CANADA / JUDGMENT

Sharma v. Chui

2019 BCSC 2115

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2019 BCSC 2115 Sharma v. Chui

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharma v. Chui,

2019 BCSC 2115

Date: 20191206

Docket: M141428

Registry: Vancouver

Between:

Kiran Sharma

Plaintiff

And

Man T. Chui, Yin Y. Chan

Mohinder S. Jhajj and Gurpreet K. Jhajj

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for Plaintiff:

D.N. Osborne

Counsel for Defendants, M. T. Chui,

Yin Y. Chan:

G.S. Sandhu

Place and Date of Trial:

Vancouver, B.C.

April 29 & 30, 2019

May 1-3, 21, 31, 2019

September 13, 2019

Place and Date of Judgment:

Vancouver, B.C.

December 6, 2019

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[1] The plaintiff was injured in a motor vehicle accident that occurred on March 10, 2012. The defendants admit liability for the accident. The sole issue is the appropriate quantum of damages to award the plaintiff.

[2] The defendants accept that the plaintiff injured her back, but dispute that the accident caused any injuries she may have to her neck, right shoulder or left knee. They also submit she has failed to mitigate her losses.

[3] The plaintiff discontinued the action against the defendants, Mohinder S. Jhajj and Gurpreet K. Jhajj, on September 29, 2014.

I. FACTS

A. Before the Accident

[4] The plaintiff was 53 years old at the time of the accident. She immigrated to Canada from India in 2005, along with her husband and two children., Their son was 28 years old at trial and lives with his parents. Their daughter is married and has her own home, but she and her husband did live with her parents and brother for about a year in 2008.

[5] The plaintiff has three degrees from an Indian university: a Bachelor of Arts, a Masters of Arts and a Bachelor of Education. Before coming to Canada, she was a teacher at a secondary school for nine years. Her husband was trained and worked in international finance before coming to Canada.

[6] Unfortunately, neither was able to transfer their skills and work in the fields in which they had education and experience when they came to Canada. However, they both studied and became qualified as insurance agents. In fact, the plaintiff was "self-taught"; she simply studied the books her husband brought home and then challenged the exam without taking a course. She passed the first time she wrote it. She has worked full time as an insurance agent at the same agency since 2009.

[7] The testimony from family and the plaintiff's colleagues was consistent in describing the plaintiff before the accident as hard-working, active and cheerful. When not working, the plaintiff was reluctant to stay in the house. She and her husband very much enjoyed going for long walks, often as long as 4 or 5 km, almost every day.

[8] She did all the cooking and at least 90% of all the housework. Her daughter described herself, her dad and her brother as very spoiled by this. However, the evidence was uncontradicted that the plaintiff preferred to take on those responsibilities and it was not a case of the family refusing or being unable to assist. The plaintiff took pride in being able to do all that housework on top of working full time, and preferred to do things herself so they were done to her standard.

[9] There is no dispute that the plaintiff suffered a workplace injury on November 10, 2011. She tripped over a box on the floor and banged her head on a door. She immediately had pain in her head and neck. She continued to suffer neck pain and headaches for a time after the fall.

[10] She took some time off work after that injury and greatly reduced the housework she did for about two months. However, she returned to full-time employment and regular household duties by January 2012.

[11] The plaintiff submits the pain and limitations from the workplace injury were less severe than those she suffered from the accident. She submits the workplace injury was almost fully resolved before the accident. The defendants dispute both the extent and severity of that injury, which I discuss later in this judgment.

[12] She does have some pre-existing medical conditions including hypothyroidism. She also suffered a fall on black ice in either 2006 or 2007 which injured her knee, but she testified that was fully resolved within six months.

B. The Accident

[13] The defendant was a front-seat passenger in a minivan, which was stopped at a red light. Without warning, a vehicle driven by one of the defendants (but owned by that defendant's husband, another defendant) rear-ended the vehicle in which the plaintiff was a passenger. The plaintiff was wearing her seat belt. She was thrown back and forth in her seat.

C. After the Accident

[14] The plaintiff did not seek out medical assistance either at the scene of the accident or upon returning home the same day. She did see a doctor the next day.

[15] The parties dispute the degree of severity and nature of her injuries generally, and whether the severity of symptoms increased and if so, when and why. I resolve those issues later in this judgment.

[16] The plaintiff submits the defendants did not confront the plaintiff during cross-examination with the assertion that her testimony about the extent and severity of her injuries was not true, and having failed to do so, implicitly they accept that evidence: R. v. Podolski, 2018 BCCA 96 at para. 161, citing R. v. Quansah, 2015 ONCA 237 at para. 79, leave to appeal ref'd [2016] S.C.C.A. No. 203.

[17] Counsel for the defendants did not suggest the plaintiff was not honest, or that she was malingering. He did question the reliability of her testimony, based on a comparison of what she reported to some experts and her testimony, but not based on contradictory evidence that was called. Thus, the requirement for confrontation did not arise on the facts before me the way it did in Podolski.

[18] Reliability and credibility, while both important to the weight placed on evidence, are separate principles. Overall, I do not find anything about the manner in which the plaintiff testified, or the coherence of the plaintiff's description of her injuries with other witnesses' testimony, impaired the plaintiff's credibility. For the most part (although with some differences), her testimony was generally consistent with what she reported to the experts who examined her.

[19] I am satisfied she was a credible witness. There may be issues of her reliability, but to the extent there were, it is due to the usual vagaries of human memory and not an intention to be inaccurate with the court.

[20] Two aspects of how the plaintiff and her husband testified are relevant to my findings. I observed the plaintiff frequently shifting position in the witness stand. I also observed that she consistently portrayed a downcast demeanour. It was clear to me she was in discomfort, consistent with her testimony.

[21] The plaintiff's husband was overcome with emotion a few times while giving his evidence. He admitted he is someone prone to expressing emotions easily, but I am satisfied the degree of his emotionality was in part a reflection of the degree to which the injuries have had a negative impact on the plaintiff's condition and functioning.

[22] While not determinative, these observations are consistent with the plaintiff's position as to the nature and extent that her injuries impacted her life.

