
CANADA / JUDGMENT

Salame v. Sutherland

2016 BCSC 1610

COURT

Supreme Court of British Columbia

DECIDED

31 August 2016

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2016 BCSC 1610 Salame v. Sutherland

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Salame v. Sutherland,

2016 BCSC 1610

Date: 20160831

Docket: M161237

Registry: New Westminster

Between:

Joulnar Salame

Plaintiff

And

Brian Douglas Sutherland

Defendant

Corrected Judgment: The text of the judgment was corrected on the

front page in Counsel for the Plaintiff's name

where changes were made on September 2, 2016

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:

S. Ballard

V. Cheung

Counsel for the Defendant:

J. Marquardt

Place and Date of Trial:

New Westminster, B.C.

December 14-18, 2015

Place and Date of Judgment:

New Westminster, B.C.

August 31, 2016

Overview

- [1] The plaintiff, Joulnar Salame, seeks damages for injuries she sustained in a car accident that occurred on June 1, 2013, at the intersection of 200th Street and 50th Avenue in Langley. She was the front seat passenger in a 1990 Mazda 4-door sedan driven by her son, Nader Khattab. They were travelling south on 200th Street when their vehicle was struck by a 2002 Honda Civic driven by the defendant, who was attempting a left turn on to 200th Street. The force of the impact was significant. Both vehicles were written off by ICBC. The defendant concedes liability.
- [2] Ms. Salame was wearing her seatbelt. At the time of the impact, she felt her chest crack and she experienced immediate, severe pain in her chest and neck. She was transported by ambulance to Langley Memorial Hospital. There is no dispute that she suffered a fractured sternum, a partial left rotator cuff tear, and soft tissue injuries in her neck. She alleges that she also sustained thoracic spinal fractures. She says her injuries caused significant and ongoing pain in her chest, left shoulder, neck and upper back, and ultimately lead to depressive symptoms.
- [3] Ms. Salame was 52 years old at the time of the accident. She has been married to Youssef Khattab for about 30 years. They have seven children whose ages at the time of the trial ranged between 30 and 17 years. The two youngest children still live at home with Ms. Salame and Mr. Khattab.

- [4] Ms. Salame and her husband have owned and operated a laundromat since 2007. Prior to the accident, Ms. Salame's life was centered on her family and the laundromat. She was primarily responsible for homemaking tasks. At the time of the accident, she was working at the laundromat approximately 28 to 30 hours a week, spread over the course of about three days, but her schedule varied depending on the workload at the laundromat and her husband's schedule. Many of her duties at the laundromat are physical.
- [5] In addition to the laundromat, Mr. Khattab operates a number of side businesses including installing security cameras, repairing computers, and preparing income tax returns. He is particularly busy with tax returns during what the parties referred to as the "tax season" which runs from February to the end of April each year.
- [6] Ms. Salame had no material health problems at the time of the accident. She had been diagnosed with hypothyroidism but that condition was treated successfully with medication. She had experienced a problem with her left foot and hip that, for a few months, prevented her from going on walks but did not prevent her from working or fulfilling her household duties. The hip and foot issue had resolved prior to the accident. Several years prior to the accident she had surgery on her right hand as treatment for carpal tunnel syndrome. That surgery was successful. After the accident, Ms. Salame was diagnosed with moderate osteoporosis. The osteoporosis pre-existed the accident but she did not experience any clinical manifestations of that condition before the accident.
- [7] In the first few months following the accident, Ms. Salame needed help with the simplest of tasks including getting into and out of bed and attending to her personal hygiene. She was prescribed anti-inflammatories, painkillers, including narcotics, and muscle relaxants. She began experiencing depressive symptoms and became irritated and anxious. Eventually, she was also prescribed antidepressant medication.
- [8] In the first six months after the accident, Ms. Salame was unable to do any of the grocery shopping, cooking and housework, and she was unable to perform any of her duties at the laundromat. Her husband and children took over those tasks. Over time, she has been able to resume responsibility for most of the household chores but the work takes her longer to complete and she continues to rely on her husband and children to do the heavier jobs.
- [9] Ms. Salame attended physiotherapy between January and June 2014 as well as massage therapy and acupuncture. She was referred to an orthopedic surgeon for investigation of the left shoulder pain. She received a steroid injection into the left shoulder which resulted in temporary improvement lasting about six weeks. She had an MRI of the shoulder which showed a partial thickness tear of one of the rotator cuff muscles.
- [10] One year after the accident, Ms. Salame was still suffering from significant pain. She had resumed some of her pre-accident homemaking duties but she remained unable to perform her duties at the laundromat. In February 2014, she and her husband hired an employee named Douglas Weir to help out at the laundromat. This coincided with tax season, during which Mr. Khattab was especially busy preparing tax returns. Mr. Weir worked part-time

until November 2014. In addition to Mr. Weir, Ms. Salame's children stepped in to perform her work at the laundromat, as did Mr. Khattab, but unlike Mr. Weir, none of them were paid wages for performing Ms. Salame's work.

- [11] Ms. Salame returned to work at the laundromat gradually, commencing with light duties in December 2014, approximately 18 months after the accident.
- [12] In December 2014 or January 2015, Ms. Salame started a second course of physiotherapy. This lasted until about October 2015 when she underwent eye surgery and when ICBC stopped funding the sessions.
- [13] Over time Ms. Salame's condition has continued to improve. She gradually expanded the scope and duration of her work at the laundromat but she remains limited in her ability to carry heavy loads of laundry, clean the washrooms and the machines, and perform repetitive and reaching motions. She continues to take medications including antidepressant medication which she says limits her ability to deal effectively with customers. At the time of the trial she was working at the laundromat 2 to 3 times a week for a total of about 15 hours each week, or roughly half the hours she worked before the accident.
- [14] At the time of the trial, Ms. Salame continued to suffer from ongoing left shoulder pain and upper back pain. She continued to experience chest pain in cold weather and when she coughs, sneezes and laughs. She continued to suffer from depressed mood and periodic episodes of extreme pain.
- [15] In late 2014, Ms. Salame developed low back pain that she acknowledges was unrelated to the accident. It was fairly significant for a few months. In 2015, she experienced the return of carpal tunnel symptoms. In October 2015, Ms. Salame underwent surgery to repair a macular hole in her right eye. At the time of the trial in December 2015 she was continuing to recover from the eye surgery. She had reduced her hours at the laundromat following the eye surgery but expected to increase her hours again once her eye healed.
- [16] The defendant concedes that Ms. Salame suffered significant injuries in the accident, including the fractured sternum, left rotator cuff tear, and soft tissue injuries, and that these caused her pain that was severe enough to prevent her from fulfilling her household duties and her duties at the laundromat for a period of about 18 months. The defendant says these injuries gradually improved leaving her with close to complete recovery by March 2015. The defence submits that Ms. Salame did not suffer thoracic spinal fractures in the accident and that her upper back pain is more likely related to pre-existing osteoporosis.
- [17] The defence submits that Ms. Salame will suffer few if any ongoing limitations as a result of the sternum fracture and that she will suffer only minor ongoing limitations from the rotator cuff injury. The defendant concedes that the injuries Ms. Salame suffered in the accident contributed to her emotional and depressive symptoms, but says that she would have suffered from some level of depression anyway as a result of various factors unrelated to the accident including the onset of menopause, the death of her mother, her children

growing up and leaving home, her osteoporosis diagnosis, and the return of carpal tunnel symptoms. The defendant submits that any ongoing symptoms significant enough to interfere with Ms. Salame's ability to work and perform household chores are related to progressive osteoporosis in her thoracic spine and lower back, carpal tunnel syndrome and the recent eye surgery, and are unrelated to the injuries she sustained in the accident.

- [18] Ms. Salame seeks damages for non-pecuniary loss, past and future loss of earning capacity, past and future loss of homemaking capacity, cost of future care, and special damages. The parties have agreed that Ms. Salame incurred special damages of \$2,142.66. In addition to that amount, the defendant submits that Ms. Salame has established a claim for non-pecuniary damages reflecting a period of 18 months of gradually improving symptoms, damages for past loss of earning capacity in an amount limited to half the cost of Mr. Weir's wages, and damages, in a modest amount, for past loss of homemaking capacity. The defendant submits that Ms. Salame has not established a claim for future loss of earning capacity, future loss of homemaking capacity or costs of future care.

Issues

- [19] The primary issues for determination are:

- (a) Did the accident cause Ms. Salame's upper back pain? Among other things, did she suffer thoracic spine fractures in the accident, was the upper back pain a result of soft tissue injuries she suffered in the accident, or was the upper back pain more likely the result of her pre-existing osteoporosis?
- (b) To what extent, if any, are Ms. Salame's ongoing physical symptoms the result of her pre-existing osteoporosis which she would have experienced even if the accident had not occurred?
- (c) To what extent, if any, are Ms. Salame's ongoing depressive symptoms the result of factors unrelated to the accident which she would have experienced even if the accident had not occurred?
- (d) What is the appropriate quantum of non-pecuniary damages?
- (e) What is the appropriate quantum of damages for past loss of income earning capacity?
- (f) Has Ms. Salame established a claim for damages for future loss of income earning capacity and, if so, what is the appropriate quantum?
- (g) What is the appropriate quantum of damages for loss of homemaking capacity?
- (h) Has Ms. Salame established a claim for damages for cost of future care and, if so, what is the appropriate quantum?

