
CANADA / JUDGMENT

Rahimi v. Ma

2014 BCSC 710

COURT

Supreme Court of British Columbia

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2014 BCSC 710 Rahimi v. Ma

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rahimi v. Ma,

2014 BCSC 710

Date: 20140425

Docket: M121696

Registry: Vancouver

Between:

Farnaz Rahimi

Plaintiff

And

Sherri Ma and Sing Lee Chung

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

Sean R. Lerner

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Counsel for the Defendants:

Jeremy M. Thom

May M. Lee

Place and Date of Trial:

Vancouver, B.C.

January 27-30,

February 3-6, 14, 2014

Place and Date of Judgment:

Vancouver, B.C.

April 25, 2014

- [1] The plaintiff, Ms. Rahimi, seeks damages for personal injuries she suffered as a result of a motor vehicle accident that occurred on April 9, 2010 (the "Accident"). The issues raised in this action are made simpler by numerous factors. Liability is admitted. Ms. Rahimi did not suffer from any pre-Accident injuries or disabilities. There is no suggestion of any intervening factors that may have contributed to or exacerbated her injuries. The defendants called no expert evidence. To the credit of counsel for both parties they worked efficiently and cooperatively to address those issues that mattered and to ignore those that did not.
- [2] Furthermore, the defendants do not contest that Ms. Rahimi suffered some physical injuries as a result of the Accident and that she is likely to suffer, to some degree, from those injuries in the future. The central issues in dispute are i) the extent to which, if at all, such injuries have in the past, and are likely to in the future, impede Ms. Rahimi in pursuing her recreational and professional endeavors, and ii) what level of care Ms. Rahimi is likely to require in the future.

Background and History

- [3] Ms. Rahimi, who is now 32 years old, was born in Iran. She is bright, articulate, well-educated and strong-minded. She moved from Iran to Dubai in 2003 and pursued her studies in interior design at the American University in Dubai.
- [4] In February 2006 she immigrated to Canada. In 2006 and 2007 she undertook further studies in interior design at the British Columbia Institute of Technology. In September 2007 she entered a four-year program in interior design at Kwantlen University. She graduated from that program with a Bachelor of Applied Design in Interior Design in April 2011.

- [5] It is not quite clear when she married or for how long she was married. She left her husband in or around June 2010. In August of that year she moved into a home used by her family when they visited from Iran. Her family, in turn, immigrated to Canada from Iran in December 2010. Ms. Rahimi lived with her family for a period of time and then moved into a two-bedroom apartment in the Yaletown area of Vancouver. Her younger sister, Sarvnaz, who gave evidence on behalf of the plaintiff, moved into an apartment a few blocks away.
- [6] In either late 2011 or early 2012, Ms. Rahimi began a personal relationship with Mr. Hakimi who is the principal of Hectagon Construction and Design ("Hectagon"). That entity provided some work to Ms. Rahimi as early as January 2010 when Ms. Rahimi was still enrolled at Kwantlen. It was as a result of these early professional dealings that their personal relationship subsequently developed. Mr. Hakimi also gave evidence on behalf of the plaintiff.
- [7] I propose to address Ms. Rahimi's recreational pursuits, housekeeping activities and professional aspirations when I consider the claims being advanced in relation to these matters.

The Accident

- [8] The facts of the Accident are not contentious. Ms. Rahimi was headed west along Alderbridge Way, in Richmond and came to a stop behind traffic at a red light at the intersection of Alderbridge Way and Shell Road. The defendant, Ms. Ma, was driving behind Ms. Rahimi at a speed of approximately 50 km/h. She failed to notice that traffic had stopped ahead of her until she was but a few feet from Ms. Rahimi's vehicle and she drove into the back of Ms. Rahimi's car. Ms. Ma's vehicle was deemed to be a total loss as a result.
- [9] Ms. Rahimi left the scene of the Accident without assistance. At trial she said that she made her way directly to a medical clinic but that the waiting times at that clinic were too long and so she then went home. This evidence does not appear to accord with the evidence that she gave at her examination for discovery. It is, in any event, clear that she went to the Burnaby Hospital later that day where she was treated for neck pain and tenderness, shoulder pain and tingling in her left hand.

The Plaintiff's Injuries, Causation and Prognosis

- [10] The plaintiff gave evidence of various injuries and difficulties which she ascribed to the Accident. She said that following the Accident, or relatively shortly thereafter, she struggled with pain and/or tightness and/or discomfort in her neck, upper back, lower back and shoulders. She experienced numbness and tingling in her left arm. She had some pain in her left thumb. She began to develop headaches. She encountered some difficulty sleeping. She was somewhat apprehensive about driving though this improved over time. She says that she has become more irritable over time. Ms. Rahimi said that though the severity of her difficulties has waxed and waned over time, there has been no appreciable improvement

or deterioration of her symptoms. She testified that for all practical purposes her condition and the status of most of her various injuries or the effects of the Accident remain as they were nearly four years ago.

- [11] I accept that Ms. Rahimi has experienced and continues to deal with some pain or discomfort in each of her neck, shoulders, upper and lower back as well as periodic numbness or tingling in her left arm and hand. She continues to experience periodic headaches. She sometimes has trouble sleeping.
- [12] The foregoing evidence is uncontested and is supported by evidence from various sources. It aligns with the evidence of both Ms. Rahimi's younger sister, Sarvnaz, and Mr. Hakimi each of whom regularly sees the plaintiff and has observed her discomfort. Ms. Sayers, a massage therapist who has treated the plaintiff for several years, testified that there was ongoing palpable tension in both Ms. Rahimi's shoulders and on both sides of her neck.
- [13] Each of the experts called by the plaintiff, Dr. Caillier, a physiatrist, and Dr. Jung, a chiropractor, provided opinions following their examination of the plaintiff that were consistent with Ms. Rahimi's having some pain or discomfort in the areas that I have described.
- [14] Furthermore there is no dispute that Ms. Rahimi's various difficulties were "caused" by the Accident: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-22; *Clements v. Clements*, 2012 SCC 32 at para. 8. Once again, this conclusion is consistent with the evidence of each of Drs. Caillier and Jung. The defendants did question whether Ms. Rahimi's lower back problems, which she only reported some months after the Accident, were attributable to the Accident. Based on the evidence of Drs. Caillier and Jung, I am satisfied that her lower back pain was also caused by the Accident.
- [15] There is one area, however, where causation is not clear. At trial, Ms. Rahimi said that she was more easily irritated than she had been prior to the Accident and she ascribed that change to the Accident. Dr. Jung's report summarizes his findings as to Ms. Rahimi's current presentation and functional deficits. That summary does not refer to Ms. Rahimi's mood. In addition, in Appendix 1 of his report he summarizes Ms. Rahimi's comments to him and, under the heading "Mood" states: "Ms. Rahimi was unable to provide me with information with respect to her mood. She did however suggest that since the collision she has been less patient with people but she was unable to attribute it fully to the Collision".
- [16] The central portion of Dr. Caillier's report does not expressly address Ms. Rahimi's mood. In Appendix 1 of that report, where Dr. Caillier summarizes Ms. Rahimi's comments to her, Dr. Caillier states: "She reports that she had some difficulties with her mood after the motor vehicle accident. She describes it as being related to arguments she had with her husband about this accident and the accident before. She reports that this impacted upon her mood. She reports that gradually it did improve".

[17] Ultimately Ms. Rahimi's comments to Drs. Caillier and Jung about increased irritability, together with a series of further matters that I will come to, are relevant to the reliability of Ms. Rahimi's evidence.

[18] Finally, the opinions of Drs. Caillier and Jung, which addressed Ms. Rahimi's prognosis, were again largely consistent and uncontradicted. In relation to her neck, shoulders and upper and lower back, Dr. Caillier, for example, said:

Prognosis: It is my opinion that, given the chronicity of her symptoms, the likelihood of her becoming pain-free is poor and it is likely that she will continue to experience pain on an intermittent basis now and beyond the next 12 months.

It is my opinion that there is still the opportunity to improve upon the management of her physical symptoms, such that there is a lessening in the frequency and intensity of the symptoms, as well as lessening the provocation of the symptoms, provided she has the opportunity to participate in and receive benefit from an active rehabilitation program and independently exercises at least three to four times per week for one hour each time.

[19] In relation to Ms. Rahimi's headaches Dr. Caillier said:

Prognosis: It is my opinion that it is likely Ms. Rahimi will achieve further improvement of her headaches, provided there is improved management of her neck pain and with this there will likely be a reduction in the intensity and frequency of her headaches.