[23] I make the following findings based on the consistency and uncontradicted testimony of the plaintiff and her family members about the plaintiff's condition after the accident:

a. The plaintiff and her husband no longer go on any long walks.

b. She has discomfort if sitting or standing in the same position for longer than 10 or 15 minutes. People sit on the floor at temple, although there are a few chairs on the perimeter of the room. She never had problems sitting on the floor for events before the accident, but now she never sits on the floor.

c. She always commuted independently to work before the accident, but now family members try to drop her off or pick her up as often as they can because of her deteriorated physical condition.

d. She is not as active as before. Since the accident, the plaintiff always has difficulty, and needs help, putting on a jacket, which I am satisfied was because of restrictions and/or pain in her shoulder.

e. The plaintiff does far less housework and cooking than before the accident. Her husband does a lot of cooking. He does all the grocery shopping. Sometimes, the plaintiff's daughter brings meals. The plaintiff's son testified that even when the plaintiff does cook the meals they are not as elaborate. When the plaintiff cooks, she needs to take breaks and needs to sit down to chop vegetables.

f. The plaintiff finds many housecleaning tasks very difficult and does much less than she did before the accident. While the plaintiff's husband and son did pitch in at first, gradually she realized they needed more help. They hired a housecleaner (someone the plaintiff's daughter used) who comes about once a month. Sometimes their son paid the housecleaner in cash and his mother reimbursed him. For a very short time, he was paid cash to do some housework.

g. She often has a depressed mood. Her daughter spoke about having to coax her mother to get out of the house on non-work days, and she stated even that does not work all the time.

h. Her daughter has seen her mother cry out of frustration with her condition, something that never happened before. The plaintiff also complains of pain and fatigue whereas she had a cheerful and happy demeanour before the accident.

i. The plaintiff never discussed plans to retire before the accident, but now mentions it.

j. Her condition seems to be worsening in the last few years.

[24] With regard to changes in the plaintiff's life after the accident, in addition to the plaintiff and her family, the office manager and a colleague, both of whom work at the same agency as the plaintiff, testified. Both have worked with her since she started at that agency in 2009. The following findings are based on the consistent and uncontradicted evidence of these two witnesses:

a. Before the accident, the plaintiff was cheerful. She never asked for assistance with tasks at work and never expressed any complaints about her physical condition.

b. Since the accident, she will ask for help with heavy files, or retrieving files that are on high or low shelves.

c. She has difficulty if she has to stand for a long period. There is a chair available at the counter in the office where they speak with clients, and the plaintiff uses that chair more than anyone in the office.

d. Since the accident, the plaintiff always has difficulty, and needs help putting on a jacket.

e. She has good days and bad days, and expresses difficulty with sleep. Her mood is depressed on bad days.

f. Despite difficulties, the plaintiff continues to work hard and completes her job well.

[25] The defendants rely on a number of documents to support their position that the only injury caused by the accident was to the plaintiff's back. Specifically, on the insurance claim form (referred to as the CL22), the only thing written under the heading "Describe injury resulting from accident" was lower back. That form was signed by the plaintiff on March 12, 2012. On the same form, she described a pre-existing neck (STI) injury at work that needed six to eight more physiotherapy treatments.

[26] Her family physician completed a medical report dated July 21, 2013 (referred to as the CL19). With regard to the plaintiff's subjective complaints, he listed pain in lower back, which was less sore on the left side. He recommended exercise and manual therapy but nothing else. He also noted that the accident injuries did not prevent the plaintiff from working full duties, full time; she only missed occasional days off. He did note she was avoiding heavier housework.

[27] The defendants also point out that the plaintiff agreed that on March 7, 2012 (this was before the accident), she told her physiotherapist that she felt 85% better overall. She also agreed that she was receiving treatments to her neck and shoulder in the weeks leading up to the accident. She also admitted that she had reported problems with her right hand and lifting in the pre-accident physiotherapy sessions.

[28] Lastly, the defendants submit it must be relevant that the plaintiff took more time off after the workplace injury, than following the accident.

II. EXPERT EVIDENCE

[29] The following experts testified at trial:

a. Louise Craig, who was qualified to give expert opinion evidence in physiotherapy, functional capacity evaluations and cost of future care. She completed one report dated June 22, 2018. She assessed the plaintiff on June 19, 2018.

b. Dr. Catherine Paramonoff was qualified as an expert in physical and rehabilitative medicine. She completed two reports. The first dated October 1, 2018, relates to her assessments of the plaintiff on January 26, 2016 and May 23, 2018. The second report dated March 7, 2019, responds to the report of the defendants' expert Dr. Boyle.

c. Dr. Gurdeep Parhar was qualified to give expert opinion evidence in general practice and family medicine, as well as in occupational and disability medicine. He completed two reports dated January 12, 2017 and January 9, 2019. He is the plaintiff's family physician. His testimony was received by playing a videotape of his deposition conducted on April 18, 2019.

d. Dr. Marc Boyle was qualified as an expert in orthopedic surgery, who completed a report dated April 18, 2019, based on an assessment of the plaintiff conducted April 12, 2018.

[30] In addition, Darren Benning, a qualified expert in economics, completed a report dated April 5, 2019, which was accepted into evidence without objection.

A. Challenges to Weight of Expert Evidence

[31] The defendants challenged the evidence of Ms. Craig and Dr. Parhar on the basis that they demonstrated advocacy, compromising their duties of neutrality to the court.

[32] Ms. Craig is the spokesperson for an organization called R.O.A.D. B.C., which was described as a group that made public statements about government funding of insurance claims. Specifically, Ms. Craig confirmed that she was not in favour of changes to the law regarding the assessment of damages. The defendants submit this should reduce the weight placed on her opinion.

[33] With regard to Dr. Parhar, the defendants submit that his evidence demonstrated he was an advocate rather than a neutral expert. The defendants submit this was illustrated by his "long-winded responses" and his tendency to use his answers to questions "as a launching pad for lecturing on chronic pain".

[34] They also assert that Dr. Parhar opined on the plaintiff's credibility and that he addressed questions reserved for the court. They also allege his disagreement with another expert's use of a common medical term (contraindication) was illustrative of his inability to concede reasonable propositions put to him. Lastly, they point to two previous cases that state he departed from his role as an independent expert witness.

[35] In White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23, at para. 32, the court commented on the role of experts. The court identified three concepts underlying expert evidence: impartiality, independence and absence of bias. The court elaborated:

The expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be independent in the sense that it is the product of the expert's independent judgment, uninfluenced by who has retained him or her or the outcome of the litigation. It must be unbiased in the sense that it does not unfairly favour one party's position over another. The acid test is whether the expert's opinion would not change regardless of which party retained him or her: [cites omitted]. These concepts, of course, must be applied to the realities of adversary litigation. Experts are generally retained, instructed and paid by one of the adversaries. These facts alone do not undermine the expert's independence, impartiality and freedom from bias.