Credibility and Reliability

- [20] The critical questions that need to be answered are what injuries were caused by the accident and what effect those injuries have had on Ms. Salame's life. While there was objective evidence of some of Ms. Salame's injuries, most notably the fractured sternum and the rotator cuff tear, her subjective reports of the impact of the injuries on her physical, mental and emotional state provide the foundation for the assessment of her damages. As in most cases involving subjective complaints, the answers to these questions turn to a significant extent on Ms. Salame's credibility. It is particularly important to exercise caution and examine her evidence carefully: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) at 399.
- [21] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd*, [2012] S.C.C.A. No. 392. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying his recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes his evidence or is otherwise inconsistent in his recollections, the witness's demeanour, and whether the witness's evidence seems generally unreasonable, impossible, or unlikely.
- [22] The defendant submits that while much of Ms. Salame's evidence is reliable, I should be cautious about accepting her evidence wholly at face value. This is because there was some confusion in her testimony about how she and her husband share the income generated by the businesses they operate; she failed to mention in her examination-in-chief some health issues that are unrelated to the accident; and the defendant submits there were some inconsistencies between her evidence at trial and her evidence given on examination for discovery. None of this gave me any cause for concern. To the contrary, I found Ms. Salame to be a very credible witness.
- [23] Ms. Salame's testimony did indicate some confusion concerning how the income from the family businesses was shared but she explained that she did not know much about this topic and that her husband looked after the accounting. There was nothing unreasonable or unlikely about her evidence in this respect.
- [24] Ms. Salame did not mention some unrelated health issues during her testimony in chief but the scope of topics covered in direct evidence is a reflection of counsel's judgment. It does not indicate a tendency on the part of the witness to withhold relevant evidence. When asked in cross-examination about unrelated health issues, Ms. Salame was forthcoming and made admissions against interest. For example, she acknowledged that her unrelated carpal tunnel symptoms affected, to some extent, her ability to perform certain duties at the laundromat.
- [25] Finally, while the defendant identified some minor differences between Ms. Salame's testimony at trial and on examination for discovery, none of those gave rise to any concern with respect to the credibility or reliability of her evidence. The differences were few and

minor and, in my view, insignificant. I do not intend to refer to all of them. An example will suffice. At trial, Ms. Salame testified that her injuries prevented her from praying in the position that she has prayed all her life, which required her to bend and kneel. She said this made her feel very guilty. During her examination for discovery, when asked about "activities" that her injuries interfered with she did not mention praying. However, when this was pointed out to her during cross-examination she reasonably explained that praying is a religious obligation and she does not consider it to be an "activity". As McEachern C.J.S.C. said many years ago in *Diack v. Bardsley* (1983), 46 B.C.L.R. 240 (S.C.), at para. 30, *aff'd* (1984), 31 C.C.L.T. 308 (C.A.), the "usefulness [of minor variations between a witness's evidence at trial and on discovery] is limited because witnesses seldom speak with much precision at discovery".

- [26] Ms. Salame's evidence concerning her pre-accident physical health and lifestyle, and the effect of her injuries was corroborated by reliable evidence from her husband, her son, her daughter and one of her good friends. None of those third-party witnesses was shown to have given inconsistent, exaggerated, unreasonable or implausible testimony and there was nothing to impugn their credibility.
- [27] Dr. Loch, the orthopedic surgeon retained by the defendant to perform an independent medical examination, acknowledged that there was no evidence of any amplified pain behaviours during his interview and examination of Ms. Salame and Dr. Loch believed she was truthful when she described her medical history.
- [28] Finally, Ms. Salame did not tend towards exaggeration, and her testimony was not shown to be implausible, internally inconsistent or inconsistent with other evidence. For these reasons, I concluded that Ms. Salame was a truthful witness who provided credible and reliable evidence.

Causation

Legal Principles

- [29] Ms. Salame must prove, on a balance of probabilities, that the accident caused the injuries in respect of which she seeks damages. The test for causation, established in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, 140 D.L.R. (4th) 235, is the "but for" test. This requires Ms. Salame to establish that it is more likely than not that but for the accident she would not have suffered the injuries underlying her claim. Causation need not be determined by scientific precision and is best answered with ordinary common sense: *Athey* at para. 16.
- [30] Ms. Salame does not have to establish that the accident is the sole cause of the injuries. If other potential causes exist, she will still satisfy the causation test if she can prove a substantial connection between the injury and the defendants' conduct, beyond the de minimus range. If she does so, the defendants will be fully liable for the harm suffered, even if other causal factors, which the defendants are not responsible for, contributed to the

harm: *Athey*; *Blackwater v. Plint*, 2005 SCC 58; *Resurface Corp. v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32; *Farrant v. Laktin*, 2011 BCCA 336.

- [31] Where there are multiple potential causes of damage, the court must consider whether the underlying injuries are divisible or indivisible. Indivisible injuries are those that cannot be separated or have liability attributed to the constituent causes whereas divisible injuries are those capable of being separated out and having their damages assessed independently: *Bradley v. Groves*, 2010 BCCA 361 at para. 20. The characterization of damage as divisible or indivisible is necessary to ensure that the defendant is not held liable for injuries not caused by his or her negligence: *Athey* at paras. 24-25. If an injury is indivisible, subject to contributory negligence, the defendant is liable to the plaintiff for all damages attributable to that injury regardless of the contribution of other causes: *Athey* at paras. 17-20.
- [32] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35

Discussion

- [33] Again, it is not disputed that Ms. Salame sustained a fractured sternum, left rotator cuff tear, and soft tissue injuries in the accident. However, the defence submits that Ms. Salame did not suffer thoracic spinal fractures in the accident and that her upper back pain was more likely related to pre-existing osteoporosis. In addition, the defence submits that any ongoing physical symptoms are attributable to progressive osteoporosis in her thoracic spine and lower back, carpal tunnel syndrome and the recent eye surgery, and that any ongoing depressive symptoms are attributable to factors unrelated to the accident.

Upper Back Pain

- [34] Ms. Salame relies on the opinion evidence of Dr. Grover who is an orthopedic surgeon. He has been qualified as such by the Royal College of Physicians and Surgeons of Canada since 2006. He worked as an orthopedic surgeon in the United Kingdom between 1999 and 2001, and then in Newfoundland. He has practised in Chilliwack since 2007 and has privileges at several hospitals in the Fraser Health Authority.
- [35] Dr. Grover assessed Mrs. Salame on March 28, 2014. He reviewed the written reports of a CT scan performed on July 26, 2013, a bone density test performed on August 30, 2013, an x-ray of Ms. Salame's sternum and thoracic spine on October 4, 2013, an x-ray of her thoracic spine on March 3, 2014, and an x-ray of her left shoulder on February 24, 2014. He testified that in addition to reviewing the reports of those imaging studies, he also reviewed the images themselves. Dr. Grover then prepared an expert report dated March 28, 2014. No

objection was made to Dr. Grover's qualifications as an expert in orthopedic surgery. No objection was made to the admissibility of any portion of his report.

[36] Dr. Grover expressed the opinion that Mrs. Salame suffered the following injuries in the accident:

- fractured sternum;
- multiple stable wedge compression fractures of the thoracic vertebrae; and
- left shoulder impingement, posttraumatic rotator cuff tendinitis and probable partial thickness rotator cuff tear.

[37] The defendant relies on the opinion evidence of Dr. Locht who is an orthopedic surgeon. He has been qualified as such by the Royal College of Physicians and Surgeons of Canada since about 1980. He has practised as an orthopedic surgeon at Chilliwack General Hospital since 1999. He has an appointment as a Clinical Instructor in the Department of Orthopaedics at UBC.

[38] Dr. Locht assessed Mrs. Salame on June 22, 2015, and then prepared an expert report. He reviewed the reports of the July 26, 2013 CT scan, the August 30, 2013 bone density test, the October 4, 2013 x-ray, the February 24, 2014 x-ray, and the March 3, 2014 x-ray, as well as x-rays conducted on June 1, 2013 and July 12, 2013, and MRIs conducted on September 11, 2014 and January 3, 2015. In addition to reviewing the reports of those studies, he reviewed the x-ray images taken on July 12, 2013, October 4, 2013 and March 3, 2014. No objection was made to Dr. Locht's qualifications as an expert in orthopedic surgery. No objection was made to the admissibility of any portion of his report.

[39] There was significant agreement between Dr. Locht's and Dr. Grover's opinions. In particular, Dr. Locht agreed that Ms. Salame sustained a fractured sternum and left shoulder rotator cuff tear in the accident. He also expressed the view that she suffered soft tissue injuries in the neck region with diffuse pain into the shoulders and upper back. The principal area of disagreement between the expert witnesses concerned whether Ms. Salame suffered thoracic spine fractures in the accident.

