her ability to return to work in any physically demanding job such as waitressing will be unlikely. Although she has had access to a variety of different musculoskeletal treatments and she reports a significant reduction in pain, this has never translated into any improvement in functionality. This suggests that although she experiences chronic pain, the mood disorders and fatigue are her primary impairing conditions.

[159] That said, in her testimony at trial, Dr. Squire agreed with Dr. Craig that functionally, Ms. Radacina is more capable than she believes herself to be.

[160] The defendants submit that Ms. Radacina had a "modest period of work disruption" following each of the accidents and that any prolonged absence for work reflects the continuation of her sporadic pre-accident employment or is attributable to other non-accident related causes.

[161] In terms of past wage loss, Ms. Radacina seeks damages of approximately \$235,000 for the period from Accident #1 to the date of trial. She arrives at this figure, roughly speaking, by multiplying \$25.00 per hour by 35 hours per week for 50 weeks per year. As I understand it, the \$25.00 hourly rate is based upon Ms. Radacina's evidence that she earned \$20.00-\$25.00 per hour as a support worker. To this amount, Ms. Radacina adds \$10,000 to reflect part-time server/manager work on evenings and weekends. Deductions are made for taxes, money actually earned by Ms. Radacina during this period and for the period of time Ms. Radacina was unable to work following her oophorectomy.

- [162] I am satisfied that Ms. Radacina has proven a real and substantial possibility that her income earning capacity has been impaired. As discussed above and noted by various medical professionals, she is a complex patient who continues to experience both physical and psychological issues.
- [163] However, there are numerous problems with her approach to calculating damages. As submitted by the defendants, there is little in Ms. Radacina's history that would suggest that but for the accidents, she would be working full-time and earning in excess of \$50,000 per year. As set out above, in 2012, the year before Accident #1, she earned approximately \$11,000. That figure does not align with Ms. Radacina's evidence that prior to Accident #1, she worked six to seven days per week at 40 or 50 hours at her two jobs. In 2013, the year of Accident #1, her earnings increased to approximately \$15,600. There is no evidence of her ever earning more than this.
- [164] Ms. Radacina testified that she earned considerable tips from her serving jobs; as much as \$200.00 on nights when she closed the restaurant and less, \$100.00-\$150.00 per night, on weekdays. She said she typically did not report this income on her tax returns. Ms. Radacina's evidence on this issue was vague and she has no records to substantiate these numbers.
- [165] Ms. Radacina testified about her aspirations of one day opening a centre to assist young people with developmental challenges develop employment skills. However, apart from gathering some basic information, she had taken no concrete steps to pursue this ambition.
- [166] Ms. Radacina also referred to working with various individuals however, she provided no details or any supporting documentation for this work. Rather, it is apparent that she worked as a support person for her one principal client and that she left that position following her oophorectomy in March 2016. The client's mother confirmed that Ms. Radacina left after her surgery. She also said that while Ms. Radacina had been an energetic support person who had a good relationship with her son, Ms. Radacina was a somewhat unreliable employee.
- [167] Taking account of all of the evidence, I agree with the defendants that Ms. Radacina's income but for the accidents was unlikely to exceed \$20,000 per year. Using that figure for the approximately seven years since Accident #1, results in a loss of \$140,000. Subtracting the money actually earned by Ms. Radacina (approximately \$53,000) and adjusting for taxes at 12%, I assess her damages for past wage loss at \$75,000.
- [168] In terms of loss of future earning capacity, Ms. Radacina advances a claim for \$1,248,000 which she calculates on the basis of \$60,000 gross income annually, based on \$30.00 per hour, 40 hours per week, 50 weeks per year until age 65. Ms. Radacina applies a 20% discount for negative contingencies.