[36] I do not find Ms. Craig's neutrality was compromised.

[37] The Government of British Columbia regulates and largely controls the entire automotive insurance industry. When it makes changes, those changes are a matter of public and political debate. Ms. Craig participated in the political process by joining a public interest group and speaking about changes the Government was planning to make to legislation about motor vehicle insurance.

[38] I presume part of the defendants' concern was that she would somehow tailor her evidence to be consistent with the political views expressed by R.O.A.D. B.C. She was confronted with that during cross-examination and I am satisfied by her answers no such thing happened. Also, as far as I am aware, she made no public comment on the task she performed as an expert in this Court. The defendants did not establish any relationship between the legislative changes contemplated at that time, and how Ms. Craig carried out her role as an expert. In any event, those changes have no relevance to the legal issues before the court in this trial.

[39] To the extent the defendants were suggesting there could be a perception that Ms. Craig's participation with an advocacy group would cause her to slant her opinion in favour of the plaintiff, that is nothing but speculation. I do not accept that any reasonable person informed of the circumstances as described above would perceive Ms. Craig's evidence was biased. She was cross-examined on the issue and nothing about her answers, or how she answered, revealed the possibility of bias.

[40] The defendants also point out that her participation in R.O.A.D. B.C. was not on her resume. Given that it is irrelevant to any opinion she provided to this Court, that omission is insignificant.

[41] Lastly, the defendants point out that the Trial Lawyers Association of British Columbia is a member of R.O.A.D. B.C. and it is public knowledge that it launched a challenge to changes to both the Rules of Court[1] and assessment of damages in motor vehicle cases. That submission is without merit. It is probable that many lawyers who appear before the court are also members of the Trial Lawyers Association of British Columbia, yet that does not impact their ability to perform their duties to their client and to the court. The suggestion that Ms. Craig's tenuous connection to the same organization could impact her independence is to impugn her professionalism by "association" with a political point of view. The submission has no merit.

[42] I found Ms. Craig to be a reliable and credible expert whose evidence was helpful.

[43] As to whether Dr. Parhar demonstrated advocacy in this trial, that cannot be determined or assisted by findings made by other judges about his evidence in different trials. This is not a situation where several judges have expressed a concern about the independence based on an expert's work history. The comments were specific to the particular evidence in those cases. Accordingly, I assess his evidence in isolation from previous judicial commentary.

[44] However, I do have concerns about Dr. Parhar's testimony. Unfortunately, because his evidence was a video-taped deposition, the court was captive to the manner in which he answered the questions, with no ability to intercede. Normally this would not present any problem. However, I agree with the defendants that his answers were frequently prolix and often went far beyond the scope of the question asked. He sometimes strayed into opining on what the court should find or decide. He frequently added unsolicited opinions to his answers all of which tended to support his conclusions. The result was his evidence was

often unhelpful and occupied an amount of trial time disproportionate to the impact of his evidence.

[45] For that reason, I place reduced weight on his evidence.

[46] I place no weight on Dr. Boyle's report for a number of reasons.

[47] The plaintiff submits she suffered soft-tissue injuries resulting in chronic pain. Dr. Boyle has no expertise with regard to pain conditions. His expertise is orthopedic surgery, which was not at issue in this case.

[48] Even if his area of expertise was relevant, his experience is dated. He ceased being a clinical instructor 30 years ago, he has not been an active clinician for at least 10 years and none of the publications listed in his CV were peer-reviewed, or addressed issues of pain.

[49] In his report, his opinions are stated as conclusions with virtually no explanation for how he arrived at those conclusions.

[50] Furthermore, the plaintiff's cross-examination of Dr. Boyle was successful in adducing Dr. Boyle's agreement with propositions directly at odds with the conclusions in his written report. He opined in his report that it is more likely than not that the plaintiff would "undergo complete resolution of the symptoms attributable to a soft tissue injury." Further, he opined that even if pain persisted, there was less than a 50% chance it would be intrusive.

[51] Yet, he agreed with a number of propositions (some of which came from his own evidence in other cases) that were directly at odds with those conclusions, including:

a. Most patients who are symptomatic after three months remain so indefinitely;

b. Pain perception and perpetuation is a complex process involving multiple areas of the brain and spinal cord;

c. People can experience pain in the absence of fractured bones, torn ligaments or crushed joint capsules;

d. Minor injuries can give rise to significant or sever chronic pain that may be resistant to recovery; and,

e. Pain that becomes chronic is maladaptive and can detrimentally affect a person's functionality.

[52] Despite all of these factors he refused to resile or qualify his prognosis of the plaintiff. One of the hallmarks of an expert's independence and impartiality is the ability to agree with reasonable propositions, sometimes hypothetical, that would alter their opinion, perhaps with qualifications.

[53] Instead, Dr. Boyle simply could not reconcile his conclusionary opinions about the plaintiff's prognosis with medical principles put to him, with which he agreed. For all the preceding reasons, I place no weight on Dr. Boyle's report, or opinions expressed therein.

B. Summary of Expert Evidence

[54] Ms. Craig opined that her assessment findings and clinical observations supported the plaintiff's subjective reports of pain and perceived ability. Accordingly, her view was that the plaintiff's self-reports of function and pain are consistent with objective findings and were reliable.

[55] Other relevant conclusions from Ms. Craig's evidence were the following:

a. The plaintiff requires accommodations at her work place.

b. Part time would be more tolerable for the plaintiff because it would allow her to manage her symptoms better.

c. Disturbed sleep and activity avoidance due to fatigue and pain aggravation have interfered with the plaintiff's ability to work, do household activities and enjoy recreational activities.

d. The plaintiff participated with consistent and full effort in appropriate treatments without resolution of symptoms.

[56] Dr. Paramonoff diagnosed the plaintiff with a chronic pain presentation and musculoligamentous injuries at the lumbopelvic regions, and aggravation of pre-existing neck/upper back pain. She also found mood disruption and decreased sleep to be confounding factors. She noted that muscle imbalance and deconditioning contributed to the ongoing presentation of symptoms but that those were due in part to inactivity secondary to the pain from the accident injuries. Although she opined that the plaintiff had degenerative changes, she concluded they were likely asymptomatic prior to the accident and the superimposition of accident injuries resulted in the unmasking of those changes, rendering them somewhat symptomatic.