[40] The basis stated in Dr. Grover's report for his opinion that Ms. Salame suffered "multiple stable wedge compression fractures of her thoracic vertebrae" in the accident is the absence of any history of pre-existing fractures and the view that Ms. Salame's pre-existing osteoporosis made her susceptible to such fractures. In cross-examination, Dr. Grover testified that his diagnosis of multiple compression fractures was based on the imaging he reviewed and Ms. Salame's history of back pain. In the body of the report, Dr. Grover did not specifically identify the thoracic vertebrae that he thought showed evidence of fracture and there is no analysis of the diagnostic imaging. An appendix attached to the report summarizes the findings of some of the imaging studies. The appendix refers to the CT scan performed on July 26, 2013; the x-ray of her sternum and thoracic spine performed on October 4, 2013; and the x-ray of her thoracic spine performed on March 3, 2014. The

appendix also refers to the bone density scan and an x-ray of her left shoulder but those are not relevant to the present question.

[41] The material portion of the radiologist's report of the CT scan of July 26, 2013 reads:

FINDINGS

Mild anterior wedging is seen for the T6 and T8 vertebral bodies without definite acute fracture planes. These could represent old injuries. No definite acute thoracic spine fracture. There is, however, vague sclerosis seen for the anterosuperior corners of T2 and T3 which could represent healing subacute fractures. Equivocal loss of anterior vertebral body height is seen for T9. T10 and T11 also show equivocal loss of anterior vertebral body height. There is qualitatively low bone density and there is subtle endplate concavity which can be seen with osteoporosis. Suggest correlation with bone density.

IMPRESSION

No definite acute thoracic spine fracture. There are thoracic wedge compression fractures as described, especially for T6 and T8 which are of unknown acuity .

[42] In the appendix to his report, Dr. Grover wrote that the CT scan of July 26, 2013 "revealed wedge compression fractures of the thoracic six and thoracic eighth vertebrae of unknown acuity", but he did not mention T2 or T3. In cross-examination, Dr. Grover acknowledged that the radiologist's report was ambiguous and that the deformities or changes noted in relation to T6 and T8 could represent old injuries. He emphasized that the radiologist noted sclerosis in relation to T2 and T3 and he said this was evidence of healing that was consistent with a traumatic fracture occurring 7 to 8 weeks previously, or, in other words, around the time of the accident. He also acknowledged that there was no similar evidence of healing in relation to T6 or T8 and he agreed that if those vertebrae had been fractured at the same time as T2 and T3 one would expect to see the same signs of healing. This testimony suggested that the findings with respect to T2 and T3 were the most significant in terms of supporting the view that thoracic fractures occurred in the accident and yet Dr. Grover did not refer to either T2 or T3 in his report.

[43] The x-ray of October 4, 2013 is stated to be a comparison of the July 26, 2013 CT scan. The material portion of the radiologist's report of that x-ray reads:

The previously described mild wedge compression fracture along the mid thoracic spine is stable. Mild wedge compression fracture along the superior endplate at the approximate T7 level is again noted with no significant interval change. No new acute osseous abnormalities are identified.

[44] In the appendix to his report, Dr. Grover wrote that the x-ray of October 4, 2013 "revealed mild wedge compression fractures of multiple thoracic vertebrae without any significant interval change". In cross-examination, Dr. Grover agreed that the radiologist report referred to fractures along "the mid thoracic spine" and he agreed that the mid thoracic spine would not include T2 or T3.

[45] The findings as stated on the radiologist's report of the March 3, 2014 x-ray are virtually incomprehensible. They read:

The bones osteopenic. Mild compression deformities are present involving T7, nine, 10 and 12. It is normal. Acute compression deformity.

Comment: No significant interval change.

[46] In the appendix to his report, Dr. Grover wrote that the March 3, 2014 x-ray "revealed that her bones continued to be osteopenic along with mild compression deformities involving the thoracic seventh, ninth, tenth and twelfth vertebrae". In cross-examination, Dr. Grover agreed that there was no evidence of injury having been sustained to T7, T9, T10 or T12 in the accident. He acknowledged that the statement "It is normal" in the radiologist report was likely a mistake. He said the statement "Acute compression deformity" could be a typo. He also said that if there had been a compression fracture at T2 or T3 it probably, but not necessarily, would have shown up on the March 3, 2014 x-ray. However, he also emphasized that the deformities in relation to T2 and T3 were originally noted on a CT scan and he said that it would be more reliable to compare a subsequent CT scan to a prior CT scan rather than a subsequent x-ray to a prior CT scan. Unfortunately there was no subsequent CT scan in evidence.

[47] In cross-examination, Dr. Grover acknowledged that osteoporosis of the spine can lead to spontaneous compression fractures (in other words, fractures that occur in the absence of trauma) if the osteoporosis is "pretty advanced". He indicated that Ms. Salame's osteoporosis was not yet at that stage.

[48] The conclusions I drew from Dr. Grover's evidence as a whole are:

- the reports of the imaging studies indicate deformities in the thoracic vertebrae but are inconclusive with respect to whether these are fractures that were sustained in the accident;
- one would expect to see evidence of healing if there were acute (i.e., recently sustained) fractures and the only evidence of healing indicated in the imaging studies was that noted in the July 26, 2013 CT scan with respect to T2 and T3;
- there was no indication of any deformity in relation to T2 or T3 in the x-rays taken after the July 26, 2013 CT scan and if there had been a compression fracture at T2 and T3 evidence of same would probably have shown up on the subsequent x-rays;

- Dr. Grover did not mention T2 or T3 specifically in his report which suggests that he did not consider the diagnostic imaging to be significant in relation to T2 or T3 at the time he wrote his report;
- Ms. Salame had pre-existing osteoporosis which renders her susceptible to compression fractures; and
- such fractures would be unlikely to occur spontaneously in a patient with moderate osteoporosis.

[49] In his report, Dr. Locht expressed the opinion that Ms. Salame did not suffer thoracic spine fractures in the accident. In his view, the pain she experienced in the area of her thoracic spine after the accident was the result of neck pain referral associated with the soft tissue injuries she sustained in the accident. His opinion that she did not suffer thoracic compression fractures in the accident was based on:

- the absence of any recorded complaints of pain in her thoracic spine by the paramedics or emergency personnel immediately following the accident;
- his view that the kind of deformities of the thoracic spine noted in the imaging studies are not uncommon in the absence of injury;
- the fact that the sequential x-rays taken on July 12, 2013, October 4, 2013, and March 3, 2014 do not show evidence of healing which would be present if fractures had occurred in the accident; and
- a thoracic spine MRI taken on January 3, 2015 (after Dr. Grover had written his report) did not show evidence of previous or healed thoracic spine fractures.

[50] In cross-examination, Dr. Locht agreed that if someone is in acute pain in one area of their body they might not notice pain in another area. This acknowledgment aligned with Dr. Grover's testimony to the effect that he would not be surprised if Ms. Salame did not complain of back pain until the day after the accident because the chest pain from the fractured sternum would likely have dominated her senses. In the circumstances, I place no weight on the fact that the paramedics and emergency personnel did not record complaints of pain in the thoracic spine.

[51] Dr. Locht agreed in cross-examination that while spontaneous spinal fractures can occur with advanced osteoporosis, it is unlikely that Ms. Salame would have had a spontaneous fracture. However, he was not cross-examined on his view that deformities in the thoracic spine of the kind noted on the imaging studies are not uncommon in the absence of injury.

[52] Dr. Locht was also not cross-examined on his view that there was no evidence of healing and that such evidence which would be present if Ms. Salame had actually sustained fractures in the accident. This view is consistent with Dr. Grover's view to the effect that one would expect to see evidence of healing if the fractures were acute. There is no evidence of healing on the sequential x-rays. As noted above, there is some evidence of possible healing with

respect to T2 and T3 on the CT scan but this was not noted by Dr. Locke at all and was not noted by Dr. Grover in his report. The only reasonable inference is that neither expert considered this single reference to T2 and T3 to be significant.