- [169] Again, for the reasons discussed above, there is no evidentiary foundation to support such an award. In addition to the absence of any basis on which to assume Ms. Radacina would have earned \$60,000 per year, I am not satisfied that she will never be able to work again in any capacity.
- [170] None of the medical experts who testified for either party opined that Ms. Radacina is totally and forever disabled from any form of work. Dr. Squire stated that with appropriate treatment, it is possible that Ms. Radacina could return to work part time as a behavioural consultant. However, like Ms. Singh's FCE report, there is no consideration of any possible alternative employment.
- [171] Assessing damages for future losses is always challenging because no one can say with any certainty what the future will look like for a particular plaintiff. It is particularly challenging in this case given the minimal evidence available to the Court about how Ms. Radacina's work life would have unfolded but for the accidents. There is also minimal evidence about what that work life will now look like as a result of the accidents.
- [172] For these reasons, the earnings approach to assessing damages is of no assistance. Rather, the factors to consider under the capital asset approach, as set out above (para. 154), all apply to Ms. Radacina.
- [173] Dr. Squire and other physicians have recommended various treatments that I will discuss below. It is reasonable to expect that Ms. Radacina will pursue those treatments over the next two years and her ability to focus on earning income will be reduced during that period, I would award her \$20,000 for each of those years. That figure again reflects her likely income had the Accidents not occurred (see para. 167 above). Beyond that period, recognizing that Ms. Radacina is likely to experience diminished employment income for the balance of her earning life, I award a further five years or \$100,000 which I consider to be reasonable compensation for the damage done to her capital asset, i.e. her earning capacity. While this is higher in terms of the number of years of average salary often awarded under the capital asset approach, it accounts for the negative contingency that Ms. Radacina's absence from the workforce may be prolonged due to the complexity of her condition. Damages for loss of future earning capacity are therefore set at \$140,000.

Cost of Future Care

- [174] In *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63, the Court of Appeal referred to test for future care damages emanating from *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.):
- [62] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

[63] McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.

[175] While Milina is often cited as the leading authority on this issue, it has led to some confusion as to the test to be applied. In the first paragraph set out above, McLachlin J. (as she then was), refers to services that are "reasonably necessary" to promote the mental and physical health of the plaintiff. However, in the second quotation, she summarizes the test as requiring that there be a "medical justification" for claimed future care costs and that they must be reasonable.

[176] Medical necessity and medical justification are different concepts. Madam Watchuk made this point in *Owen v. Folster*, 2018 BCSC 143 at para. 312:

Medically justified future care is different than medically necessary future care. Medical justification only requires some evidence that the expense claimed is directly related to the injury or disability arising from the accident and is incurred with a view of ameliorating its impact. *Harrington v. Sangha*, 2011 BCSC 1035, at paras. 150-151. Medical necessity is a more stringent test. Imposing this test in a personal injury case would impose a standard other than reasonableness; asking whether the expense might be avoided. This test is not appropriate: *Harrington*, at para. 151.

[177] Nonetheless, the "reasonably necessary" test continues to find its way into costs of future care decisions: see for example *Dornan v. Stephens*, 2019 BCSC 701 at paras. 108, 110.

[178] I agree with Justice Watchuk that a requirement that future care costs be proven to a standard of medical necessity imposes an improper and unfair burden on a plaintiff. In my view, the proper test for assessing future case costs is that they must be "medically justified and reasonable". As noted by Watchuk J. in *Owen* at para. 312, this requires some evidence that the expense claimed is directly related to the injury resulting from the accident and is incurred with a view to ameliorating its impact. See also *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244, where Justice Kent provides a helpful and thorough summary of the applicable governing principles.