[57] Dr. Paramonoff commented on the cyclical nature of chronic pain and mood disorders as follows:

It is my opinion that confounding factors are likely also significantly contributory to the ongoing symptom presentation; such factors include mood symptoms/psychological issues, decreased sleep; such factors can negatively affect a person's experience of pain, thereby contributing to an ongoing [chronic] pain presentation.

[58] She confirmed that the plaintiff had a pre-existing history of pain in her right side at the neck, upper back and shoulder girdle regions. She opined that the plaintiff was pre-disposed to regional pain absent the accident. However, overall, she concluded that there may have been aggravation of the pre-existing symptoms as a result of the superimposed soft-tissue injuries. The persistence of symptoms beyond two months most likely represents sequelae of accident injuries.

[59] She opined the left knee pain was not related to the accident.

[60] Dr. Paramonoff opined that the plaintiff "will likely have a prolonged course of recovery", but she did indicate that if the plaintiff follows treatment recommendations, she could have mild and possibly moderate symptomatic improvement. She clarified that elimination of symptoms would not occur and the plaintiff will likely have a residual baseline of symptoms.

[61] As noted, I place reduced weight on Dr. Parhar's opinion, but note that his recommendations are very similar to Dr. Paramonoff with the addition of a recommendation for anti-depressant medication. He also expressed the view that her physical injuries, mood disruption and impairment of ability to stand and sit with sustain postures are likely permanent.

III. INJURIES

A. Causation

[62] The parties do not dispute the guiding legal principles on causation. The plaintiff's burden is to establish that it is more likely than not that "but for" the accident she would not have suffered the losses for which she claims damages: Athey v. Leonati, [1996] 3 S.C.R. 458 at paras. 13-14. In Athey, the court also noted that the defendant is not required to put the plaintiff in a better position than she was before the accident. Accordingly, "if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award" (at para. 35).

[63] The defendants submit that a 20% reduction in the award for non-pecuniary damages is justified based on the injuries to the plaintiff's neck and right shoulder that existed before the accident, and her knee injury which is unrelated to the accident.

B. Analysis

[64] The major dispute between the parties is what injuries were caused by the accident, and to what extent should any reduction be made in the amount of damages because of the pre-existing work place injuries.

[65] I find on a balance of probabilities that any pain in her left knee is unrelated to the accident. Dr. Parhar expressed the opinion that it was linked, but I found his reasoning on that to be unpersuasive. Moreover, I find Dr. Paramonoff's expertise to be more reliable on that issue, and her opinion was clear that it was unrelated.

[66] The defendants accept that the accident caused soft-tissue injuries to the plaintiff's back.

[67] The defendants submit the injuries have not been overly intrusive on her life, and other than occasional assistance with heavy lifting, she has not requested any modifications at her job. They also question the degree to which her complaints arise from that injury, as opposed to the knee and other unrelated injuries.

[68] I agree the contribution of the unrelated knee injury must be accounted for in the award of non-pecuniary damages to some degree.

[69] The defendants point out that Ms. Craig's assessment recorded the plaintiff reporting her left-knee pain at between 5 and 6 out of 10, whereas lower back and shoulders and upper back pain were both recorded at 4 to 5 out of 10. She also reported elbow and arm pain at 5 out of 10. They also point out the plaintiff accepted that she received a medical opinion that her knee would continue to worsen over time.

[70] Based on those facts, the defendants' position is that the knee injury has a greater impact on her future capacities (difficulty with work and housework) than the accident-related injuries.

[71] I do not agree. Ms. Craig's assessment represents a snapshot of the plaintiff's condition on one day and cannot be determinative of her overall condition. The consistency of her reports of pain in her back, neck and shoulders outweighs the assessment of the degree of knee pain on one day.

[72] I do find, however, that the knee is contributing to some degree to her overall condition. I agree that should be taken into account in assessing the amount of non-pecuniary damages. The plaintiff's primary position is that no discount is justified because of pre-existing injuries, but she submits alternatively that a maximum 10% discount for the contribution of her knee problems to her overall condition would be reasonable.

[73] The issue of the workplace injury is more complicated. The defendants suggest that the plaintiff exaggerated to the experts the degree to which she had recovered from it prior to the accident. The plaintiff reported to Ms. Craig that she was injury-free prior to the accident. She also told Dr. Paramonoff that she was "totally cured" before the accident.

[74] I accept what the plaintiff told a number of experts regarding her prior workplace injury was not accurate. I also acknowledge that she stated she was 85% recovered to the physiotherapist days before the accident, and still had some physiotherapy sessions scheduled. However, I do not find the inaccuracy was the result of the plaintiff being dishonest. She was assessed by Ms. Craig in June 2018, over six years after the accident and six and a half years after the workplace injury. She was assessed by Dr. Paramonoff in

January 2016 and May 2018, also many years after the workplace injury and accident.

[75] I find it more telling and significant that she had returned to work and regular household work, full time months before the accident. Those are consistent with a description that she was "totally cured". The estimation of 85% is not necessarily inconsistent with being "cured". She may have had some residual pain but those lingering issues were not interfering with her ability to function as she had before the workplace injury.

[76] Moreover, I rely on Dr. Paramonoff's opinion that any pre-existing neck and shoulder injury was aggravated by the accident and together with the injury to her back has led to a chronic pain situation.

[77] Therefore, I find to the extent the plaintiff's description to the experts that she was totally cured from her workplace injuries before the accident was inaccurate, that was simply a reflection of how much time had passed and the fact that she had returned to full time work and household activities.

[78] Accordingly, my award of non-pecuniary damages must take into account that the workplace injury was a contributing factor to her overall condition, but was not significant enough, as a stand-alone issue, to justify any percentage reduction.

C. Failure to Mitigate

[79] The accepted test for failure to mitigate was stated in Jason Chiu v. James Chiu, 2002 BCCA 618, at para. 57, to be that the plaintiff has not pursued a course of medical treatment recommended to her by a doctor. The burden is on the defendant to establish both: the plaintiff acted unreasonable in eschewing the recommended treatment, and the extent to which, if any, the plaintiff's damages would have been reduced had she acted reasonably.

[80] The defendants have failed to meet this test. The sole basis upon which they claim damages should be reduced is that "instead of losing weight, she gained weight".

[81] The defendants rely heavily on Dr. Parhar's recommendations that the plaintiff work out in a gym or participate in a fitness program.