- [53] As already discussed, Dr. Grover confirmed that his diagnosis of multiple compression fractures was based, in significant part, on the imaging studies but there was no actual analysis of those studies in the body of his report and the radiologist's reports are, on their own, ambiguous. His opinion was undermined in cross-examination by his acknowledgment that one would expect to see evidence of healing if the fractures were acute and that the only evidence of healing was a single reference to T2 and T3, neither of which was referred to in his report. For these reasons, I prefer Dr. Locht's opinion on the question of whether Ms. Salame sustained thoracic spine fractures in the accident.
- [54] Ms. Salame's family physician, Dr. Ahmed, also authored an expert report and testified at the trial. I have not overlooked her opinion, as expressed in her report, that Ms. Salame suffered "multiple thoracic spine wedge compression fractures" in the accident. However, in cross-examination, Dr. Ahmed confirmed that this opinion was based on the radiologist's report of the CT scan performed on July 26, 2013 which, as already discussed, was equivocal. Also, Dr. Ahmed agreed that upper back pain could be caused by soft tissue injury. In the circumstances, Dr. Ahmed's evidence did not provide a persuasive retort to Dr. Locht's opinion.
- [55] The burden to prove causation is on the plaintiff. I am not persuaded that is more likely than not that Ms. Salame suffered compression fractures to her thoracic spine in the accident. However, I agree with the submissions of Ms. Salame's counsel to the effect that this is of little consequence in this case because, notwithstanding the defence submissions to the effect that the upper back pain was most likely caused by the pre-existing osteoporosis, the defence expert, Dr. Locht, expressed the opinion that "all of Ms. Salame's complaints after the subject accident were a result of the accident related injuries". He documented her complaints as including pain in the interscapular area. He attributed this to "pain referral pattern" caused by soft tissue injuries to her neck sustained in the accident. In this regard, he stated:

Ms. Salame's diffuse pain pattern was consistent with a Whiplash Associated Disorder Grade II and included the posterior neck, occiput, trapezius ridges, shoulder prominences and radiation down between the shoulder blades to include the thoracic spine.

- [56] Accordingly, although I am not satisfied that Ms. Salame sustained thoracic fractures in the accident, I am satisfied that she suffered from severe upper back pain as she described it, and I accept Dr. Locht's opinion that this was referred pain resulting from the soft tissue injuries to her neck which were sustained in the accident.

Ongoing physical symptoms

- [57] Ms. Salame testified that at the time of the trial, she continued to suffer from ongoing left shoulder pain. It had improved overall since the accident but continued to be bothersome and had deteriorated since she stopped attending physiotherapy in October 2015. She testified she also continued to suffer from constant upper back pain. She continued to experience chest pain in cold weather and when she coughs, sneezes and laughs. She continued to suffer from periodic episodes of extreme pain, which occur about every five to six weeks. She said that she still cannot turn her neck completely and her sleep is still disrupted.
- [58] In late 2014, she developed some low back pain, which became quite severe for a period of a few months. In 2015, she complained of carpal tunnel symptoms in both hands, but primarily in the left. In October 2015, she underwent surgery to repair a macular hole in her right eye. At the time of the trial in December 2015, she was continuing to recover from the eye surgery.
- [59] The defence submits that Ms. Salame's ongoing physical symptoms are related to progressive osteoporosis in her thoracic and lumbar spine, carpal tunnel syndrome and the recent eye surgery, and are unrelated to the injuries she sustained in the accident.
- [60] It is important to emphasize that Ms. Salame is not advancing a claim for damages associated with low back pain, carpal tunnel symptoms or her eye issue. Those conditions might be relevant considerations when assessing her damages but they are unrelated to determining the legal cause of the injuries for which she seeks compensation in this action. In other words, the low back pain, carpal tunnel symptoms and eye issue are injuries or conditions that are divisible from the injuries underlying the claim. At this stage, the question is whether any of the ongoing symptoms that she attributes to the injuries she sustained in the accident are more properly characterized as the debilitating effects of the pre-existing osteoporosis which she would have experienced anyway.
- [61] Ms. Salame did not have any material pre-accident history of shoulder or back pain. The osteoporosis was diagnosed after the accident but she concedes that it pre-existed the accident. She also concedes that she has had some low back pain since the accident but she denied this was her main ongoing problem. Her primary ongoing physical complaints are the shoulder and upper back pain. There is no evidence or suggestion that the shoulder symptoms are related to the osteoporosis. The remaining question is whether the ongoing upper back symptoms are properly characterized as the effects of pre-existing osteoporosis that she would have experienced anyway (i.e., whether the crumbling skull rule applies).
- [62] In my view, the evidence does not support the conclusion that Ms. Salame's ongoing upper back pain is the result of her osteoporosis that she would have suffered from irrespective of the accident.

- [63] As already discussed, Dr. Grover attributed Ms. Salame's back pain to compression fractures in her thoracic spine caused by the accident. While he agreed, in cross-examination, that osteoporosis was a progressive condition that could lead to spontaneous fractures and generalized pain and stiffness, he said the condition would have to be "pretty advanced" for it to happen spontaneously. The clear implication of this testimony was that, in his view, Ms. Salame's osteoporosis was not so advanced. He was not specifically asked to express an opinion as to whether Ms. Salame would have experienced upper back pain as a result of her osteoporosis even in the absence of the accident.
- [64] As already discussed, Dr. Ahmed attributed Ms. Salame's back pain to compression fractures caused by the accident. In cross-examination, she agreed that osteoporosis is a risk factor for compression fractures but said it is not a cause of such fractures except in much older people who could suffer spontaneous fractures. Again, the implication was that Ms. Salame was not suffering from osteoporosis that had progressed to the stage where she was at risk of spontaneous fractures.
- [65] Dr. Locht agreed that despite the osteoporosis there was a less than 50% chance that Ms. Salame would have developed fractures in the next 10 years as a result of the osteoporosis. Further, his opinion, as expressed clearly in his report, is that Ms. Salame's "current" pain complaints in the neck and interscapular area, which he described as "posterior mid thoracic pain", are related to what he referred to as "her Chronic Whiplash Associated Disorder". That report was written on July 30, 2015, roughly five months before the trial. He did not express the opinion that her back pain was a symptom of the osteoporosis that she would have suffered in any event of the accident. For the reasons already expressed, I accept Dr. Locht's evidence in this regard.
- [66] For the forgoing reasons, I conclude that Ms. Salame is suffering from Chronic Whiplash Associated Disorder and that her ongoing upper back pain was caused by the soft tissue injuries to her neck which were sustained in the accident. Her pre-existing osteoporosis rendered her susceptible to traumatic compression fractures but, for the reasons I have already expressed, I am not persuaded that it is more likely than not that Ms. Salame actually sustained thoracic compression fractures in the accident.

Ongoing depressive symptoms

- [67] Ms. Salame testified that at the time of the trial she continued to suffer from depression. She continued to take antidepressants.
- [68] The defendant concedes that the injuries Ms. Salame suffered in the accident likely contributed to her depression, but says that she would have suffered from some level of depression anyway as a result of various factors unrelated to the accident including the onset of menopause, the death of her mother, her children growing up and leaving home, her osteoporosis diagnosis, and the return of carpal tunnel symptoms. The defendant submits that these other factors substantially contributed to Ms. Salame's mental state and are the cause of its persistence.

- [69] Ms. Salame's evidence was that she did not suffer from any significant mood conditions prior to the accident. She testified, compellingly, about the significant, constant pain that she suffered during the six months following the accident, and the ongoing pain she suffered thereafter. The pain medication made her feel lazy, dizzy and drowsy and caused her to be unable to focus or concentrate. She felt disappointed because she could not help her family around the house and could not contribute at work. She felt guilty because she was unable to pray in the manner in which she had done for her whole life. Her sleep became affected. She isolated herself and became anxious and irritated. This evidence was corroborated by the evidence of her husband, her son and her daughter. I accept it without reservation.
- [70] Dr. Ahmed expressed the opinion that Ms. Salame is suffering from chronic pain disorder and depression as a result of the injuries she suffered in the accident. There is no contrary evidence and her opinion in this respect was not undermined in cross-examination.
- [71] I find that within six months of the accident Ms. Salame began experiencing depressive symptoms as a result of the injuries she suffered in the accident and that she continues to suffer depressive symptoms. Even if other factors contributed, I would find that her depression was an indivisible injury for which the defendant is liable regardless of the contribution of other causes. Having said that, the evidence does not support the defendant's submission. There is simply no evidence, expert or otherwise, to the effect that the other factors the defendant relies upon caused Ms. Salame's depression or even contributed to it.
- [72] Ms. Salame denied experiencing significant mood symptoms associated with menopause. This was corroborated by Dr. Ahmed who testified that although she reported mild mood symptoms along with other menopause-related symptoms in December 2012, the first time Ms. Salame reported any significant mood symptoms was after the accident. Dr. Ahmed testified that in December 2012 she recommended an herbal treatment and gave Ms. Salame a prescription to use if the herbal treatment did not work. She testified that Ms. Salame did not fill the prescription. None of this evidence was undermined and I accept it.
- [73] Ms. Salame denied that her mother's illness and death, or her children leaving home, contributed to her depressive symptoms. She readily admitted that her mother's illness and death caused her sadness, but she had not lived close to her mother since 2006 and her mother was elderly when she died. Her death cannot be characterized as unexpected or tragic. Ms. Salame testified that even though some of her children had left home, the family remained close and she was eagerly anticipating the arrival of grandchildren. I accepted all of her evidence in this respect without reservation.
- [74] For the forgoing reasons, I conclude that Ms. Salame continues to suffer from depressive symptoms caused by the injuries she sustained in the accident.