- [179] Ms. Radacina relies on Ms. Kaczmarek's report in support of her claim for certain future care costs. Before considering that report, I will start with Dr. Squire's third report and her future treatment recommendations as again, Dr. Squire has considerable experience treating Ms. Radacina and demonstrated the most thorough insight into her condition.
- [180] Dr. Squire recommended that Ms. Radacina have one final Botox treatment for her headaches. Beyond that treatment, Dr. Squire expected that Ms. Radacina's headaches would improve with better posture and neck strengthening exercises.
- [181] Likely the most significant recommendation made by Dr. Squire is that Ms. Radacina attend a Dynamic Neural Retraining Program to address the neuroplastic changes in her brain. As Dr. Squire and other physicians have noted, Ms. Radacina processes pain in an abnormal manner and addressing that issue will be fundamental to her experiencing any improvement.
- [182] In terms of Ms. Radacina's psychological issues, Dr. Squire supports ongoing counselling and access to anti-depressant medications as recommended by a psychiatrist. In this regard, Dr. Ganesan recommended Ms. Radacina undergo cognitive behavioural therapy ("CBT") for a minimum of 20 sessions. Dr. Ganesan also recommended a course of Eye Movement Desensitization and Reprocessing ("EMDR") treatment to address Ms. Radacina's PTSD. In terms of medications, Dr. Squire recommended pharmacogenomics testing to assist in choosing an appropriate anti-depressant medication given problems Ms. Radacina has encountered in tolerating certain medications.
- [183] Dr. Squire recommended that Ms. Radacina engage in an active exercise program and that she have access to a gym membership for a year as well as six additional training sessions with a kinesiologist. Dr. Squire also recommended further intramuscular stimulation ("IMS") treatments once a month for a year to address her myofascial pain.
- [184] I accept Dr. Squire's recommendations, including what I take to be her endorsement of Dr. Ganesan's recommendation concerning CBT and EMDR treatment. The costs associated with these recommendations are as follows, relying generally on Ms. Kaczmarek's report:
- a) Botox treatment
\$1211.00 (for the Botox units plus injection)
 - b) Dynamic Neural Retraining Program
\$4,000.00 (based on Dr. Squire's estimated cost of 3,000 USD)
 - c) CBT (20 sessions)
\$4,140.00
 - d) EMDR (6 sessions)
\$942.00

e) Pharmacogenomics testing

\$600.00

f) Active Rehabilitation Assessment and six sessions with a kinesiologist

\$574.00

g) Gym membership (one year)

\$296.00

h) IMS (12 treatments)

\$1,008.00

[185] Both Dr. Squire and Dr. Ganesan recommend anti-depressant medications. Ms. Kaczmarek estimates the annual cost of the medications to be \$7,365.04, however that misconstrues Dr. Ganesan's recommendation. He does not suggest that Ms. Radacina use all of the medications together but rather that she first try Pristiq and then, if she cannot tolerate that medication, he proposes alternatives. Dr. Ganesan further suggests that Ms. Radacina stay on the anti-depressant medication for at least a year and longer if necessary.

[186] Using Ms. Kaczmarek's cost of \$2306.80 for one year of Pristiq, adjusting that figure upwards to reflect the possibility that Ms. Radacina will need it for longer, and adding an amount to reflect her ongoing use of over the counter medications, I find that \$6,000.00 is a reasonable amount to award for the future cost of medications.

[187] A large component of Ms. Radacina's cost of future care claim is for housekeeping services. I will address that claim below.

[188] Based on the above, I assess damages for the cost of future care at \$18,771.00 rounded to \$19,000.

Loss of Housekeeping Capacity

[189] Depending on the nature of the claim and the evidence, loss of housekeeping capacity may be dealt with as an element of non-pecuniary damages or may warrant a separate pecuniary award.

[190] In *Kim v. Lin*, 2018 BCCA 77 at paras. 27-34, aff'g 2016 BCSC 2405, Chief Justice Bauman reviewed a number of cases and academic writings addressing this distinction, and concluded:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by

a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

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

See also: *Riley v. Ritsco*, 2018 BCCA 366 at paras. 97-103; *Abraha v. Suri*, 2019 BCSC 1855 at para. 68.

- [191] Here, I am satisfied that loss of housekeeping capacity should be assessed as a separate pecuniary award. Ms. Radacina seeks damages in the amount of \$56,812.50 for loss of housekeeping capacity from the date of Accident #1 to trial and \$202,575.00 for future loss of housekeeping capacity, representing one-and-a-half hours per day of housekeeping assistance scaling down to one hour to age 75. In addition, she seeks \$33,000 for two hours per month of heavier cleaning, again to age 75.