[82] They also point out that Dr. Paramonoff recommended participation in an exercise program. However, Dr. Paramonoff recommends in her report under "Exercise Program" that the plaintiff "continue to participate in a regular, independent exercise program" and comments that the plaintiff "had been instructed in exercises during physiotherapy and active rehabilitation". In other words, the "exercise" the doctor was recommending was what the plaintiff had already done by being diligent about her physiotherapy exercises. It's true that Dr. Paramonoff also recommended exercises done in a gym or with home gym equipment, but reading her report as a whole, I cannot conclude that the plaintiff did not pursue those recommendations.

[83] The point is that the medical recommendations to exercise was to work on "strengthening (including spinal and scapular stabilizing, and core/lumbopelvic musculature exercises), and conditioning" (Dr. Paramonoff). The purpose of engaging in those activities was to allow the plaintiff to improve her ability to manage residual pain, and better tolerate participations in her activities.

[84] The plaintiff acknowledged those recommendations but stated after working a full day, including a long commute, and doing whatever housework she could, she was too busy and too fatigued to attend a gym.

[85] The plaintiff did adjust her diet but found that did not work to lose weight. She diligently followed every other treatment recommendation given to her.

[86] I do not find the plaintiff was failing to take reasonable steps for her own recovery. She continued to work and given the length of her commute and the family's custom that she did as much housekeeping and cooking as she could, it was not unreasonable that she could not summon the energy or time to work out. Indeed, Ms. Craig's recommendation is that she cut back her working hours in order to undertake treatments.

[87] Had she worked less and also failed to follow treatment recommendations there may have been more support for a finding of failure to mitigate. However, based on the facts in this case, the defendants have failed to satisfy the test.

[88] I add that it is common knowledge that it is notoriously difficult to lose weight, especially for non-athletic, older adults. Because of the defendants' negligence, the plaintiff injured her back, aggravated pre-existing injuries and suffers from chronic pain and low mood. Despite her chronic pain, she works full time, which has mitigated her losses to a significant degree, and does her best to keep up her normal daily activities for her family. To penalize her because she does not carve out of those things time and energy to work on her own conditioning is unreasonable and unjustified.

[89] I am not satisfied any reduction is appropriate for a failure to mitigate.

D. Non-Pecuniary Damages

[90] The legal test for assessing non-pecuniary damages is well known and not contested. A non-exhaustive list of considerations to be taken into account was set out in Stapley v. Hejslet, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100. They include the age of the plaintiff, the nature of the injury, the severity and duration of pain, degree of disability, emotional suffering and loss or impairment of life. Additional consideration which may be subsumed in the preceding list include impairment of family, marital, social relationships and physical and mental abilities and loss of lifestyle.

[91] In Giang v. Clayton, Liang and Zheng, 2005 BCCA 54 at paras. 54-55, Justice Southin stated that a stoic "plaintiff who continues to work when it would be reasonable for him or her not to work should not be penalized for his or her grit." That guidance is particularly apt in this case.

[92] In her written submissions, the plaintiff provided a table summarizing the 19 cases upon which she relies for the amount of non-pecuniary damages. The table identifies each case and lists the age and occupation of the plaintiff, the injuries, the amount of non-pecuniary damages awarded, pinpoint cites to the relevant paragraphs and an indication whether the plaintiff's award was reduced because of a failure to mitigate.

[93] Of the cases listed, I find the following three to be the most relevant to the issues before me, with differentiating factors noted:

a. Cumpf v. Barbuta, 2014 BCSC 1898 - the plaintiff was in her late 40s and worked as a building manager. She was permanently limited in her ability to work and take care of her household because of soft-tissue injuries and chronic pain to her shoulder, back and hips in addition to adjustment disorder and fibromyalgia. She was awarded $150,000 in non-pecuniary damages. One difference from the facts before me is that the court completely rejected the defendant's position that the plaintiff had not recovered from a prior motor vehicle accident at the time of the subject accident.

b. Eccleston v. Dresen, 2009 BCSC 332 - 43-year-old unemployed woman who suffered moderate soft-tissue injuries to her neck and upper back resulting in chronic pain and depression. She was awarded $120,000 but that was reduced by 10% for pre-accident disposition to depression and somatoform symptoms. However, the court concluded that the chronic pain was completely debilitating for her. Also, her depression was severe enough that intensive psychotherapy for at least a year was recommended. Both factors led the court to reject the defendant's estimates of damages in the range of $30,000 to $40,000.

c. Hu v. Tan, 2016 BCSC 908 - 38-year-old female who was an accounting administrator with soft-tissues injuries to the shoulder, neck and back with headaches, and also anxiety and insomnia. She continued to work despite her chronic pain, which presented as a stoic plaintiff. She was awarded $90,000. The court found that she had pre-existing "discomfort", but that was insufficient to impact the non-pecuniary award. I find this case to be the most similar to the facts before me.

[94] The defendants refer to three cases all of which involved reductions to non-pecuniary damages and loss of future income because of pre-existing injuries. I find only one has enough similarities to provide some guidance, albeit with a noted difference from the facts before me.

[95] In Hosking v. Mahoney, 2009 BCSC 803, the 47-year-old plaintiff had previously injured her neck, upper back and shoulders in two prior motor vehicle accidents. The court specifically found the plaintiff had not fully recovered from those injuries (para. 175). However, the court also found the plaintiff had not done everything she could to recover (paras. 176-177), which is an issue of mitigation Instead, the court awarded $80,000, and stated that must be reduced by 25% for pre-existing and intervening injuries (para. 179).

[96] More generally, the defendants refer to four cases they submit involved similar facts and can guide the award of non-pecuniary damages. I find the two discussed below to be helpful, with noted differences.

a. Parker v. Martin, 2017 BCSC 446 - the plaintiff was 53 on the day of the accident and sustained soft-tissue injuries in a parking lot accident. He suffered from injuries to his neck, shoulder and back with associated headaches. He continued to work. However, he had a long history of shoulder symptoms and was treated for some lumbar and neck pain before the accident. He also had carpel tunnel syndrome in his right arm and hand, which the court found were responsible for precluding his participation in two activities that he previously enjoyed (guitar and bicycling). In addition, four years after the accident, but before trial, the plaintiff suffered a significant myocardial infarction, which caused major heart damage and restricted the plaintiff's work. This was not connected to or caused by the accident. The court awarded $45,000 for non-pecuniary damages.

b. Sharifi v. Chaklader, 2012 BCS 685 - the plaintiff was 53 at the time of the accident. She was a passenger in a vehicle driving through an intersection that was struck by another vehicle making a left turn. She suffered soft-tissue injuries to her cervical spine, upper back and shoulders. The additional pain following the accident contributed to ongoing stress and anxiety, which contributed to her tendency to suffer from migraines. However, the court also found that her soft-tissue injuries were superimposed on other problems existing at the time of the accident including a history of some neck pain, and a recurrent shoulder injury. I also note that the court concluded that it could place little weight on the plaintiff's own evidence (para. 98). She had previously been very active working out at the gym, long-distance running, extensive hikes and had a black belt in martial arts. She was awarded $50,000 for non-pecuniary damages.