Current Condition and Prognosis

- [75] The defendant submits that by March 2015, Ms. Salame's recovery was close to complete. The evidence does not support that submission. It appears to be based on a note in Dr. Ahmed's clinical records from March 2015 to the effect that Ms. Salame had returned to work full-time in January 2015, and a note in Ms. Salame's physiotherapist's clinical records from March 2015 to the effect that Ms. Salame reported working six days a week.
- [76] Dr. Ahmed acknowledged that on March 5, 2015 she made a note in her clinical records to the effect that Ms. Salame was back to work on a full-time basis since January. However, she testified that she was unaware of what full-time meant to Ms. Salame. Ms. Salame testified that by January 2015 she was back to work three times a week, which was her normal pre-accident schedule, but for fewer hours each day than she had typically worked before the accident. She started working about five hours a day and then increased to about eight hours a day during tax season. She testified that she found the work difficult and painful and so when tax season was over she reduced her hours again. She acknowledged that she may have told Dr. Ahmed, in March 2015, that she was working full-time, but for her three days a week was her normal schedule.
- [77] The physiotherapist, Krystie Cheong, acknowledged that on March 18, 2015 she made a note in her clinical records to the effect the Ms. Salame was going to work six days a week. However, she also testified that Ms. Salame sometimes had difficulty expressing herself in English and she acknowledged that her note could reflect a misunderstanding on her part. She also acknowledged that in July 2015 she made a note in her clinical records to the effect that Ms. Salame was, at that time, trying to work a few hours every week. Ms. Salame denied the suggestion that she was working six days a week in March 2015. She maintained that Ms. Cheong must have misunderstood what she said, in March 2015, about the extent to which she was working.
- [78] For the reasons I have already expressed, I found Ms. Salame to be a very credible witness. The two clinical notes, considered in the broader context of Dr. Ahmed's testimony and Ms. Cheong's testimony, as summarized above, do not detract from Ms. Salame's credibility. I accept her evidence as to the state of her condition in early 2015. I find that she was working three days a week at that time, starting with about five hours a day and progressing to about eight hours a day.
- [79] I also accept Ms. Salame's evidence as to her current condition. Specifically, she continues to suffer from significant left shoulder pain and is limited in her ability to perform heavier physical tasks as a result. She continues to suffer constant pain in her upper back and occasional pain in her chest. She suffers periodic episodes of severe pain. Her sleep continues to be disrupted.
- [80] There is no material conflict in the expert evidence of Dr. Grover and Dr. Lochter concerning Ms. Salame's prognosis.

- [81] Dr. Grover characterized his prognosis as guarded. His opinion was that Ms. Salame's injuries were "very likely" to continue to affect her recreational activities and she was "very likely" to continue to suffer long-term symptoms and restrictions. At the time he wrote his report, in March 2014, it was his view that her pain was "very likely to persist for at least another eighteen to twenty four more months, and could well last longer, on a balance of probability".
- [82] Dr. Loch's report is dated July 30, 2015, roughly five months prior to trial. His prognosis for Ms. Salame's shoulder is guarded due to "permanent changes to the rotator cuff tendon". He said ongoing bursitis and impingement is to be expected. With respect to her sternum injury, he said she would probably have tenderness in the area indefinitely. He did not provide a prognosis for her soft tissue injuries.

Summary on causation

- [83] In summary, I make the following findings on causation, the current state of Ms. Salame's condition, and her prognosis:

- Ms. Salame sustained a fractured sternum, left rotator cuff tear, and soft tissue injuries in the accident.
- Ms. Salame developed and continues to suffer from chronic pain, or what Dr. Loch referred to as Chronic Whiplash Associated Disorder. Her prognosis is guarded and it is more likely than not that her pain will continue indefinitely.
- Over time, the pain interfered with Ms. Salame's sleep and resulted in anxiety and depression. She continues to suffer from depressive symptoms as a result of the injuries she sustained in the accident.

Damages

General legal principles

- [84] The fundamental principle in assessing tort damages is that the quantum should be that which is required to place the plaintiff in her original position; that is, the position she would have been in absent the defendant's negligence: *Athey* at paras. 32-35.
- [85] If there is a measurable risk that a pre-existing condition, in this case osteoporosis, would have detrimentally affected Ms. Salame even without the defendant's negligence, that risk must be taken into account in reducing the damages award. However, where no such measurable risk is established, the fact that a pre-existing condition may have made her more vulnerable to sustaining the injury caused by the defendant's negligence will not serve to reduce the damage award.

- [86] Unrelated intervening events may be taken into account in the same way as pre-existing conditions. If there is a measurable risk that an unrelated intervening event, in this case the onset of low back pain, the return of carpal tunnel symptoms and the eye issue, would have affected Ms. Salame's original position adversely irrespective of the defendant's negligence, it may be appropriate to reduce the quantum of the defendant's liability accordingly: *Athey* at paras. 31-32.
- [87] Measurable risks, or in other words contingencies, need not be proved on a balance of probabilities. Rather, as with any hypothetical event, they are given weight in the assessment of damages according to their relative likelihood: *Athey*, para. 27.
- [88] I will initially assess Ms. Salame's damages under each of the heads of damage that she claims, without regard for contingencies associated with the pre-existing osteoporosis, the low back pain, the carpal tunnel symptoms, and the eye surgery. At the end of this section, I will adjust for any contingencies that I find amount to a measurable risk.

Non-Pecuniary Damages

- [89] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] SCCA No. 100, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle.
- [90] Notwithstanding her pre-existing osteoporosis, Ms. Salame had no material health problems prior to the accident. She was able to maintain her home and, together with her husband, work at their business. She was happy and social, and enjoyed spending time with her family and socializing with friends.
- [91] Ms. Salame sustained serious injuries in the accident. For about six months following the accident, she suffered from severe and unrelenting pain in her chest, neck, upper back and left shoulder areas. Within about a year of the accident, Ms. Salame's chest pain and neck pain had improved but she still had constant pain in her shoulder and upper back. At the time of the trial, more than 2 ½ years after the accident, she continued to suffer from ongoing left shoulder pain and upper back pain. She continued to experience chest pain in cold weather and when she coughs, sneezes and laughs. She continued to suffer from periodic episodes of extreme pain in her upper back. Ms. Salame's prognosis is guarded. It is more likely than not that her pain will continue indefinitely. Over time, the pain interfered with Ms. Salame's sleep and resulted in anxiety and depression. She continues to suffer from depressive symptoms as a result of the injuries she sustained in the accident. The medication she took left her drowsy and impaired her concentration. She suffered side

effects from the medication including constipation and hemorrhoids.

- [92] Ms. Salame was completely disabled by her injuries for about six months. She needed help with the simplest of tasks, including getting out of bed, attending to her personal hygiene and getting dressed. Over time, her functionality has improved but she is still not able to perform heavier housekeeping task and duties at the laundromat.
- [93] In addition to the pain and physical suffering, Ms. Salame's injuries have had a significant negative effect on the enjoyment of her life. It was apparent to me that she and her husband have a very close and supportive relationship, but their relationship was damaged as a result of her condition. Mr. Khattab testified, persuasively, that he feels he has lost the person he loved. He walks on eggshells when he is around Ms. Salame and works hard to accommodate her moods. His physical touch causes her pain and their intimacy has been affected. Ms. Salame's relationship with her children has also been affected as she has become withdrawn and is much less communicative.
- [94] Ms. Salame loves her work at the laundromat. She particularly enjoyed communicating and socializing with customers. I will address her claim for loss of income earning capacity later. However, I am satisfied that her inability to work for about a year and a half after the accident had a negative impact on her enjoyment of life and this is a factor that is appropriately considered in assessing her non-pecuniary damages.
- [95] Similarly, Ms. Salame loves maintaining her household and took great pride in her home. Her friend, Ms. Hoda Mohamad, testified that before the accident, Ms. Salame's home was very clean and tidy, but after the accident it became messy, dishes were left in the sink, and food was left out around the stove. I will address Ms. Salame's claim for loss of homemaking capacity later. However, her inability to maintain her home, particularly in the first six months or so after the accident, had a negative impact on her enjoyment of life.
- [96] The pain also prevented Ms. Salame from enjoying and participating in recreational activities. Before the accident, she walked regularly, for exercise, sometimes with Ms. Mohamad. She also enjoyed helping her husband with yard work, reading, and walking to the grocery store to shop for food for her family. She and her husband socialized with friends every Saturday evening and Ms. Salame enjoyed preparing refreshments for those gatherings.
- [97] In the months following the accident, Ms. Salame's ability to walk was impeded. She was only able to walk for short periods of time. She is now able to go for longer walks on days when her pain is not bad. In the first few months after the accident she was unable to read because she could not sit still, due to the pain, and the medication affected her ability to concentrate. In the first few months after the accident she was unable to do the grocery shopping. Her social life has not returned to its prior state. Although she has resumed socializing, she does so less frequently and she no longer prepares refreshments. Her friends drop by to see her but they do not stay for long and she is withdrawn and not engaged in the visits.