Given the chronicity of her neck pain, it is likely that she will continue to experience headaches on an intermittent basis now and beyond the next 12 months and that the frequency as well as intensity of the headaches will depend upon her neck pain.

There is a strong possibility that if she does not respond positively to the active rehabilitation program and independent exercise program that her headaches will not improve in frequency and intensity and as such the headaches will likely continue at the same level they are presently.

[20] In relation to the issue of sleep Dr. Caillier said: "I anticipate that her sleep will improve, provided she is able to participate in and receive benefit from the active rehabilitation program, as well as independently exercises".

[21] I should note that with the agreement of counsel, and based on a series of further documents and reports that postdated Dr. Caillier's report of September 27, 2012, Dr. Caillier confirmed that the opinions she expressed in her initial report remain consistent to the present time.

[22] Dr. Jung confirmed that he was generally "in agreement with Dr. Caillier's opinions with respect to the injuries" of Ms. Rahimi.

- [23] Finally, I observe that the defendants did not in any meaningful way challenge the conclusions that were expressed with respect to Ms. Rahimi having suffered the injuries described, the fact that those injuries were caused by the Accident or the prognosis for her recovery. Instead, again, the contest between the parties focused on the extent to which, if at all, these injuries have impacted on Ms. Rahimi's personal and professional life or will do so in the future.

Credibility and Reliability

- [24] Counsel for the defendants argued that Ms. Rahimi's evidence should be regarded with some skepticism. There were concerns, it was said, with both her candour and her reliability.
- [25] The concerns identified by counsel with respect to Ms. Rahimi's credibility found their roots in various tax returns where Ms. Rahimi had not accurately reported her income. Similarly, she wrote a letter to Kwantlen University in aid of obtaining a bursary, wherein she stated that she was not working part time, which was not, based on her evidence at trial, forthright. Ms. Rahimi ascribed such conduct to her then husband and said that, for various reasons, she had not been able to oppose her husband. I do not consider that I need to address these issues directly. I do observe that Ms. Rahimi has continued, in many instances, to be paid in cash for her professional services and has not rendered any form of formal invoice for her work - a practice that is generally inappropriate and that is not consistent with forthright and transparent business practices.
- [26] The concerns with the reliability of her evidence are, however, more acute. The following are simply examples of this concern. At trial Ms. Rahimi said that though her symptoms had waxed and waned a little over the years, those symptoms and their severity were largely unchanged from the date of the Accident through to the trial. Dr. Caillier's report, however, states "Ms. Rahimi has had improvements in her symptoms since the time of their onset following the motor vehicle accident of April 9, 2010. In particular, the lower back symptoms have improved to the extent that they are only present when she sits for a prolonged period of time". Similarly, Dr. Caillier's report concludes "Ms. Rahimi's headaches have improved since the time of their onset." Dr. Caillier, in Appendix I of her report also notes that Ms. Rahimi told her that "her pains were constant, but gradually improved to sometimes being there and sometimes not".
- [27] Dr. Jung met Ms. Rahimi about a month after Ms. Rahimi met with Dr. Caillier. His report, on the other hand, states "At the assessment, Ms. Rahimi told me that over the last year, her overall condition has "gotten a little worse".

- [28] At trial Ms. Rahimi said that she had turned down several pieces of work as a result of her injuries from the Accident. Those jobs formed part of her past wage loss claim. Ms. Rahimi reported to Dr. Caillier, however, that as of the date of their meeting she had not turned down work as a result of her symptoms. Instead she told Dr. Caillier, based on Dr. Caillier's record in Appendix I of her report that "her work is on and off, and will depend on obtaining work. To date, she does not turn down work as a result of the symptoms".
- [29] Ms. Rahimi told Ms. Craig that she was working full time and that she had not worked for Hectagon until after the Accident. Based on her evidence at trial neither of these assertions is accurate.
- [30] At trial Ms. Rahimi said that she had been prescribed various medications by a physician she had seen and, indeed, she thereafter reported to another physician that those medications were effective. She said, however, that she preferred not to take prescription medicine. She told Dr. Jung, on the other hand, that she had not been prescribed any medication for her injuries.
- [31] At trial Ms. Rahimi said that she was unable to drive for more than approximately a half hour without discomfort. She reported to Dr. Jung, however, that she was able to drive without difficulty if she adjusted her seat properly.
- [32] At trial Ms. Rahimi said that she could walk for 30 to 45 minutes without discomfort. She told Dr. Jung that she encountered discomfort after walking 15 to 20 minutes.
- [33] These concerns with the reliability of Ms. Rahimi's evidence do undermine the force or weight of her evidence. The most significant concern that exists, however, arises from the significant disconnect between her assertions of the extent to which her injuries have affected or impaired both her day-to-day life and her professional activities and the objective assessment of those claims made in the expert reports that were filed on her behalf. I propose to deal with additional examples of such inconsistencies when I address the particular heads of damage that are being advanced on her behalf.
- [34] A telling example of this incongruity, however, is found in the report and evidence of Ms. Craig. Ms. Craig concluded that Ms. Rahimi's self-reports of function and pain were considered "mostly" reliable. One source of concern to Ms. Craig, however, was that Ms. Rahimi, in relation to both her neck and low back, filled out questionnaires whose conclusions indicated that Ms. Rahimi, in relation to these areas of her body, "perceives herself to be in the severely disabled to crippled category". The reality of Ms. Rahimi's condition does not begin to approach this level of severity.

Mitigation

i) The Usual Context

- [35] The question of whether Ms. Rahimi has properly mitigated her losses presents itself in a somewhat unusual context. Generally, in personal injury cases, the issue of whether a plaintiff has properly mitigated his or her losses focuses, at least in large part, on whether the defendant has proved that the plaintiff has acted unreasonably in failing to undergo or to follow various recommended treatments or therapies.
- [36] The leading case on mitigation in British Columbia is *Chiu v. Chiu*, 2002 BCCA 618, where the court concluded that in order to prove a failure to mitigate the defendant must prove (1) that the plaintiff acted unreasonably in eschewing recommended treatment; and (2) the extent to which the plaintiff's damages would have been reduced had he/she acted reasonably (at para. 57).
- [37] More recently, in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, Garson J.A., for the court, described the test as a subjective/objective test, "That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment" (at para. 56, emphasis in original).
- [38] In *Lemieux v. Evers*, 2000 BCSC 1464 at para. 61, Martinson J. outlined the content of the defendant's evidentiary burden as a three-part test determined on a balance of probabilities:

The onus of proving a failure to mitigate lies with the defendant. Discharge of this onus requires the defendant to establish on a balance of probabilities the following: (1) the steps a plaintiff could have taken in mitigation (e.g. taking doctor recommended treatment); (2) the reasonableness of pursuing those steps; and (3) the extent to which the plaintiff's loss would thereby have been avoided: [*Janiak v. Ippolito* (1985), 16 D.L.R. (4th) 1], at 14 to 17.

- [39] In *Antoniali v. Massey*, 2008 BCSC 1085, Preston J. formulated the defendant's burden in similar conceptual terms, though he identified four distinct elements that must be proven:
- [31] In order to conclude that Ms. Antoniali's damages should be reduced by application of the principle that a plaintiff has a positive duty to mitigate his or her injuries, I would have to find that the defendant has established:
1. that a program of stretching and conditioning under the guidance of a personal trainer would have reduced or eliminated the effect of the injuries;
 2. that the reasonable plaintiff in Ms. Antoniali's circumstances would have followed such a program;
 3. that Ms. Antoniali unreasonably failed to follow such a program and;
 4. the extent to which Ms. Antoniali's damages would have been reduced if she had followed such a program.