- [192] An award of this magnitude is not justified on the evidence. I accept that Ms. Radacina experienced some difficulty with regular household tasks following the two accidents. Both of her parents testified that they regularly assisted her with things like cleaning and laundry. Both Ms. Goss and Ms. Roylance also testified that Ms. Radacina struggled with household duties.

- [193] That said, in her third report, Dr. Squire recommends that Ms. Radacina be responsible for light cleaning activities given that she "does not have any physical contraindications" for such activities. This is consistent with Dr. Squire's opinion, again agreeing with Dr. Craig, that Ms. Radacina is capable of doing more than she believes. This follows on Dr. Squire's comment in her first report that "Ms. Radacina is able to manage all of her own activities of daily living and household tasks." Dr. Squire does opine however, that Ms. Radacina may be permanently disabled from heavy cleaning duties. Further, Ms. Kaczmarek observed Ms. Radacina in her home and while she noted certain limitations in Ms. Radacina's performance of household tasks, her recommendation is for two hours of housecleaning assistance per month for heavier and seasonal tasks.

[194] I accept that following the two accidents, Ms. Radacina experienced difficulties with household tasks and that she was assisted by her parents and by Ms. Goss and Ms. Roylance. Applying Ms. Kaczmarek's cost of \$900.00 per year based upon two hours of cleaning assistance per month, amounts to \$6,300.00 for that period. I would round that figure up to \$8,000.00 to reflect the fact that she likely required assistance with more than just the heavier cleaning tasks.

[195] Going forward however, I accept Dr. Squire's opinion, supported by Ms. Kaczmarek, that Ms. Radacina should undertake regular household tasks and that she should receive assistance for heavier or seasonal tasks. I accept Ms. Kaczmarek's costing of \$900.00 per year. Given Dr. Squire's opinion that this may be a permanent disability, I accept that this cost should be calculated to age 75. As she is currently 38 years old, 37 years at \$900.00 per year equals \$33,300.00, discounted to \$24,000 to reflect the approximate present value of that amount.

[196] Loss of housekeeping capacity damages are therefore assessed at \$32,000.

Special Damages

[197] The defendants have agreed to Ms. Radacina's claim for special damages in the amount of \$13,710.42.

Mitigation

[198] The defendants submit that Ms. Radacina failed to adequately mitigate her damages. In particular, they submit that she failed to pursue proper and recommended treatment for her PTSD and for her chronic pain. Rather, she fell back on her historical practice of relying on opioids.

[199] In *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, the Court of Appeal stated the test for mitigation as follows:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[200] The defendants have not met this test. While they identify certain recommendations that Ms. Radacina did not follow up on, they have not established the extent to which her damages would have been reduced had she done so. Further, it is apparent that Ms. Radacina has tried numerous different treatments and therapies since the accidents and that it was not until she started seeing Dr. Squire that she began to better understand her condition and started seeing some improvements. In her second report, Dr. Squire described Ms. Radacina as an "eager participant in her treatments".

[201] I find that Ms. Radacina did not fail to mitigate.

Conclusion

[202] In summary, Ms. Radacina is awarded the following damages, after applying the 40% adjustment set out in para. 142:

- a) Non-pecuniary damages \$120,000
- b) Past loss of earning capacity \$45,000
- c) Loss of future earning capacity \$84,000
- d) Cost of future care \$11,400
- e) Loss of housekeeping capacity \$19,200
- f) Special damages \$8,226

Total: \$287,826

[203] Unless there are circumstances of which I am unaware, Ms. Radacina is entitled to her costs at Scale B. If the parties cannot agree, they may make arrangements to speak to the matter within 90 days from the date of these reasons. Each party will provide a written submission, not to exceed ten pages, one week in advance of any further hearing into costs.

"Skolrood 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/20/11/2020BCSC1143.htm>

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

Prepared on 25 October 2026 · Esheria