- [98] The pain also interfered with Ms. Salame's ability to practice her religion. As already discussed, she was unable to pray in the manner that she had done her entire life because she could not bend over and kneel down. She resumed praying a couple of months after the accident but she had to do so from a seated position. Ramadan was two months after the accident and because of her medication she was unable to fast. She testified that she felt guilt as a result.
- [99] As Ms. Salame's condition has improved, she has resumed some aspects of her old lifestyle, but it was apparent to me that the ongoing pain and depression has affected her personality causing her to be anxious, short tempered and withdrawn. This continues to have a significant effect on her relationships with her husband, her children and her friends, and in turn has caused Ms. Salame significant emotional suffering.
- [100] Counsel for Ms. Salame and counsel for the defendant have each provided me with several cases to assist in determining the appropriate award of non-pecuniary damages.
- [101] Counsel for the defendant submits that the authorities support an award of about \$60,000 for non-pecuniary damages. Speaking generally, the authorities the defendant relies on concern plaintiffs whose injuries were less severe and long-lasting than the injuries sustained by Ms. Salame.
- [102] In *Bhandal v. Charlebois*, 2015 BCSC 2315, the plaintiff suffered moderate soft tissue injuries to his neck, back and shoulders that initially caused significant pain and disability but resolved within about a year. He also suffered ongoing head pain and pain and stiffness in his neck at the base of his skull. Non-pecuniary damages of \$60,000 were awarded.
- [103] In *Harris v. Xu*, 2013 BCSC 1257, the plaintiff suffered soft tissue injuries to her neck, shoulder and back. Her previously asymptomatic disc disease was aggravated. She also suffered two broken ribs and bruises, headaches, fatigue and disturbed sleep. She continued to suffer from neck symptoms four years post-accident. However, it was found that she had "generally recovered" within about 10 months of the accident. Non-pecuniary damages of \$60,000 were awarded.
- [104] In *Butcher v. Vantol*, 2013 BCSC 2425, the plaintiff suffered neck, back and shoulder pain and headaches, all of which were significant for a few months but then fluctuated in intensity. Within less than two years of the accident, the plaintiff was having more good days and bad. Her lifestyle was affected by the injuries but for the most part she was able to continue to work. Non-pecuniary damages of \$60,000 were awarded.
- [105] In *Amini v. Mondragaon*, 2014 BC SC 1590, the plaintiff suffered soft tissue injuries causing pain in her neck, upper back and shoulders, capsulitis of the right shoulder, a mild injury to her rotator cuff, as well as a mild disc bulge at C5/6. She remained somewhat limited in her functionality and her mood suffered. However, she was able to continue to work in the two years after the accident. She took a two-month medical leave more than two years later, during which she traveled to Iran. Non-pecuniary damages of \$55,000 were awarded.

- [106] In *Turner v. Coblenz*, 2008 BCSC 1801, the plaintiff suffered moderate soft tissue injuries to her neck, upper back, left shoulder and chest wall, as well as mild hearing loss due in part to a mild concussion. She was substantially recovered by the time of the trial, three years post-accident, but was left with residual shoulder pain. Non-pecuniary damages of \$50,000 were awarded.
- [107] Counsel for Ms. Salame submits that the authorities support an award in the range of \$100,000 to \$130,000 for non-pecuniary damages. I have read the authorities he relies upon but I will not refer specifically to all of them. Speaking generally, I found these authorities to concern plaintiffs who suffered injuries, with resulting pain and suffering, that was more similar to Ms. Salame's situation than the plaintiffs in the cases relied upon by the defendant.
- [108] In my view, *Andrews v. Mainster*, 2012 BCSC 541, was the most helpful comparison. That case concerned a female plaintiff aged 51 years. She sustained two small sternum fractures, an exacerbation of pre-existing degenerative arthritis that resulted in pain in her neck and arm, soft tissue injuries and an exacerbation of pain in her shoulder, back and hip. She also suffered a serious exacerbation of anxiety, depression and mood disorders. The chest fractures had substantially healed within about four months of the accident and the other physical injuries within about 15 to 16 months. The plaintiff continued to suffer from significant psychological symptoms but it was found that her pre-existing psychological condition was about 50% responsible for her current psychological condition. Non-pecuniary damages of \$85,000 were awarded but that reflected a significant reduction to account for the fact that the ongoing psychological symptoms were attributed, in significant part, to her pre-existing condition.
- [109] Awards of damages in other cases provide a guideline only. Ultimately, each case turns on its own facts. While similar in nature, Ms. Salame's physical injuries were more severe and long-lasting than those suffered by the plaintiff in *Andrews*. In particular, in *Andrews* it was found that within sixteen months of the accident, with respect to her physical injuries, the plaintiff had returned to her original position. In contrast, at the time of the trial more than 2 ½ years had passed since the accident and Ms. Salame continued to suffer constant pain in her upper back and shoulder, and this is likely to continue. While Ms. Salame's anxiety and depression was not as significant as that suffered by the plaintiff in *Andrews*, she did not have pre-existing psychological conditions.
- [110] Having considered all of the authorities and the factors discussed in *Stapley*, I assess Ms. Salame's non-pecuniary damages at \$110,000, prior to any adjustment for contingencies associated with her pre-existing osteoporosis. As already explained, I will adjust for contingencies later in this judgment.

Loss of Income Earning Capacity

- [111] Compensation must be made for the loss of income earning capacity as a capital asset and not merely the loss of earnings: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 251-254. Nevertheless, a pecuniary loss must be established, the existence of which is typically assessed by comparing what would have been the plaintiff's past and future earnings if the accident had not occurred with the plaintiff's actual past and likely future earnings given the accident did occur. The fundamental question is whether the plaintiff has established, to the requisite standard of proof, an impairment to his or her income earning ability leading to a pecuniary loss, which loss might exist even when the plaintiff continues in his or her usual occupation: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [112] The determination of what would have happened in both the past and the future had it not been for the accident, and the determination of what will happen in the future given the accident did occur, are hypothetical exercises. While actual past events must be proven on a balance of probabilities, the standard of proof in relation to hypothetical events is simple probability: *Athey* at para. 27. If a plaintiff establishes a real and substantial possibility, as opposed to a speculative possibility, of a hypothetical event, the event must be given weight according to its relative likelihood and compensation must be awarded based on an estimation of the chance that the event will occur: *Steward v. Berezan*, 2007 BCCA 150 at para. 17. The court must make allowances for the possibility that the assumptions upon which the determination is based may prove to be wrong, and all contingencies, positive and negative, that are established as realistic as opposed to speculative possibilities must be given effect.
- [113] In summary, to award damages for loss of past earning capacity, the court must be satisfied, on a balance of probabilities, that the accident caused an impairment of the plaintiff's ability to engage in some activity relevant to her income earning potential and, if so satisfied, the court must assess the chances that the plaintiff would have earned more income than she did earn in the pre-trial period had she not been injured and make an award based on that assessment that reflects all realistic contingencies: *Smith v. Knudsen*, 2004 BCCA 613 at paras. 31, 36-37.
- [114] To award damages for loss of future earning capacity, the court must be satisfied that, as a result of the accident, there is a real and substantial possibility of a future event leading to an income loss: *Perren* at para. 32. If so satisfied, the court must assess the chances that the plaintiff would have earned more income in the future had she not been injured than she will earn in the future given that she has been injured and make an award based on that assessment that reflects all realistic contingencies.
- [115] There is more than one way to analyze a loss of future income earning capacity. The "earnings approach", which is generally appropriate where the plaintiff has some earnings history and the court can more easily measure the loss mathematically, typically involves a determination of the plaintiff's estimated annual income loss, multiplied by the remaining

years of work, and then discounted to reflect current value; or, alternatively, awarding the plaintiff's entire annual income for a year or two: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233. The "capital asset approach", which is typically used when the loss is not as easily measurable, involves the consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.).

- [116] Irrespective of the approach used, the court is required to quantify a pecuniary loss and the quantification must be grounded in the evidence and the particular facts of the case. There must be a "reasoned analysis to explain and justify the award": *Schenker v. Scott*, 2014 BCCA 203 at para. 56. While the loss need not be calculated with mathematical precision, mathematical, statistical, and/or economic evidence will inform the assessment. This reflects the fact that an award for loss of earning capacity, irrespective of the quantification approach adopted, is not "simply at large": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 20.