[97] The plaintiff submits the appropriate range of damages is between $90,000 and $120,000. I find the high end of that range is not justified based on the evidence before me and the cases cited.

[98] The defendants submit the appropriate award is $60,000 for non-pecuniary damages (inclusive of loss of housekeeping capacity), but that should be discounted by 40%: 20% for failure to mitigate, and a further 20% for pre-existing injuries and the unrelated knee condition.

[99] As already explained, I reject the evidence supports any deduction for failure to mitigate. I do find it is appropriate to consider the possibility that the unrelated knee injury has and will continue to contribute to the plaintiff's condition in the future, as well as the pre-existing injuries. However, in my view 40% reduction is too high. In my view, the appropriate reduction is 10%.

[100] Taking all factors into account from the cases, and in consideration of all the evidence, and applying a slight reduction because of the unrelated knee injury, I find an appropriate award of damages for the plaintiff is $80,000.

IV. DAMAGES FOR LOSS OF EARNING CAPACITY

[101] The parties have agreed that the plaintiff is entitled to $2,394.63 for loss of past (pre-trial) income loss. I am satisfied that award is justified on the evidence adduced at trial. They dispute what amount is appropriate for future loss of earning capacity.

[102] However, there is no dispute about the principles guiding damages for loss of future earning capacity, despite citing different cases. That assessment involves two fundamental questions: (i) has the plaintiff's earning capacity been impaired by the injuries; and if so, (ii) what compensation should be awarded for the resulting financial harm that will accrue over time: Simmavong v. Haddock, 2012 BCSC 473 at para. 95.

[103] A helpful summary of the applicable principles is set out in Hoy v. Williams, 2014 BCSC 234 at paras. 153-161 (adopted in Arletto v. Kin, 2016 BCSC 77 at para. 61). Drawing on those paragraphs, the following principles emerge:

a. The assessment is a matter of judgment, not calculation.

b. The evidentiary burden to establish the loss of earning capacity is not the balance of probabilities, but a real and substantial possibility of the loss.

c. The key task is to put the plaintiff in the same position she would have been but for the injuries caused by the defendant's negligence. The assessment is a comparison between what the likely future working-life would have been had the accident not occurred, with what will likely be the plaintiff's future work-life after the accident.

d. There are two approaches to assess loss of future earning capacity: the earnings approach and the capital asset approach.

e. The earnings approach can be undertaken in one of two ways:

i. the court postulates a minimum annual income for the plaintiff's remaining working years but for the accident and multiplies that by the plaintiff's pre-accident number of remaining working years; or,

ii. the court awards the plaintiff's entire pre-accident annual income for a period of one or two years.

f. The capital asset approach is used when the future loss cannot be measured in a pecuniary way. It involves considering a number of potential factors including, whether the plaintiff, post-accident is:

i. less capable overall of earning income from all types of employment;

ii. less marketable or attractive to potential employers;

iii. less able to take advantage of all job opportunities; and,

iv. less valuable to herself as a person capable of earning income in a competitive labour market.

g. Even though the court does not assess damages pursuant to the capital asset approach by way of a mathematical calculation, the factual basis of the award must be explained.

h. The assessment must take into account the overall fairness and reasonableness.

i. Allowance must be made for the contingency that the assumptions upon which the loss is based may not come to pass.

[104] Of some importance in this case is para. 161 from Hoy:

The plaintiff may be able to prove a substantial possibility of future loss of income despite having returned to his or her usual employment and even where he has received a raise or obtained a promotion: Perren v. Lalari, supra; Combs v. Bergen, 2013 BCSC 321. There is no principle of law requiring the medical evidence to establish an impairment of earning capacity; rather, such impairment is established on the totality of the evidence: Miscisco v. Small, [2001] B.C.J. No. 2042.

[105] The plaintiff submits any award should take into account and implement Ms. Craig's recommendation that she work only part time to free up time to engage in treatment and that aspect of her loss is in the range of $17,500 and $35,000 based on her current income.

[106] The plaintiff submits she is entitled to an additional $100,000, reflecting that the injuries have produced a real and substantial possibility she will retire earlier than she would have, but for the accident.

[107] The defendants submit no amount should be awarded for loss of future earning capacity.

[108] They point to Dr. Paramonoff's opinion that there are no accident-related contraindications for her to engage in daily activities. However, significantly, Dr. Paramonoff also recommended that adaptations and management strategies are medically reasonable to improve her comfort. She also made recommendations for future treatments. Both recommendations are inconsistent with a conclusion that a negative impact on the plaintiff's future earning capacity is speculative.

[109] The defendants submit the following cases provide helpful guidance in support of their position.

[110] In Ju v. Morpurgo, 2019 BCSC 194 at paras. 59-60, no award was made for loss of future earning capacity. The court concluded that the plaintiff's concern about her future employability did not rise above her subjective perception. The plaintiff's expert did opine that heavy lifting would be difficult, but she had been successfully employed in a job that required no heavy lifting. On that basis, the court concluded the evidence did not establish a real and substantial possibility that her future earning capacity was impaired. It appears the only medical evidence in that case was a report from the plaintiff's family doctor. The principal limitation in that report related to heavy lifting, which the court found would have no impact on her future employability. That distinguishes the case from the facts before me.

[111] The defendants also rely on Liu v. Zhang, 2019 BCSC 778, but I find the circumstances that precluded an award for future loss of income are distinguishable from the facts before me. The court held that there was no reasonable explanation why the plaintiff's income was more significantly affected in the fourth and fifth year after the accident, given that her income had steadily risen in the first three years after the accident (at para. 102). I also note that the court did not award the plaintiff any damages for past lost income and relied on the reasons for that conclusion, in part, for precluding the loss of future earning capacity (at para. 105).