- [40] Though Lemieux and Antoniali expand on the Chiu test by identifying the distinct elements that must be proven by the defendant, they do not directly address how this evidence should be adduced or the kind of evidence that will satisfy this burden.
- [41] Another legal principle is relevant: "[t]he plaintiff is not held to a high standard of conduct in mitigation; the law is satisfied if the plaintiff takes steps that a reasonable person would take in the circumstances to reduce the loss": *Middleton v. Morcke and Lee*, 2007 BCSC 804 at para. 37; see also *Alden v. Spooner et al*, 2002 BCCA 592 at paras. 23-24, leave to appeal ref'd, [2002] S.C.C.A. No. 535.
- [42] In this case, Ms. Rahimi has sought little medical advice or assistance from the time of the Accident to the time of trial. Furthermore, though she was aware of various independent medical reports in the possession of her counsel and was aware that at least one of those reports made treatment recommendations, she did not read the report(s) or so much as ask for it/them. The issue before me then turns not on Ms. Rahimi's failure to follow advice but rather on her failure to seek advice or more specifically her failure to apprise herself of the advice available to her.
- ii) Does the Obligation to Mitigate include an Obligation to Seek Medical Assistance or Advice?
- [43] Ms. Rahimi, over a period of four years, appears to have seen four different physicians on a total of six to eight occasions about her injuries. She saw different people on different occasions partly because she did not, at most times, have a personal physician and partly because she did not like some of the advice she was given. Thus, for example, she appears to have chosen not to continue to see Dr. Karimirad because he was reluctant to support her request for further massage or physiotherapy treatment and, instead, recommended prescription medications that she did not want to use. Even this event, however, is telling. Ms. Rahimi was not so much seeking advice, as she was seeking someone who would endorse the form of therapeutic activity that she wished to pursue.
- [44] In *Ken Cooper-Stephenson, Personal Injury Damages in Canada*, 2d ed. (Scarborough, Ont.: Carswell, 1996) at p. 862, the author states "Personal injury victims cannot sit back after the accident and allow their losses to accumulate. They must take all reasonable steps to avoid those losses".
- [45] In *Sevinski v. Vance*, 2011 BCSC 892, I said:
- [68] Instead, the proper starting point is the obligation of an injured plaintiff to seek appropriate medical assistance. The failure to seek such assistance cannot and does not displace or diminish the plaintiff's obligation to mitigate his or her loss. Thus, in *Jamie Cassels and Elizabeth Adjin-Tetty, Remedies: The Law of Damages*, 2nd ed. (Toronto: Irwin Law, 2008) at 389, the authors state:

Plaintiffs who are tortiously injured have an obligation to take reasonable steps to mitigate their injuries and cannot collect damages for losses that could be avoided. Mitigation in the circumstances ordinarily requires the plaintiff to seek appropriate medical treatment...

[69] Similarly, in S.M. Waddams, *The Law of Damages*, looseleaf (Aurora, Ont: Thomson Reuters, 1991) at 15.260 the author states:

In personal injury cases, the plaintiff is obligated to submit to reasonable medical treatment and to seek and follow medical advice where appropriate.

[83] In summary, I find the plaintiff's failure to raise her difficulties at an early stage and/or on an ongoing basis with appropriate medical advisers, her failure to obtain guidance or advice on the treatment of those difficulties, and her failure to engage actively and diligently in a course of physical or rehabilitative treatment, together constitute a failure to mitigate her losses.

[46] In *Papineau v. Dorman*, 2008 BCSC 1443, where a plaintiff failed to obtain medical advice for eight months after an accident, Brown J. said:

[247] Mr. Papineau's failure to seek medical help for eight months is another mitigation issue. Against this has to be weighed the serious challenges people face trying to find a family physician, especially when moving to a new city. At the same time, Mr. Papineau never even made his way to a walk-in clinic, despite urgings to do so. Injured people are entitled to make reasonable decisions about their own bodies and about when and where they seek medical advice; but when they wait an unreasonably long time without reasonable explanation, a defendant may have legitimate grounds for complaining that the plaintiff has failed to mitigate.

[47] In *Papineau*, this early failure to seek medical assistance was overshadowed by the plaintiff's failure to follow the advice he was subsequently given.

[48] The positive obligation to seek assistance, as with all aspects of mitigation, need only be reasonable. Whether a plaintiff has acted reasonably will be a function of many circumstances. Some plaintiffs may reside in remote locations where medical assistance is not easily accessed. Some plaintiffs may suffer from depression or an addiction issue that affects their functionality and their ability to seek assistance; see, for example, *Penner v. Silk*, 2009 BCSC 1682 at para. 50, var'd on other grounds (sub nom *Penner v. Insurance Corporation of British Columbia*) 2011 BCCA 135. Some plaintiffs' injuries may be sufficiently modest that a failure to seek assistance is readily understood.

[49] In this case Ms. Rahimi is an intelligent and educated individual who resides in an urban centre. Though no specific details were provided, she appears to come from a financially comfortable background, such that her financial situation would not have been an impediment to her seeking medical treatment; her father hired her, for example, to decorate both his apartment and her sister's apartment. However, she was identified by each of Dr. Caillier, Dr. Jung and Ms. Craig as being significantly deconditioned. She has gained

approximately 40 pounds since the Accident. She asserts that her injuries affect her ability to sit, stand, walk, drive, work, cook, clean her home, get groceries, carry most things, and engage in virtually any recreational activity that she enjoys. She also says that the severity of her injuries has remained constant since the Accident.

- [50] In such circumstances it is exceedingly difficult to understand why Ms. Rahimi would not endeavor to address her injuries in a more focused and formal way. In saying this I recognize that she has frequently attended for physiotherapy and massage treatments. She has sought out acupuncture treatments on the advice of her boyfriend. She has, on the advice of a friend, worked for a period of time with a personal trainer. She now does some yoga.
- [51] It is not enough, however, to unsuccessfully cast about for help. Her activities have lacked the structure, consistency and focus that is being recommended for her by those independent medical examiners upon whom she now relies in support of her future loss claim. Each of those independent experts recognizes that the plaintiff is deconditioned and that she requires a serious active exercise regime, which would only be periodically supplemented by the largely passive treatments that Ms. Rahimi has generally relied upon to date.
- [52] I do not say that Ms. Rahimi's failure to obtain further medical assistance, without more, gives rise to a failure on her part to mitigate losses. I do say that the obligation to mitigate, based on the authorities I have referred to, and the circumstances that exist in a given case, can extend beyond simply following the medical advice that a plaintiff is provided. It can extend, instead, to the positive obligation to reasonably seek assistance or guidance. In saying this, I recognize that the burden of proving that a plaintiff has failed to act reasonably rests, at all times, on the defendant.

iii) The Care Recommendations Contained in the Reports of Drs. Caillier and Jung and Ms. Craig

a) Was Ms. Rahimi Aware of these Care Recommendations?

- [53] Ms. Rahimi was cross-examined about whether she was aware of the recommendations in the reports of Ms. Craig and, in particular of Drs. Caillier and Jung. What, if anything, she knew about the recommendations in the reports of Ms. Craig and Dr. Jung is unclear and I have, consequently, focused on the report of Dr. Caillier though even here Ms. Rahimi's evidence was not consistent.
- [54] At one point Ms. Rahimi said that she had a copy of Dr. Caillier's report but had only read the first page. She later said she did not remember receiving or having a copy of the report. It is clear that Ms. Rahimi's counsel sent a copy of Dr. Caillier's report to Dr. Kang, who had become Ms. Rahimi's family doctor. Relevant clinical notes suggest that Dr. Kang discussed Dr. Caillier's report with Ms. Rahimi, though Ms. Rahimi had no clear memory of this. Importantly, Ms. Rahimi did recall that she had been told by her counsel that Dr. Caillier's report contained recommendations for her, relating to exercise, massage and physiotherapy,

though she was not told of the details of these recommendations.

[55] Thus, for present purposes, the one fact that is clear is that the plaintiff knew, through her counsel, that Dr. Caillier's report made care recommendations for her.

b) What Care Recommendations did Dr. Caillier make?

[56] In relation to the plaintiff's headaches Dr. Caillier said:

Recommendations: It is my opinion that participation in an active rehabilitation program, as well as ensuring that she is exercising independently at least three to four times per week will result in improvement in headaches with a lessening in intensity and frequency.

[57] In relation to the plaintiff's neck, back and shoulder pain Dr. Caillier said:

It is my opinion that there is still the opportunity to improve upon the management of her physical symptoms, such that there is a lessening in the frequency and intensity of the symptoms, as well as lessening the provocation of these symptoms, provided she has the opportunity to participate in and receive benefit from an active rehabilitation program and independently exercises at least three to four times per week for one hour each time.

Recommendations: I am recommending Ms. Rahimi participate in an active rehabilitation program. I am recommending she have at least 14-16 sessions with a kinesiology-based exercise trainer. The goal of this program is to improve upon the strength, endurance, and flexibility about the neck, upper back, shoulders, rotator cuff muscles, scapular stabilizers, and low back, core and pelvis regions.

I am also recommending that she have an allowance for an additional 4 to 5 kinesiology sessions per year for the next 3 years to assist in the management of her chronic pain and progress her exercises / alter the exercise program as needed.

Ms. Rahimi does need to understand that when she tries an activity she has not done or has not done for a while, this will likely result in a flare of her symptoms; therefore, it would not be surprising if she experiences an increase in pain, particularly of the neck, during the active rehabilitation program. She should continue to go forth with this program.