Past loss of income earning capacity

- [117] Ms. Salame and her husband operate the laundromat as a family business and the income earned goes into a "family pot". The income earned from Mr. Khattab's side businesses also goes into the "family pot".
- [118] The laundromat is open seven days a week from 7 a.m. to 10 p.m. Ms. Salame and Mr. Khattab offer a laundry drop off service. They personally sort, wash, dry and fold the laundry that is dropped off. They accept dry-cleaning and alterations but send that work out. They also pick up and deliver laundry. Before the accident, Ms. Salame was working about three full days a week. Occasionally the children would help out on the weekends. There were no paid employees.
- [119] Prior to the accident, Ms. Salame's duties included receiving laundry; sorting, washing, drying and folding laundry; talking to clients, answering their questions, and helping them with the machines; answering the phone; making change; cleaning the machines; cleaning the premises; and taking out and picking up alterations and dry-cleaning. Mr. Khattab's duties were similar but, in addition, he was responsible for repairing the machines, bookkeeping and accounting.
- [120] It is not disputed that Ms. Salame was unable to work at the laundromat for about a year and a half after the accident. She returned to work in December 2014, doing light duties and at reduced hours.
- [121] During the time that Ms. Salame was not able to work at the laundromat, her duties were assumed by Mr. Khattab, by some of Ms. Salame's children, and for about a 10-month period of time by the part-time employee, Mr. Weir. Mr. Khattab spent 9 to 10 hours a day,

seven days a week at the laundromat. The children worked about 15 hours a week. In February 2014, Mr. Weir was hired. He worked about 17 hours a week between February and November 2014, for a total of slightly less than 700 hours. The children were not paid wages for their work but Mr. Weir was paid wages. The cost to the business for Mr. Weir's work, including wages and CPP and EI contributions, was \$7,870.08.

- [122] Mr. Khattab turned down requests for security camera installations because that work required him to leave the laundromat and Ms. Salame was not able to cover for him. He estimated that he lost about \$2,000 in income in 2015 as a result. He turned down this kind of work in 2013 and 2014 as well, but he did not provide an estimate or any evidence of the amount of income lost as a result.
- [123] At the time of the trial, Ms. Salame was working about 15 hours a week at the laundromat and was expecting to increase her hours after recovering from the eye surgery. Mr. Khattab estimated he was spending about 40 to 45 hours a week there and the children continued to work about 15 hours a week. Again, the children were not paid wages for their work.
- [124] The laundry has generated annual net income of approximately \$15,000 per year. Ms. Salame does not claim that the income from the laundromat decreased as a result of her inability to work. Rather, she says that as a result of her injuries she suffered a pecuniary loss represented by the cost of hiring Mr. Weir, the forgone income from Mr. Khattab's security camera installation business, and the value of the time spent by Mr. Khattab and the children doing the work at the laundromat that she would have done had she not been injured. She seeks a total of \$20,000 under this head of damages.
- [125] The defendant concedes that Ms. Salame suffered a compensable loss of earning capacity but says her loss is limited to half the cost of hiring Mr. Weir. The defendant says that only half that cost is recoverable by Ms. Salame because the other half of the cost is properly viewed as Mr. Khattab's loss given they divide all the costs and profits equally.
- [126] There is no doubt that Ms. Salame's ability to do her work was impaired, completely, during the first year and a half after the accident, and that it remained partially impaired thereafter. She continues to be unable to do the heavier aspects of her work at the laundromat, particularly the duties that involve reaching and heavy lifting. The question is whether she has established that the physical impairment resulted in a pecuniary loss.
- [127] I have no difficulty concluding that Ms. Salame has established a pecuniary loss in an amount equal to the full cost of hiring Mr. Weir. Although she and Mr. Khattab share the income from the laundry business they do so from a family pot that would have been greater, by the amount of that cost, but for the accident. It was Ms. Salame's contribution to the business that was satisfied by Mr. Weir's labour.
- [128] Similarly, I have no difficulty concluding that Ms. Salame has established a pecuniary loss in an amount equal to the income forgone from the security camera installation business. While she was not personally involved in that business, I am satisfied that it was as much a

family business as was the laundromat in that the income from it went into the same family pot. Had an employee been hired to mind the laundromat so that Mr. Khattab could attend to the security camera installation business, the laundromat would have suffered a loss. In *Hanson v. Smith*, 1990 CanLII 438 (BCSC), a similar situation was held to give rise to a compensable loss of earning capacity. The measure of this aspect of Ms. Salame's loss is the loss to the security camera installation business. This is difficult to quantify on the evidence before me. I accept Mr. Khattab's estimate of \$2,000 of income forgone in 2015, but there is no evidence of the magnitude of the loss in the earlier years. Ms. Salame's counsel submits that it is reasonable to infer the loss would be similar each year, but Mr. Khattab did not testify to that effect. Ms. Salame bears the burden of establishing the loss. In the circumstances, she has only established a loss of \$2,000 in forgone income from the security camera installation business.

- [129] The final question, in respect of this head of damages, is whether the time spent by Mr. Khattab and the children performing Ms. Salame's work represents a compensable loss of earning capacity, in the absence of evidence of any particular pecuniary disadvantage as a result. I find it does not. Ms. Salame cites *Ibbitson v. Cooper*, 2012 BCCA 249 as supportive of her position that their labour represents a compensable loss to her. In my view, *Ibbitson* is distinguishable. In *Ibbitson*, the Court of Appeal found, at para. 20, that the plaintiff suffered a pecuniary disadvantage because he had to work longer hours to maintain his pre-accident level of income. Ms. Salame suffered no pecuniary disadvantage as a result of her family performing her work.
- [130] For the forgoing reasons, I assess Ms. Salame's damages for past loss of earning capacity, prior to any adjustment for contingencies, at \$9,870.08. Again, I will adjust for contingencies later in this judgment.
- [131] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover only his or her past net income loss: *Rizzolo v. Brett*, 2009 BCSC 732 at para. 72, *aff'd* 2010 BCCA 398. If the parties are unable to reach agreement on the amount to be deducted from this award, by reason of this provision, they may apply for further directions.

Future loss of income earning capacity

- [132] As explained above, the threshold question is whether Ms. Salame has established a real and substantial possibility of a future event leading to an income loss.
- [133] As already discussed, Ms. Salame's prognosis is guarded. It is more likely than not that she will continue to suffer from ongoing shoulder and upper back pain, and occasional pain in her chest area. She continues to suffer from periodic severe episodes of pain. I accept her evidence that she remains limited by her pain in performing all the duties at the laundromat that she used to perform. She cannot do the heavy lifting, she cannot clean the machines, she cannot clean the washrooms or the floors.

- [134] I am satisfied that, as a result of Ms. Salame's ongoing physical limitations, there is a real and substantial possibility of a future event leading to an income loss. Specifically, there is a real and substantial possibility that in the future she and Mr. Khattab will have to hire someone to perform some of her duties at the laundromat or Mr. Khattab will have to decline opportunities to earn income from one or more of his side businesses, or both. Although Ms. Salame is well-educated (she obtained a Bachelor's degree in history from the University of Alexandria in Egypt in 1984), since immigrating to Canada in 2001 she has not worked except at the laundromat. At her age and with her ongoing pain and associated physical limitations, there is no real possibility that she could take up alternative paid employment to offset this potential loss.
- [135] It is difficult to measure Ms. Salame's future loss of income earning capacity. In my view, the capital asset approach should be employed. As a result of her injuries, Ms. Salame has clearly been rendered less capable overall of earning income from all types of employment. She is less marketable or attractive as a potential employee and she has clearly lost the ability to take advantage of all job opportunities that might otherwise have been open to her. While her loss need not be calculated with mathematical precision, an award for loss of earning capacity is not at large and its quantification must be grounded in the evidence.
- [136] The cost of hiring Mr. Weir for 10 months was \$7,870.08. This is \$9,444 on an annualized basis. In a single year, Mr. Khattab gave up \$2,000 in income from the security camera installation business. This amounts to a total potential annual loss of \$11,444. Of course, the cost of hiring Mr. Weir represents the cost of replacement labour during a time when Ms. Salame was not working at all. Further, there is some duplication because with a part-time employee available it might not be necessary for Mr. Khattab to give up side jobs. Ms. Salame has now returned to work and she anticipates that once she recovers from her eye surgery she will work as many hours as she worked before the accident. However, she continues to suffer from quite significant pain and it is reasonable to infer that she may not be able to sustain this number of hours. In addition, it is likely that she will never recover sufficiently to be able to perform all her pre-accident duties.
- [137] In all the circumstances, I assess the chances of Ms. Salame having to hire replacement labour in the future and being unable to cover for Mr. Khattab so that he can attend to side jobs at 30%. At the time of the trial she was 55 years old. It is reasonable to infer that she will work another 10 years, to age 65. I assess her damages for loss of future earning capacity at \$35,000 which is roughly 30% of \$11,444 multiplied by 10 years. Again, this is prior to any further adjustment for the contingencies discussed later in this judgment.

Loss of homemaking capacity

- [138] A loss of homemaking award is properly characterized as an award for loss of capacity, distinct from a cost of future care claim: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; *Westbroek v. Brizuela*, 2014 BCCA 48 at paras. 72-78. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the

plaintiff but which she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss.

[139] As stated in Westbroek at para 74:

An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff. [Emphasis in original.]