[112] The defendants are correct that the plaintiff has been able to perform her current job without formal accommodations. However, the testimony was clear that she is able to rely on her colleagues for support. I am satisfied that is due to the plaintiff having established a good reputation and record as a reliable and valuable employee prior to the accident. Common sense dictates that she would run into barriers were she to search for a job with another employer given her age and the degree to which she continues to experience pain and discomfort while performing her regular job duties.

[113] In my view, an award is clearly supported based on the opinions of Dr. Paramonoff and Ms. Craig, experts whose evidence I place significant weight on.

[114] I conclude the evidence is sufficient to establish that there is a real and substantial possibility that the plaintiff will suffer a loss to her future earning capacity. The more difficult question is how to quantify that award. The facts of this case do not fit into the earnings approach; as a result, I have used the capital asset approach. However, even that approach presents some difficulty given the nature of the plaintiff's circumstances.

[115] The plaintiff's approach is to implement the award based both on her working part time for a period of one or two years, as recommended by Ms. Craig, and roughly three years of her current income to account for early retirement. Ms. Craig testified about why she recommended the plaintiff work part time for a period. She explained that her testing and the plaintiff's reports indicated that by working and still doing housework, the plaintiff was "pushing her to her limits". She explained further:

So when people have pain in response to a workday of four to five out of 10 and that limits them from participating in their recreational activities, their household chores, social activities, exercise activities, I feel that they are doing too much. So what I thought would be better for Ms. Sharma was to reduce her hours so that her pain wasn't as severe at the end of her shift and then that would also allow her to pursue the things that have been recommended by myself and the medical practitioners who have seen her, which is to take in some exercise. She told me she was too sore and too tired after work to do that and that was consistent with what I saw during my assessment, so by maybe reducing her hours somewhat she would have the energy and wouldn't be as sore in order to do the activities that were recommended.

[116] I find Ms. Craig's comments are particularly apt for the plaintiff's situation. The plaintiff has been diligent with her treatment and complied with doctor's recommendations, save for the exercise program. However, I find Ms. Craig's interpretation of that to be reasonable.

[117] However, I am less sure that the evidence establishes a real and substantial possibility of early retirement. I accept the plaintiff is concerned about that possibility, but I am not satisfied that is a view supported by the medical experts. Moreover, the purpose of working part time is to enable her to devote time and energy to treatments that ought to improve her tolerance and management of symptoms, which would diminish and possibly eliminate a need to retire early. There is a danger that awarding both may amount to some degree of double recovery.

[118] Taking into account all the foregoing, and emphasizing that damages for loss of earning capacity awards the loss of an asset, and should be assessed based on an exercise of judgment and not mathematical calculation, I conclude that an appropriate award is $75,000.

V. DAMAGES FOR COST OF FUTURE CARE

[119] The legal principles are not in dispute, and were helpfully summarized in Dzumhur v. Davoody, 2015 BCSC 2316 at para. 244:

The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

· the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;

· the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;

· the test for determining the appropriate award is an objective one based on medical evidence;

· there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;

· the concept of "medical justification" is not the same or as narrow as "medically necessary";

· admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;

· however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;

· still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and

· no award is appropriate for expenses that the plaintiff would have incurred in any event.

See Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Krangle v. Brisco, 2002 SCC 9; Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); Aberdeen v. Langley Township, 2008 BCCA 420; Gregory v. ICBC, 2011 BCCA 144; Jacobsen v. Nike Canada Ltd. (1996), 19 B.C.L.R. (3d) 63 (S.C.); Penner v. ICBC, 2011 BCCA 135; Shapiro v. Dailey, 2012 BCCA 128.

[120] Assessment of damages under this head is complicated by the necessity to predict the future based on the evidence, but also make adjustments for contingencies: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21. In Bystedt v. Hay, 2001 BCSC 1735 at para. 163, the court stated that the claim for cost of future care must be supported by evidence that demonstrates what a reasonable person of ample means would provide to meet the reasonable needs of the plaintiff. This is assessed on an objective basis that is fair to both parties.

[121] However, the court must have some assurance that the plaintiff will incur the costs. Damages should not be awarded under this head if it is unlikely the plaintiff will avail herself of the services in future: Maltese v. Pratap, 2014 BCSC 18 at para. 78. In addition, whether adjustments are necessary to account for contingencies that are either positive (improvement in the plaintiff's condition) or negative (additional care will be required) depends on the specific care needs of each plaintiff: Langille v. Nguyen, 2013 BCSC 1460 at para. 234.

[122] The plaintiff seeks between $30,000 and $40,000 in damages for cost of future care. The defendants submit the only item that can be supported is an award to implement Ms. Craig's recommendation for a supervised exercise program to maximize and maintain physical strength and functional abilities for six months, but no figure was given during final submissions.

[123] In terms of treatment recommendations, Dr. Paramonoff recommended a further 18 sessions over one to two years, on a decreasing basis over time, with a physiotherapist or kinesiologist. However, at the same time, she opined that the plaintiff should not rely on passive treatment (listed as massage and physiotherapy) and only have limited assess to adjunctive treatment, of up to six treatments over next two years.

[124] The only way to reconcile those two references to physiotherapy is to assume there is a type of physiotherapy that she would recommend that involves exercises for stabilization and conditioning, as opposed simply for symptom relief.

[125] In addition, Dr. Paramonoff made the following recommendations:

a. Short to medium course of medication such as nortriptyline for as long as one to two years depending upon her response as well as over the counter analgesic or anti-inflammatory medication;

b. Assistance with heavier season cleaning;

c. One or two sessions with an occupational therapist;

d. Psychiatric or psychological counselling for non-medicinal pain management strategies; and,

e. Chronic pain clinic for educational component.

[126] Ms. Craig's recommendations from her report are listed below together with the cost estimate she provided during her testimony:

a. Multi-disciplinary pain program that includes education on "hurt vs. harm" principle, pacing and pain management strategies with a progressive, supervised reactivation program - between $13,900 and $14,500 for daily attendance at a five to six week program.

b. Four to six exercise sessions with a kinesiologist annually - between $60 to $80 per session;

c. Shortened work week to two or three days a week to enable participation in the programs;

d. Supervised exercise program, for six months to a year, once or twice a month - between $60 to $80 per session;

e. Six to 12 physiotherapy or massage therapy treatments annually; between $95 to $145 per session;

f. Aquasize one time a week (approximately $20 per session) for at least six months; and,

g. Physiatrist assessment to address neck, knee and back pain and occupational therapy to help plan further treatment.