Ms. Rahimi should be exercising at least three to four times per week for one hour each time. This should be a combination of gym and pool-based exercises. The goal is to improve upon her posture as well as overall strength, endurance, and flexibility about the neck, upper back, shoulder, low back, core and pelvis musculature.

I am recommending Ms. Rahimi's workstation at home be assessed from an ergonomical standpoint. I am recommending there is not only ergonomical assessment of her workstation but also of the table where she does the freehand drawing. This will likely allow for improved management of her symptoms such that there is a reduction in flares of her symptoms with sustained postures as well as result in a lessening of undue stress placed upon the musculature of the neck, upper back and shoulder regions.

[58] In relation to the plaintiff's recreational activities Dr. Caillier said:

With regards to her recreational activities, she does need to gradually improve upon her tolerance and endurance for activities. This means going swimming on a consistent basis as well as even riding a bike on a consistent basis. The pain that she is likely experiencing when she is doing these activities is also likely secondary to fatigue-related lack of endurance of the musculature, prompting a flare of her symptoms. This will likely lessen eventually however, there is a possibility that the fatigue related pain will not lessen despite best efforts with the active rehabilitation program and independent exercise.

[59] In relation to the plaintiff's difficulties with sleep Dr. Caillier said:

I anticipate that her sleep will improve, provided she is able to participate in and receive benefit from the active rehabilitation program, as well as independently exercises [sic].

c) Should Ms. Rahimi have Inquired about the Care Recommendations made by Dr. Caillier?

[60] Ms. Rahimi knew that Dr. Caillier's report contained care recommendations that had been made for her. That issue was tested in Ms. Rahimi's cross-examination. The present case is thus quite different from Chiu where the defendant did not cross-examine the plaintiff on his failure to pursue treatment (para. 65). The court in Wahl v. Sidhu, 2012 BCCA 111, at paras. 44-46 and 52, emphasized a similar failure on the part of the plaintiff that was not tested by the defendant in cross-examination.

[61] The present case is also different from cases such as Tam v. Cheung, [1998] B.C.J. No. 842 at para. 33 (S.C.) or Rezaie v. Leland, 2013 BCSC 1650 at paras. 107-109, where there was no evidence that the plaintiff was aware of the recommendations contained in various independent medical legal reports. Thus, in Rezaei Punnett J. said:

[108] The evidence of the plaintiff is that none of the physicians he consulted recommended therapy. While Dr. Gropper in his medical legal report of 2008 recommended therapy there is no evidence that he informed the plaintiff of that given his role was to conduct an independent medical examination, not to treat the plaintiff. In cross-examination he stated that he recommended to the plaintiff's lawyer a course of therapy however there is no evidence that the plaintiff was ever aware of that recommendation.

[109] Given it has not been established that the plaintiff was told to take therapy there is no proof that the plaintiff knowingly failed to follow such medical recommendations. As a result I find no failure to mitigate.

[62] In this case, again, though Ms. Rahimi was not aware of the specific care recommendations contained in Dr. Caillier's report she was aware that such recommendations were made.

- [63] The question then becomes whether her failure to inquire further was unreasonable. I find that it was. In saying this I recognize that the burden of proof, in relation to the issue of mitigation rests throughout on the defendants. I further recognize that the care recommendations I am addressing are recommendations that are found in the report of an independent medical examiner and not a treating physician and that the roles of such physicians are different.
- [64] The plaintiff addressed this issue briefly and indirectly during her cross-examination as an explanation for why she did not directly ask either Dr. Caillier or Dr. Jung for their recommendations. She said that she did not consider that that was appropriate because she was there to be examined by them. Though that explanation is reasonable in the context of her original appointment or examination by these experts, I do not consider that it remained reasonable after she became expressly aware that Dr. Caillier's report did, in fact, contain care recommendations for her.
- [65] I also do not consider, however, that the difference in the role or function of an independent expert as opposed to a treating physician insulates an individual from having to act reasonably and, in appropriate circumstances, making further inquiries. It was, for example, open to Ms. Rahimi to ask her family doctor, Dr. Kang for input or comment on the report of Dr. Caillier. It was this very result that her counsel, by sending the report of Dr. Caillier to Dr. Kang, sought to achieve. Indeed, there is some evidence that this discussion in fact took place.
- [66] In this case I consider that a reasonable person in Ms. Rahimi's circumstances would have inquired about Dr. Caillier's care recommendations.
- d) Is There Evidence That Ms. Rahimi's Damages and/or Difficulties Would Have Been Reduced had she Followed Dr. Caillier's Recommendations?
- [67] The defendants must "present the necessary evidence to raise failure to mitigate from speculation to reasonable inference", Chiu at para. 66. In Chiu the defendants did not identify medical opinion evidence relating to the plaintiff's failure to seek more counseling, including evidence that spoke to the ameliorative effect that such counseling would have had on the plaintiff's impairment.
- [68] Similar concerns were expressed by the court in Gregory, where it was held that an expert opinion which identified that a treatment was reasonable to try and "might afford some relief" was not sufficient to meet the Chiu threshold. The court considered that the benefits of the treatment remained mere speculation and did not afford a reasonable inference that the treatment would have reduced the plaintiff's damages to some extent (at paras. 57-58).

[69] Wahl is another example of where the court held that the defendant's failure to cross-examine the plaintiff on his failure to pursue recommended treatment, coupled with a failure to identify medical evidence that established that the plaintiff's symptoms would have been reduced or would have been resolved had the plaintiff undergone the recommended treatment, meant that the defendant's burden, as established in Chiu, had not been met (paras. 45 and 52).

[70] As a relevant aside, the distinction between speculation and reasonable inference was discussed in *Graham v. Rogers*, 2001 BCCA 432 at para. 53, leave to appeal ref'd, [2001] S.C.C.A. No. 467, where the court cited the English case of *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152 (H.L.) for the following propositions:

... Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.

[71] In this case the segments of Dr. Caillier's report that I have referred to earlier assert that the forms of treatment she recommended either "will result" in or are "likely" to be of benefit to the plaintiff. These conclusions are not speculative but rather are expressed as at least a probability of a future event.

[72] I am reinforced in this conclusion by the relative uniformity in the views of Dr. Caillier, Dr. Jung and Ms. Craig and their conclusions that the general recommendations made by Dr. Caillier would give rise to some amelioration of Ms. Rahimi's symptoms. I am not focusing on particular exercises but rather on the need for some active regime. Each expert emphasized the need for an increased level of active rehabilitation, though each also proposed either different or additional activities.

[73] In the result I do not consider that Ms. Rahimi has acted reasonably to mitigate her losses.

General Damages

[74] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd, [2006] S.C.C.A. No. 100, Kirkpatrick J.A. identified the following non-exhaustive considerations that are relevant to an award of non-pecuniary damages: the age of the plaintiff; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's degree of stoicism. The object of such damages is to provide the injured person with reasonable "solace" for his or her misfortune. Accordingly an appreciation of the individual's loss is important.

- [75] It is also important to recognize that an award of non-pecuniary damages is intended to compensate for both past pain and suffering and loss of enjoyment of life as well as for such losses that the plaintiff is likely to experience in the future; see, for example, *MacIntosh v. Davison*, 2013 BCSC 2264 at para. 91.
- [76] Ms. Rahimi asserts that the injuries she suffered as a result of the Accident have impeded her in multiple respects and impaired her ability to enjoy many of the things that had previously given her pleasure. She was a relatively accomplished and avid swimmer and she had, in the past, gone swimming with some regularity - particularly in those periods when she was not busy. She enjoyed walking and the things that came with walking; she liked, for example, to explore new neighborhoods and to go window shopping. She would periodically go bicycling. On a few occasions she went skiing and camping and she enjoyed these activities. She had, for example, over an eight-year period gone skiing perhaps eight or ten times. She liked to entertain and to cook traditional Persian meals. She is also quite artistic and enjoyed making jewelry, drawing or painting and making artificial flowers designed to look like china.
- [77] Ms. Rahimi's claim that she is impeded in her ability to partake in these various activities and pastimes is supported by the evidence of each of Mr. Hakimi and her younger sister, Sarvnaz Rahimi.
- [78] I emphasize the words "impeded" or "impaired" because Ms. Rahimi accepts that she can engage in these activities but says that they cause her discomfort either at the time or shortly thereafter.
- [79] I accept that Ms. Rahimi suffers from some degree of discomfort and/or pain when she engages in some of these activities. I also accept, based on the evidence of Drs. Caillier and Jung, that though she is likely to learn to manage her pain better in the future, she is also likely to continue to struggle, to some degree, in the future.
- [80] I do not accept, however, that Ms. Rahimi suffers from the severity, or breadth of impairment that she asserts. I say this for several reasons. It is not consistent with her activity during the extended period of time that immediately followed the Accident. Ms. Rahimi returned to her classes the day after the Accident and missed no school as a result of the Accident. She testified that she would wake up at about 6:00 a.m. each day and commute to and from school. On some days she drove, which took approximately an hour and 15 minutes in each direction - well beyond the time she now says that she can drive without discomfort. She attended classes all day. Those classes would have required extended periods of sitting and standing - both of which she says are difficult for her. She says she often studied or worked until midnight and sometimes she worked through the night. She also did some part-time work for Hectagon during this period. She graduated on time with the rest of her class. She went to Spain for two weeks with that class. This entire period of time, some 15 months, speaks to an extremely high level of sustained functionality.