[140] Before the accident, Ms. Salame assumed responsibility for virtually all of the homemaking tasks for her family. This included grocery shopping and cooking for her family, cleaning their 3,800 square foot house, and doing the laundry. In the first six months after the accident she was unable to perform any of these chores. Mr. Khattab and the children did all the work around the house. Collectively, they dedicated approximately 30 hours a week to these tasks. Over time, Ms. Salame gradually resumed responsibility for most of the housework. By the end of 2014 she was doing lighter jobs such as some cooking, doing dishes, making beds and tidying up. By the time of the trial, she had resumed responsibility for most of the household chores but it takes her longer to do the work and she still depends upon her husband and children to do the heavier tasks such as cleaning the floors and the washrooms. Mr. Khattab estimated that by the time of the trial, Ms. Salame was performing about 75% of the housework.

[141] Ms. Salame is seeking an award of \$50,000 under this head. This is based on an estimate of 30 hours a week of housework in the first six months after the accident, 15 hours a week in the subsequent 12 months, 7 ½ hours a week in the following 12 months (to the time the trial), and five hours a week for the five years following the trial. At \$25 an hour, this amounts to \$48,750 for the past loss and \$38,750 for the future loss. Ms. Salame submits that considering the overall reasonableness of an award, \$50,000 is appropriate.

[142] I accept Ms. Salame's estimate of the number of hours of homemaking services she would have performed but for her injuries as reasonable and supported by the evidence. I also accept that her proposed rate of \$25 per hour is reasonable. However, as discussed above, the Court of Appeal has made clear that a cautionary approach to the assessment of damages under this head is adopted to ensure that the award is commensurate with the loss. In Westbroek, where the plaintiff did not intend to pay anyone else to perform the household chores he was unable to do, an award based on \$24 per hour for housekeeping services was reduced by two-thirds in keeping with the cautionary approach.

[143] There was no evidence that Ms. Salame paid anyone else to perform the homemaking tasks she was unable to perform or that she has any intention to pay anyone else to perform those tasks in the future. In the circumstances, I would reduce her estimate of \$48,750 for the past loss and \$38,750 for the future loss by two-thirds, and award \$16,500 for the past loss and \$13,175 for the future loss. This is prior to any further adjustment for the contingencies discussed later in this Judgment.

Cost of future care

[144] Ms. Salame is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition insofar as that is possible. The award is to be based on what is reasonably necessary on the medical evidence, to preserve and promote her mental and physical health: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[145] The test for assessing an appropriate award for the cost of future care is an objective one based on the medical evidence. It is two-fold: first, there must be a medical justification for the cost; and second, the claim must be reasonable: *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[146] In her report, Dr. Ahmed recommended continued medication and regular exercise. During her oral testimony, she clarified that by regular exercise she meant that Ms. Salame should exercise either on her own or under the supervision of a physiotherapist or kinesiologist. She said once or twice a month sessions with a physiotherapist might be helpful. In his report, Dr. Lochter recommended a home exercise program and anti-inflammatory medications, but in cross-examination he agreed that Ms. Salame should have periodic reviews of her exercise program by a physiotherapist.

[147] Ms. Salame testified that she intends to continue to take medication for pain and depression. She estimated the cost of antidepressants at \$20 per month and pain medication at a further \$20 per month. Ms. Salame testified that she intends to continue to attend physiotherapy because it resulted in improvement of her shoulder symptoms. Ms. Cheong testified that the cost of a private physiotherapy session is \$65.

[148] Ms. Salame seeks an award of \$12,600 for cost of future care which is based on one physiotherapy session per month, at \$65 per session, and \$40 per month for medications, for 10 years.

[149] I am satisfied that Ms. Salame's claim as it relates to medications is reasonable. However, in my view, the medical evidence falls short of establishing that one physiotherapy session per month is reasonably necessary. Again, Dr. Ahmed testified only that once or twice a month sessions might be helpful and she did not actually recommend physiotherapy in her written report. Dr. Lochter's evidence, however, satisfies me that a home-based exercise program with periodic reviews by physiotherapist is reasonably required. Two physiotherapy sessions per year to check on her progress and modify her program is reasonable. At \$65 a

session, for 10 years, this would cost \$1,300. To this I add medication costs of \$40 per month for 10 years (\$4,800) for a total award under this head of \$6,100.

Special damages

[150] Special damages are agreed to in the amount of \$2,142.66.

Adjustments for contingencies

[151] As already discussed, Dr. Grover testified that Ms. Salame's pre-existing osteoporosis renders her susceptible to compression fractures. He also said that the possibility of spontaneous fractures would increase with age. Dr. Ahmed expressed a similar view. She said osteoporosis is a risk factor for compression fractures but said it is not a cause of such fractures except in older people who could suffer spontaneous fractures. Dr. Lochter testified that there was a less than 50% chance that Ms. Salame would have developed fractures in the next 10 years as a result of the osteoporosis.

[152] I am persuaded that there was and remains a realistic possibility of Ms. Salame suffering compression fractures causing upper back pain as a result of her pre-existing osteoporosis, irrespective of the accident. On the evidence before me, this was a remote possibility prior to trial but it becomes a more significant possibility as Ms. Salame ages. In these circumstances, it would not be appropriate, in my view, to reflect this contingency in assessing Ms. Salame's past loss of earning capacity or her past loss of homemaking capacity; however, I would reduce her claim for non-pecuniary damages, her loss of future income earning capacity claim, and her loss of future homemaking capacity claim by 10% each to reflect the possibility that she would have, in the future, developed significant upper back pain as a result of the osteoporosis, in any event.

[153] Ms. Salame has suffered from periods of low back pain, carpal tunnel symptoms and the discomfort associated with her recent eye surgery, but as already discussed those are divisible injuries or conditions. I would make no adjustment in assessing her non-pecuniary damages for the divisible injuries or conditions because that assessment reflects only the pain and suffering associated with the injuries for which the defendant is liable. However, Ms. Salame acknowledged that these conditions interfered with her ability to work in the time period up to trial, although to a much less significant extent than did the fractured sternum, the shoulder injury and the upper back pain. It is reasonable to infer that these conditions also interfered with her ability to maintain her home in the period up to trial, although, again, to a much less significant extent than the accident-related injuries. In the circumstances, I would reduce her loss of past income earning capacity claim and her loss of past homemaking capacity claim by 5% each to reflect the impact of these conditions, irrespective of the accident.

[154] There is no evidence to suggest that Ms. Salame's eye condition will continue to cause any ongoing problem. However, given the pre-existing osteoporosis and the fact that she has had recurring carpal tunnel syndrome, I am satisfied that there is a measurable risk that

low back pain and carpal tunnel symptoms would have affected her future income earning capacity and her future homemaking capacity in any event. On the evidence, it is very difficult to predict when and to what extent this would have occurred. The most I can say is that it is likely that the risk of low back pain arising as a result of the pre-existing osteoporosis would have increased gradually as she aged. I would reduce her loss of future income earning capacity claim and her loss of future homemaking capacity claim by a further 5% each to reflect the contingency that she would have developed low back pain as a result of the osteoporosis and would have suffered from carpal tunnel syndrome symptoms in the future, irrespective of the accident.

[155] I would make no adjustment to Ms. Salame's claim for damages for the cost of future care or to her special damages claim, because those claims reflect actual costs associated only with the injuries she sustained in the accident.

Conclusion

[156] Ms. Salame is awarded total damages of \$173,243.66, less a deduction for taxes on the past loss of earning capacity component of this award. This total amount is comprised of:

- (a) non-pecuniary damages in the amount of \$99,000 (originally assessed as \$110,000 but reduced by 10% to reflect the possibility that she would have developed upper back pain in the future as a result of the osteoporosis, irrespective of the accident);
- (b) damages for past loss of income earning capacity in the amount of \$9,377 less a deduction for taxes (originally assessed as \$9,870.08 but reduced by 5% to reflect the impact of her low back pain, carpal tunnel symptoms and eye surgery, irrespective of the accident);
- (c) damages for future loss of income earning capacity in the amount of \$29,750 (originally assessed as \$35,000 but reduced by 10% to reflect the possibility that she would have developed upper back pain in the future as a result of the osteoporosis, in any event, and by a further 5% to reflect the possibility that she would have developed low back pain as a result of the osteoporosis and would have suffered from carpal tunnel syndrome symptoms in the future, irrespective of the accident);
- (d) damages for past loss of homemaking capacity in the amount of \$15,675 (originally assessed as \$16,500 but reduced by 5% to reflect the impact of her low back pain, carpal tunnel symptoms and eye surgery, irrespective of the accident);
- (e) damages for future loss of homemaking capacity in the amount of \$11,199 (originally assessed as \$13,175 but reduced by 10% to reflect the possibility that she would have developed upper back pain in the future as a result of the osteoporosis, in any event, and by a further 5% to reflect the possibility that she would have developed low back pain as a result of the osteoporosis and would have suffered from carpal tunnel syndrome symptoms in the future, irrespective of the accident);

- (f) damages for cost of future care in the amount of \$6,100; and
- (g) special damages in the amount of \$2,142.66.

[157] If the parties are unable to agree on costs, or the amount to be deducted from the past loss of earning capacity component of the award, they may arrange to make submissions concerning those matters by contacting the Registry.

"WARREN J."

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