[127] I find there is considerable overlap in Ms. Craig's recommendations and therefore there is no justification to award damages for all of the items.

[128] Taking into account all the evidence, I conclude the evidence supports an award for future care that will provide the plaintiff with the ability to get specialized professional education and supervision for exercise directed specifically at pain management and conditioning. In addition, the plaintiff should be able to access some amount of therapy for symptom relief, including possibly counselling, and a modest amount to pay for regular exercise either at home or by joining a community centre or gym.

[129] I also find support for a few sessions with an occupational therapist to review what adaptations she can make at home and work to better tolerate activities given her pain level.

[130] Based on the evidence, attendance at a comprehensive multi-disciplinary pain clinic would substitute for many of the other recommended treatments (kinesiology and/or guided physiotherapy, counselling, education on hurt vs. harm and supervised exercise). Accordingly, I do not find it appropriate to base the amount of damages under this head on both. Nor do I recall the plaintiff providing testimony that there was a real and substantial possibility that she would enroll in an intensive pain clinic. Unlike other treatments, it is a considerable disruption to one's family and work life to devote five to six weeks with daily attendance at a clinic. Despite the predicted benefits, I cannot assume the plaintiff would want to undertake that commitment.

[131] Mr. Benning's report included a table setting out future cost of care multipliers for the plaintiff. It included adjusted cost of care for $1,000 in each of the plaintiff's future years for her life expectancy, as well as annual multipliers and cumulative multipliers. I have taken those tables into account in assessing the appropriate damages award.

[132] In light of all the foregoing, I find an award of $25,000 is appropriate.

VI. LOSS OF CAPACITY FOR HOUSEKEEPING

[133] Loss of housekeeping capacity differs from damages for cost of future care. It is meant to compensate for the value of work that would have been done (and cannot be done in future) because of the plaintiff's injuries. As such it is the loss of an asset -- the capacity to do housekeeping: McTavish v. MacGillivray, 2000 BCCA 164 at para. 63. Because it reflects the loss of a personal capacity, it is awarded regardless of whether the costs are actually incurred: O'Connell v. Yung, 2012 BCCA 57 at para. 67. The Court of Appeal has stated that a cautionary approach is appropriate, suggesting awards be subjected to a "regime of reasonableness" similar to that imposed on awards premised on uncertain future events: Westbroek v. Brizuela, 2014 BCCA 48 at para. 77, citing Kroeker v. Jansen, [1995] 6 W.W.R. 5 at para. 29, leave to appeal ref'd [1995] S.C.C.A. No. 263.

[134] However, it is within the trial judge's discretion whether to compensate the plaintiff for this loss of capacity as a separate pecuniary award, or an element of non-pecuniary damages. In Kim v. Lin, 2018 BCCA 77, the Court stated:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

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

[135] The plaintiff seeks $100,000 for loss of housekeeping capacity, relying on Parhar v. Dawe, 2014 BCSC 580 at para. 145.

[136] Before the accident the plaintiff did all the cooking and took responsibility for over 90% of housekeeping duties. The evidence was unchallenged that she could no longer do so. The plaintiff and her husband have hired help to supplement what she is still able to perform. The evidence was uncontradicted that what she does do, she does with pain. I find the evidence is clear that her injuries, and particularly the pain and fatigue from them, has resulted in a loss of housekeeping capacity.

[137] The defendants submit Dr. Paramonoff's opinion "makes the claim for loss of housekeeping capacity untenable." They rely on Dr. Paramonoff's opinion that while it was reasonable for the plaintiff to have assistance with housekeeping duties, over the long term, the plaintiff will be able to carry out regular homemaking activities with the strengthening and reconditioning as described and with activity adaptations. Dr. Paramonoff also opined assistance with heavier seasonal cleaning was justified.

[138] The defendants submit the plaintiff's non-accident related complaints would require her to need assistance irrespective of the accident. In particular, they question how much the plaintiff's inability to do housekeeping is because of her knee injury.

[139] This ignores the fact that Dr. Paramonoff concluded that the plaintiff will likely suffer residual pain even though she may experience up to moderate improvement of her symptoms by following all treatment recommendations.

[140] I do not agree that an award for loss of housekeeping capacity is untenable when considering Dr. Paramonoff's evidence as a whole. On the contrary, I find the evidence supports a real and substantial possibility that the plaintiff has in the past, and will in the future, experience a loss of her capability to perform household duties to the same extent she did before the accident.

[141] The plaintiff has continued to do as much housekeeping and cooking as her stamina and pain allow. She has not suffered a complete loss of capacity, but I accept the evidence does establish she has demonstrated a loss of capacity in the long term.

[142] In my view, a modest award is appropriate to compensate for a loss of housekeeping capacity for the remainder of the plaintiff's life, with the consideration of a positive contingency that she will experience some symptom improvement.

[143] Ms. Craig testified that heavier seasonal cleaning was about $75 per hour, and typically eight hours a couple times a year. Regular cleaning is typically billed at about $65 for two hours for two cleaners.

[144] Taking all factors into account, including the multipliers provided in Mr. Benning's report, I find an award of $40,000 is supported and justified.

VII. SPECIAL DAMAGES

[145] The defendant accepted the plaintiff's figure of $13,819 was appropriate but submitted it should be reduced by 20% for the failure to mitigate. I have rejected that reduction and therefore award the amount sought by the plaintiff.

VIII. SUMMARY OF CONCLUSIONS AND COSTS

[146] I award the following amounts in damages to the plaintiff:

Non-pecuniary damages

Loss of past income

Loss of future earning capacity

Cost of future care

Loss of housekeeping capacity

Special damages

TOTAL

$ 80,000.00

$ 2,394.63

$ 75,000.00

$ 25,000.00

$ 40,000.00

$ 13,819.00

$ 236,213.63

[147] The plaintiff is entitled to her costs. If there are circumstances that may be relevant to a different cost award, the parties may seek a brief hearing before me to address that so long as a request to arrange that hearing is made within two weeks of the date of this judgment.

"Sharma J."

[1] That challenge was allowed in reasons issued on October 24, 2019: Crowder v. British Columbia (Attorney General), 2019 BCSC 1824. The Chief Justice held the restriction on the number of experts that can be called, absent consent of the parties, in motor vehicle cases was both ultra vires the governing legislation and unconstitutional.

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