- [81] Ms. Rahimi's evidence is also not consistent, for example, with the evidence of Mr. Hakimi who said he spends about 80 - 85% of his day with her. This would include being at the office, going to job sites, going to lunch and spending their evenings together.
- [82] It is also not consistent with the relatively modest efforts she made to get medical assistance or advice in the years following the Accident or with the extended gaps in her seeking massage or physiotherapy treatment. Thus, Ms. Rahimi often went for three or four or more months, generally in the summertime, without seeking any such treatments. She addressed some of these gaps by explaining how busy she had been at this particular time - though based on her evidence, it is when she is busy that she would be most in need of such assistance.
- [83] A proper assessment of Ms. Rahimi's non-pecuniary losses is further impeded by a somewhat unusual factor. Ms. Rahimi has demonstrated a curious inflexibility in addressing the difficulties she says she faces. She enjoys swimming and says, for example, that swimming the front crawl causes her discomfort in her neck and shoulders. She accepts that she has been told to try the back crawl but has not done so because she does not like doing that stroke. She likes to cycle but says it causes her pain in her neck and shoulders. Dr. Jung has proposed that she try a type of bicycle that he described as a "comfort bike". Her response, in cross-examination, to whether she had or would try such a bike was to question why she should when she already had another kind of bike. Though Ms. Rahimi says she likes to walk and has discomfort if she walks for more than 30 to 45 minutes, the fact is she does not seek to walk even this amount. Instead, based on her evidence, she generally limits her walks to perhaps two 10 to 15 minute walks with her dog per day.
- [84] Addressing her artistic pursuits, and whether she is impaired in her ability to pursue these activities, requires a more searching assessment but involves similar issues. Ms. Rahimi accepts that her ability to make jewelry has not been affected by the Accident. She accepts that the fact that she no longer makes artificial flowers as she used to is unrelated to the Accident. She says that she no longer draws or paints because her preference is to do so for extended or uninterrupted periods of time. This would require either sitting or standing for an extended time. She accepts that she could both paint and draw if she took some breaks. She did, for example, take painting and drawing classes at Kwantlen University following the Accident and did well in those classes.
- [85] Ms. Rahimi accepted that she had not been camping in some years because she had not been invited to do so. She said if she were invited she would likely go but suspected that she might have some difficulty doing so.
- [86] The reality is then that Ms. Rahimi is neither unable nor seriously impeded in her ability to engage in many of the activities that she has enjoyed in the past. These pastimes, or many of them, remain available to her with some adjustment or change in how she undertakes them.

- [87] The further reality, based on the evidence of Drs. Caillier and Jung, is that if Ms. Rahimi undertakes the forms of rehabilitation recommended by them she is likely to be able to manage her symptoms better. This speaks to the prospect of both a broader and greater level of activity than she has engaged in in recent years.
- [88] She also told Dr. Caillier that both her headaches and back pain had improved since the Accident. Dr. Caillier has said that a sustained active rehabilitation program is likely to further assist her with these difficulties and with her sleep patterns.
- [89] Counsel for Ms. Rahimi argued that the application of the factors identified in Stapley supports an award of non-pecuniary losses of \$85,000 to \$90,000.
- [90] The defendants argue that an award of \$35,000, in all the circumstances, would be appropriate. The defendants also submit that some further adjustments to this figure, to accommodate or recognize the plaintiff's failure to mitigate her losses, are appropriate.
- [91] I consider that neither set of cases provided to me by counsel properly reflects Ms. Rahimi's status. The cases relied on by counsel for Ms. Rahimi relate to plaintiffs whose injuries were generally more severe than Ms. Rahimi's.
- [92] In *Johal v. Meyede*, 2013 BCSC 2381, there were "[d]ramatic changes from the plaintiff's pre-accident condition to her post-accident condition, both physically and in terms of her mental disposition" (para. 54). The court awarded the plaintiff \$85,000 in non-pecuniary damages.
- [93] In *Kasidoulis v. Russo*, 2010 BCSC 978, the plaintiff suffered more serious injuries than did Ms. Rahimi, injuries that had a broader range of consequences for the plaintiff. For a period after the accident her pain was "disabling" and it was "impossible for her to work" (para. 8). The court described her pain as "debilitating" (para. 39). Though some symptoms abated, her doctor noted "no significant improvement in [her] symptoms" (para. 13). The plaintiff had also become much more withdrawn and less social. She was awarded \$90,000.
- [94] In *Smith v. Fremlin*, 2013 BCSC 800, the plaintiff was described as a "somewhat driven individual" (para. 11). She suffered from some pain "all of the time" (para. 9). She had been an accomplished cyclist and marathon runner. She was articling at the time of the accident. She was no longer able to cycle. She was able to continue to run, though she ran more slowly and for shorter distances. She recognized she would no longer be able to satisfy "the rigours of the traditional practice of law" and chose to pursue a doctorate in law in the hope that she would find a teaching position. It is telling that after her functional evaluation she required two days of bed rest and it took her the better part of a week to return to the level of pain she normally lived with. She was awarded \$90,000 for her non-pecuniary losses.
- [95] The cases relied on by the defendants similarly do not align with Ms. Rahimi's condition or prognosis. In *Nair v. Cindric*, 2013 BCSC 2128, the plaintiff was 14 years old at the time of the accident. She did not miss any school as a result of the accident and she continued to participate fully in her primary activities of volleyball and Indian classical dance. Mr. Justice

Skolrood found the plaintiff suffered a mild to moderate soft tissue injury to her upper back. He found that she would likely continue to experience periodic flare-ups of her upper back, which the medical evidence suggested was unlikely to resolve entirely. The court awarded non-pecuniary damages of \$30,000.

- [96] In *St. Germain v. Jemmott*, 2012 BCSC 1041, the plaintiff was a 31-year-old woman. The court found that her accident caused her significant and persistent lower back pain but there was no evidence that her headaches were caused by the Accident. The court further found that the plaintiff's overall health and well-being were impacted by personal and financial issues that were unrelated to the Accident and that her lower back condition was exacerbated by her failure to undertake recommended treatments and exercise routines. Non-pecuniary damages of \$35,000 were awarded.
- [97] In *Basi v. Buttar*, 2010 BCSC 9, the plaintiff was a 36-year-old woman. Her complaints included neck pain that radiated into the back of her head, and pain between her shoulder blades that radiated down to her mid and low back. Mr. Justice Brown found that the plaintiff had nearly made a full recovery since the Accident. He found that she would fully recover if she were to follow the medical advice made to her. He awarded \$30,000 for non-pecuniary damages.
- [98] Having regard to the foregoing guidance, I consider that an award of \$60,000 properly compensates the plaintiff for her general damages. This award properly reflects the Stapley factors I have referred to, my findings in relation to the plaintiff's physical status and the recognition that if the plaintiff follows the recommendations of Drs. Caillier and Jung and of Ms. Craig, she is likely to be able to better manage her symptoms in the future.
- [99] I also consider that a 20% reduction of this amount is appropriate and reflects the plaintiff's failure to mitigate her losses. Ms. Rahimi is thus awarded \$48,000 on account of her general damages.

Past Wage Loss

- [100] The plaintiff asserts that the Accident affected her ability to work and has caused her loss. Though past wage loss claims can be advanced as a loss of earning capacity, *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19, this was not the theory of loss that was advanced in this instance. Instead, counsel for Ms. Rahimi advanced various types of specific calculations on her behalf. Some were based on the loss of income from projects that Ms. Rahimi was offered by Hectagon and that she either declined or that she started and then stopped working on. Other related calculations were based on what Ms. Rahimi might have earned working for a design firm, but for the Accident, less the amount she did earn working for Hectagon.

- [101] Post-graduation, Ms. Rahimi applied to two design firms for work. She did not indicate in her applications that she suffered from any impairment in her ability to work. She was not hired by either entity and has never, thereafter, sought either to obtain full-time or part-time work from any such firm or to seek contract work from any source other than Hectagon. It also does not appear that Ms. Rahimi has sought additional work from Hectagon, though Mr. Hakimi said he had further work or projects for her.
- [102] The reasons Ms. Rahimi gave for declining certain projects that were offered to her were varied. Some projects required "too much research". Others were too large, though, as a matter of context, they were often projects that would have taken either weeks or a month or two of work. In some cases the clients were perceived to be difficult for various reasons and Ms. Rahimi believed she would become irritated with them. Other projects would have required more driving than Ms. Rahimi was comfortable with. Others appeared to be projects that Ms. Rahimi was not interested in, and counsel for Ms. Rahimi accepted this in his closing submissions. She has a greater interest in the design of public space than in the primarily residential spaces that Hectagon works on. She also said that she had wanted to take a break of some months after graduation. Ms. Rahimi acknowledged that she could work, or sit and stand as required for work, but that if she were required to do so for any prolonged period of time her symptoms would be irritated.
- [103] Importantly, if one adds up the work that Ms. Rahimi has done since she graduated from Kwantlen University, that calculation yields a very modest figure. In each year she has only worked, in combination, for a total of a few months a year. This level of effort or work history is completely out of step with her capabilities as expressed in the expert evidence that was called on her behalf.
- [104] Dr. Caillier was the only medical doctor who gave evidence at trial. Her report acknowledges that at times Ms. Rahimi finds it difficult to be on her computer or to do freehand drawing. Nevertheless that report unequivocally states:

Limitations and Restrictions: Ms. Rahimi is currently taking contract work as an interior designer. It is my opinion that she is capable of doing so. It is my opinion that she is a likely physically capable of working on a fulltime basis if she were to find such work but that during times of symptomatic flares she will likely need to pace and prioritize what needs to be done.

- [105] I reiterate that Ms. Rahimi told Dr. Caillier that she had not turned down any work as a result of her injuries. Dr. Jung did not address Ms. Rahimi's capacity to work. Ms. Craig's report states:

Ms. Rahimi reports that she must use pacing and breaking strategies at her workplace to manage her pain, with the result that she sometimes does not finish her work. Although she meets the essential functional demands of her job, she reports symptom increase, necessitating pacing and breaking which in turn results in reduced productivity and incomplete work. To explain further, she is able to sit at work but is limited in the duration that she can tolerate this work posture, therefore limiting her ability to meet this demand fully. At the present time Ms. Rahimi is best

suited to part-time work where she is able to pace and break as needed to enable her to better manage her pain. Ms. Rahimi would be best suited to a position that is 6 hours per day, 5 days per week that would allow her the flexibility to break at regular intervals. My suggestion for managing her work day is as follows: work 1.5 hours break 30 minutes; work 1.5 hours break 1 hour: work 1.5 hours break 30 minutes; work 1.5 hours. This type of schedule (slight variation is expected based on symptoms on any given day and work load) would allow Ms. Rahimi a structured day with scheduled breaks to allow recovery during the day from work intensive sitting tasks. This type of schedule, if attainable, would allow Ms. Rahimi to take consecutive contracts or find a longer term employer. Ms. Rahimi is limited to very light or sedentary work, reducing employment options and competitive employability overall.

- [106] Three observations flow from this opinion. First, Ms. Craig is of the view that Ms. Rahimi can, on a sustained basis, work for six full hours a day. The average workday, with some breaks and/or lunch, and absent overtime, is likely seven hours or eight hours. Ms. Rahimi has not worked a fraction of this.
- [107] Second, though Ms. Rahimi reports she has discomfort from sitting after 30 minutes, Ms. Craig has Ms. Rahimi sitting for four 1.5 hour segments each day.
- [108] Third, Ms. Craig's opinion is premised on the need for Ms. Rahimi to sit on a consistent and ongoing basis at her workplace. Thus, if such sustained and inflexible sitting were required, Ms. Rahimi would, in Ms. Craig's view, be limited to working a six-hour day. Ms. Craig's report says "she would not tolerate constant work intensive sitting which may be required by some employers". This description does not in fact accord with what Ms. Rahimi says is required of her as a designer. Nor, for example, does it accord with the evidence of Ms. Gladwin, who owns her own design firm, and who was called by the defendants.
- [109] Though there are times when Ms. Rahimi has to sit at a computer, this is not invariably or even generally the case. Instead, there are times she has to sit and times she has to go to meetings, or to a job site or to a showroom. The evidence of Ms. Gladwin made clear that there is frequent opportunity in these various contexts to stand up and to move around. Ms. Rahimi's job as a designer, by virtue of these various requirements and types of activities, all of which import some flexibility into the physical requirements of her job, in fact accommodate her various difficulties to an unusual degree. Thus, though many employment positions require one to sit at a desk on a sustained day in and day out basis, this is simply not the case with Ms. Rahimi's work.
- [110] Furthermore, Ms. Gladwin made clear that there is limited lifting or carrying required for the job and that if design samples have to be transported to a meeting her staff normally use a small cart to do so.

- [111] The flexibility inherent in Ms. Rahimi's work has, in fact, been further enhanced by virtue of the professional relationship that Ms. Rahimi has with Hectagon. She has neither a start time nor an end time to her day. She can get up, stretch, and go for a walk as and when she wants. She can organize her day, subject to the need to get the work she undertakes completed, as she wishes.
- [112] Ms. Rahimi may subjectively believe that she has been limited in her ability to work on a full-time basis. I do not accept, on the whole of the evidence, that this is so. Accordingly I do not consider that Ms. Rahimi has suffered any past loss of income.

Future Wage Loss

- [113] There are three appellate decisions that provide useful guidance on the legal principles that govern this head of loss. In Gregory, the court, in eschewing the value of comparator cases in future wage loss claims, said:
- [32] In my view comparator cases are of limited utility in the assessment of awards for future losses, generally. It is well settled that an individual's earning capacity is a capital asset: Parypa v. Wickware, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: Rosvold v. Dunlop, 2001 BCCA 1 at para. 11; Ryder v. Paquette, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry. I am persuaded by what Macfarlane J.A. said in Lawin v. Jones, 98 B.C.L.R. (2d) 126, [1994] B.C.J. No. 2107 at para. 35, about the lack of utility in comparisons to other cases:
- [G]iven the fact that we cannot foresee the future, it is impossible in a case like this to find any comfort in resort to other cases where the future may be more predictable. Judges will differ, perhaps widely, in making assessments in cases which have been said to depend on what may be seen in a crystal ball. What is certain is that a trial judge who hears and observes the witnesses is in a much better position than an appellate judge to come to a conclusion as to what is fair and reasonable in the circumstances. ...
- [114] In Reilly v. Lynn, 2003 BCCA 49, leave to appeal ref'd, [2003] S.C.C.A. No. 221, the majority said:

[100] An award for loss of earning capacity presents particular difficulties. As Dickson J. (as he then was) said, in *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, *supra*. A capital asset has been lost: what was its value?

[115] Finally, in *Perren v. Lalari*, 2010 BCCA 140, the court described the two approaches that can be used to assess a claim for the loss of future earning capacity:

[12] These cases, *Steenblok*, *Brown*, and *Kwei*, illustrate the two (both correct) approaches to the assessment of future loss of earning capacity. One is what was later called by Finch J.A. in *Pallos* the 'real possibility' approach. Such an approach may be appropriate where a demonstrated pecuniary loss is quantifiable in a measurable way; however, even where the loss is assessable in a measurable way (as it was in *Steenblok*), it remains a loss of capacity that is being compensated. The other approach is more appropriate where the loss, though proven, is not measurable in a pecuniary way. An obvious example of the *Brown* approach is a young person whose career path is uncertain. In my view, the cases that follow do not alter these basic propositions I have mentioned. Nor do I consider that these cases illustrate an inconsistency in the jurisprudence on the question of proof of future loss of earning capacity.

[116] The burden of proving that there is a real and substantial possibility of a future event leading to an income loss lies with Ms. Rahimi; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64, citing *Perren* at para. 32.

[117] Numerous considerations inform or are relevant to the loss of Ms. Rahimi's earning capacity. At age 32 she has a very limited work history. I do not intend this as a criticism. She is a relatively recent immigrant to this country and was in school for many years. The reality, however, is that she is not able to point to any history of professional success or promotion that foreshadows future success.

[118] Though she graduated on time from Kwantlen University, her grades were relatively average. Ms. Gladwin, at whose design firm Ms. Rahimi completed a practicum, reported that her staff had been dissatisfied for various reasons with Ms. Rahimi's performance and that she had communicated that dissatisfaction to Kwantlen University. None of those concerns had anything to do, as Ms. Rahimi suggested in her evidence, with how Ms. Rahimi dressed.

[119] Ms. Gladwin also said Kwantlen University and other schools will recommend their better students to employers. Sometimes students who do well on a practicum are invited to work at a design firm. There is no suggestion that such considerations pertain to Ms. Rahimi.

- [120] Ms. Rahimi said that her plan had been to work at a design firm for a period of time and to then perhaps open her own firm. Though there is a real and substantial possibility that this may occur, what success Ms. Rahimi would, in any event, have enjoyed is almost impossible to determine. Nevertheless, on the evidence before me, aspects of this plan may now be more difficult for Ms. Rahimi to accomplish. Though I have found, and the evidence before me properly construed indicates, that Ms. Rahimi can work on a full-time basis, she may struggle with working on a more than full-time basis. Ms. Gladwin who has had her own design firm for many years said that she has consistently worked long days and weekends. Certainly this is not uncommon for many small business owners.
- [121] I also consider that Ms. Rahimi may at times work with some pain or discomfort. In *Cheung v. MacDonald et al*, 2004 BCSC 222, Ehrcke J. concluded that the loss of capacity to work without pain was properly compensable within a future wage loss claim (para. 89). See also *Rezaei* at paras. 97-99.
- [122] There was no suggestion or evidence that Ms. Rahimi was contemplating another career. Nevertheless, I believe I can consider that Ms. Rahimi may seek some other form of employment in the future. Her injuries, and the difficulties associated with them, may then be more significant.
- [123] The report from Mr. Carson, an economist retained by Ms. Rahimi, did not specifically address or adjust for such normal contingencies in the marketplace as job displacement, layoffs or the prospect of Ms. Rahimi having children. Nevertheless, I can consider such general contingencies and their impact on Ms. Rahimi's future income.
- [124] The reports of each of Drs. Caillier and Jung indicate that the Accident has made Ms. Rahimi more vulnerable or susceptible to future trauma or a further car accident. She is thus at risk of some worsening of her symptoms which may, in turn, impact on her ability to work.
- [125] At the same time, Dr. Caillier and Dr. Jung foresee the likelihood of some improvement, with an active rehabilitation regime, in the management of her symptoms and pain.
- [126] I consider that Ms. Rahimi has established some loss of earning capacity. However, the foregoing considerations, in combination, impede any rigorous assessment of such loss. I consider, therefore, that the sum of \$50,000 addresses the various contingencies I have identified and properly compensates Ms. Rahimi for her loss of future earning capacity. That figure, in context, reflects about one year's income for an accredited designer with perhaps five years' experience.

Loss of Housekeeping Capacity

- [127] Awards for housekeeping capacity may be made for either past or future losses, or both; *Kroeker v. Jansen*, 123 D.L.R. (4th) 652, [1995] 6 W.W.R. 5 (B.C.C.A.) at para. 25, leave to appeal ref'd (sub nom *Jansen v. Kroeker*), [1995] S.C.C.A. No. 263. Such claims are different

from a future cost of care claim in that they reflect a "loss of a personal capacity" but are "not dependent on whether replacement housekeeping costs are actually incurred": O'Connell v. Yung, 2012 BCCA 57 at para. 67; Westbroek at para. 76. Having said this, such claims are frequently valued using a replacement cost approach. These claims are also distinct from a claim for non-pecuniary damages; Poirier v. Aubrey, 2010 BCCA 266 at paras. 31-32.

- [128] In both Kroeker, at para. 29, and in Westbroek, at para. 76, the Court of Appeal said that such awards should be valued conservatively or cautiously.
- [129] Ms. Rahimi's claim for loss of housekeeping capacity is based on i) a diminished ability to cook traditional Persian meals which can be quite elaborate and time-consuming; ii) a diminished ability to do general housekeeping; iii) a diminished ability to do heavier or seasonal cleaning; and iv) a diminished ability to do heavier, repetitive gardening.
- [130] These various claims do not, in many respects, find support in the plaintiff's evidence or the expert evidence called on her behalf.
- [131] Ms. Rahimi did say she has some pain when she cleans her house, that she has trouble carrying groceries and that she struggles to make more elaborate meals. Aspects of this evidence were supported by her sister and by Mr. Hakimi.
- [132] Ms. Rahimi also gave evidence that, because she has a dog, she vacuums and sweeps her apartment each day for an hour. She told Dr. Caillier that she maintains her home without assistance. She told Dr. Jung that she generally wakes at 6:30 a.m. and for "the first three hours she will prepare for the day with cooking, cleaning and sometimes exercise or go for walks". She did tell Dr. Jung that some activities such as cleaning a tub or meal preparation, if such preparation was lengthy, would affect her.
- [133] Dr. Caillier has opined that Ms. Rahimi does not require any housekeeping assistance, whether seasonal or otherwise. Ms. Craig has agreed that Ms. Rahimi does not require help with regular household cleaning but does say that Ms. Rahimi should get some assistance for heavier and seasonal cleaning and for heavier or repetitive gardening.
- [134] Ms. Rahimi also told Dr. Caillier that she did all of the cooking she required. She told Ms. Craig, however, that she found some housework, including meal preparation, physically challenging, though Ms. Craig's report does not suggest that Ms. Rahimi requires any cooking assistance.
- [135] Aspects of Ms. Rahimi's own evidence, as well as the opinions of each of Dr. Caillier and Ms. Craig thus help give some context to this component of the plaintiff's claim.

- [136] I do accept that hosting dinner parties, something Ms. Rahimi has enjoyed doing in the past, would be more difficult for her. Having said this, based on her evidence, she would generally not give such parties or create more lavish meals when she was busy or, for example, in school. I also accept that certain forms of heavy cleaning may be somewhat more difficult for Ms. Rahimi.
- [137] The issue of gardening assistance is problematic in several respects. There was no evidence that Ms. Rahimi has any interest in gardening. She also presently lives in an apartment, though I accept that she may buy a home at some point in the future.
- [138] The plaintiff's claim also seeks, in respect of these various subcategories of loss of capacity, to ascribe what is, in the circumstances, an unrealistic precision. Thus, for example, the issue of gardening assistance required generation of an annual dollar amount, which was calculated to take effect in eight years, when Ms. Rahimi notionally might buy a home, and it was thereafter calculated for another 42 years, or until Ms. Rahimi is 82 years old. I consider that it is unlikely, quite apart from the Accident, that Ms. Rahimi would have done either heavy cleaning or heavy and repetitive gardening into her 80s.
- [139] I also reiterate that if Ms. Rahimi conscientiously undertakes an active rehabilitation program, her ongoing ability to perform her various household activities is likely to be enhanced.
- [140] In the result, I consider that a global amount of \$10,000 properly compensates Ms. Rahimi for all aspects of her loss of housekeeping capacity claim. This figure includes both a past and a future component.

Cost of Future Care

- [141] The test for determining the appropriate award for the costs of future care is an objective one based on medical evidence. For an award of future care: 1) there must be a medical justification for claims for costs of future care; and 2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, [1985] B.C.J. No. 2762 at para. 199 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.). In *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22, when addressing the assessment of costs of future care, Chief Justice McLachlin confirmed that courts rely on "evidence as to what care is likely to be in the injured person's best interest", and that the measure of such care is "objective, based on the evidence". That same test was recently applied in *Shapiro v. Dailey*, 2012 BCCA 128 at para. 51.
- [142] The following additional legal principles govern an award for future care costs:
- a) An award of future care costs should be reasonable and the award must be moderate and fair to both parties; see *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-243.

- b) Common sense should inform claims for the costs of future care, however much they may be recommended by experts in the field; see *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13.

[143] A further principle is particularly important in this case. Counsel for the plaintiff argued, in his written submissions, that once "a care item is found to be justified and reasonable, that is the end of the analysis". In support of that principle, he relied on the following statement in *Andrews* at 246-7:

It is not for the Court to conjecture upon how a plaintiff will spend the amount awarded to him. There is always the possibility that the victim will not invest his award wisely but will dissipate it. That is not something which ought to be allowed to affect a consideration of the proper basis of compensation within a fault-based system. The plaintiff is free to do with that sum of money as he likes.

[144] The foregoing statement does not have the effect that counsel for Ms. Rahimi contends. In *O'Connell*, the court concluded that the trial judge had erred in concluding that "future care costs are payable whether or not they may be incurred in the future" (para. 68).

[145] In "assessing what is reasonably necessary to promote the plaintiff's health the court should consider whether the plaintiff would likely use the items or services in the future": *Prempeh v. Boisvert*, 2012 BCSC 304 at para. 107. It has been found that if this factor is not taken into consideration then "determining what [the plaintiff] needs would at best be highly speculative and at worst a futile exercise" (*Coulter (Guardian ad litem) v. Leduc*, 2005 BCCA 199 at para. 85, leave to appeal ref'd (sub nom *Coulter v. Ball*), [2005] S.C.C.A. No. 289). This assessment can be based on evidence of the plaintiff's attitude towards a care regime and/or the plaintiff's failure to follow that care regime in the past. In *Izony v. Weidlich*, 2006 BCSC 1315, Masuhara J. said:

[74] I agree that future care costs must be justified as reasonable both in the sense of being medically required and in the sense of being expenses that the plaintiff will, on the evidence, be likely to incur (see generally *Krangle*) I therefore do not think it appropriate to make provision for items or services that the plaintiff has not used in the past (see *Courdin* at 1] 35), or for items or services that it is unlikely he will use in the future. The evidence at trial and the clinical records clearly indicated Mr. Izony has expressed resistance to using items or availing himself of services that were medically recommended.

[146] Evidence that a plaintiff likely won't engage in a recommended care regime has been a basis for both refusing awards and for applying negative contingencies to reduce the quantum of the award sought. A negative contingency was used in *O'Connell* to accommodate the fact that though the plaintiff was refusing the assistance of home care at the time of trial because her husband was assisting her, it was unlikely her husband would be able to care for her indefinitely. Similarly, in *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, a general 20% reduction was applied to the cost of psychological counselling as the evidence suggested that the plaintiff would only "consider" going to

counselling, and not that he was actually committed to going (para. 54). However, in both *Izony* at para. 74 and *Muhammed v. Ogloff*, 2013 BCSC 496 at paras. 200-201, this court fully rejected claims for the cost of various therapies based on evidence that the plaintiff would not take advantage of those therapies in the future.

- [147] In this case the foregoing principles are important because the plaintiff seeks all of the future care costs suggested by each of the various experts who addressed the issue.
- [148] Thus, Dr. Caillier emphasized Ms. Rahimi's need for an active rehabilitation program consisting of exercise and swimming together with some massage and physiotherapy. Dr. Jung added chiropractic treatments and a comfort bike. Ms. Craig recommended yoga and an aqua fit class. Several experts recommended that Ms. Rahimi get advice on how to set up her workplace from an ergonomic perspective. The experts also recommend some ongoing massage or physiotherapy.
- [149] I do not consider that the plaintiff would engage in all such forms of activity at all times. This is partly because to do so would be unrealistic. Dr. Caillier has recommended that Ms. Rahimi engage in an exercise program at least three to four times a week for at least an hour. It is unlikely that the plaintiff would also concurrently cycle and go to yoga and go to aqua fit classes. If she did so she would be more likely to do so intermittently or to fit them into a coherent schedule. She is also unlikely to do all of these things into her early 80s.
- [150] These conclusions are also supported by Ms. Rahimi's behaviour. For example, during the period from February 2013 to April 2013, she saw a personal trainer. She stopped going to massage therapy entirely during this period.
- [151] Furthermore, having heard Ms. Rahimi's evidence, I do not accept that she would engage in all of these forms of activities to the extent recommended or, in some cases, at all.
- [152] I have described her reaction to a "comfort bike". Though both Dr. Caillier and Ms. Craig discussed ergonomic improvements to her work situation, she told both that she had a good working situation. She was asked about aqua fit classes in her cross-examination. She said she had once seen such a class and had tried to imitate the exercises. She found them hard to do and did not want to try further. In response to whether she had seen Dr. Caillier's recommendations relating to exercise she said that if she didn't feel comfortable she would "decide whether to follow the recommendation".
- [153] Still further, she presently lives in a building that has both an exercise centre and a pool which would likely, at least for the present, accommodate many of the recommendations being made for her. In addition, many people, at some point, join a health club, or pool, a recreation centre or go to yoga simply to advance and preserve their good health. The plaintiff's cost of future care claim is premised on the assumption that Ms. Rahimi would have incurred no such expenses in relation to maintaining her fitness in the future. With this backdrop, I turn to the specifics of the plaintiff's future loss claim.

a) Kinesiologist

[154] Dr. Caillier recommended Ms. Rahimi see a kinesiologist for 15 sessions in year one and for a further four to five sessions per year in the ensuing three years. These costs would total about \$2,500. Because this training appears to be fundamental to Ms. Rahimi's future well-being, I accept that she will take such classes and award her \$2,500.

b) Gym, Pool and Pool-based Exercises

[155] The plaintiff seeks both the cost of a recreational centre membership, which could give her access to a gym and a pool, as well as the costs of aqua fit classes. I do not consider, for the various reasons I have described, that Ms. Rahimi will use such facilities and classes throughout the period that spans her life expectancy. I consider that an amount of \$10,000 reasonably provides for this recommendation.

c) Massage Therapy and Chiropractic Treatments

[156] Dr. Caillier and Dr. Jung support Ms. Rahimi going to a massage therapist six times a year. Dr. Jung proposes two to four chiropractic treatments a year. The plaintiff's calculations are based on her requiring such treatments over the next 50 or so years. I do not believe or accept that she would do both at all times throughout this period of time and would award Ms. Rahimi \$7,500 for such treatments.

d) Ergonomic Assessment

[157] Such an assessment, as well as an ergonomic chair, is recommended by different experts. I do not accept that Ms. Rahimi would commission such an assessment every seven years during her working life. I consider there is a substantial possibility she may not do so once. I would award her \$500 for this item.

e) Advil

[158] Ms. Rahimi reasonably uses Advil to manage her headaches. Dr. Caillier's prognosis is that with exercise, Ms. Rahimi's headaches "will result in improvement with a lessening in intensity and frequency". I would award Ms. Rahimi \$100 for this care item.

f) Comfort Bike

[159] Dr. Jung recommended the use of such a bike, the cost of which can vary from \$200 to \$1,000. I believe there is a substantial possibility Ms. Rahimi will not acquire such a bike. I would award her \$200 for this care item.

g) Yoga

[160] Yoga was recommended or endorsed by Ms. Craig and Dr. Caillier. Ms. Rahimi appears to enjoy yoga. I consider that she is, however, unlikely to consistently take yoga classes in combination with the other activities that have been recommended for her and that this award provides for. I would award Ms. Rahimi \$5,000 on account of this care item.

h) Psychologist

[161] Dr. Caillier and Dr. Jung recommended that Ms. Rahimi have access to a psychologist to address fear avoidance and pain management. Though no cost for this item was provided, courts will, on occasion, "ball park" an expense; see *Chaban v. Chaban*, 2009 BCSC 87 at paras. 65-73; *Loewen v. Bernardi*, 93 B.C.L.R. (2d) 242, [1994] B.C.J. No. 1169 (C.A.) at paras. 24-27. I award \$1,000 for this care item.

[162] The total award I have made on account of Ms. Rahimi's future care costs is \$26,800.00.

Special Damages

[163] The parties were able to agree on most of the plaintiff's special damages. This included her attendance at massage, physiotherapy and active rehabilitation. It includes the cost of the yoga classes that Ms. Rahimi has attended to date and some taxi cab expenses.

[164] The defendants question Ms. Rahimi's acupuncture expenses, an amount of \$401.44, and certain other cab fares. Ms. Rahimi testified that her acupuncture treatments assisted her. In the circumstances I consider this expense as well as the further cab fares reasonable.

[165] The plaintiff's total award for her special damages is \$5,772.54.

Summary**General Damages**

\$ 48,000.00

Past Wage Loss

0.00

Future Wage Loss

50,000.00

Loss of Housekeeping Expense

10,000.00

Cost of Future Care

26,800.00

Special Damages

5,772.54

TOTAL:

\$140,572.54

[166] I am satisfied that the amount of \$140,572.54 fairly and reasonably compensates Ms. Rahimi for her loss.

[167] Counsel for the parties agreed that they would deal with the tax and other adjustments to my award that may be necessary. If they encounter any difficulty with this, I am available to assist them further. The issue of costs arising from this action was not addressed by counsel.

"Voith J."

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