CANADA / JUDGMENT

Sidhu v. Alton

2020 BCSC 1802

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2020 BCSC 1802 Sidhu v. Alton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Alton,

2020 BCSC 1802

Date: 20201124

Docket: M186714

Registry: New Westminster

Between:

Parampal Kaur Sidhu

Plaintiff

And

Thomas Peter Alton and Wendy Alton

Defendants

- and -

Docket: M188543

Registry: New Westminster

Between:

Parampal Kaur Sidhu

Plaintiff

And

Helen Ho

Defendant

- and -

Docket: M213743

Registry: New Westminster

Between:

Parampal Kaur Sidhu

Plaintiff

And

Arshpreet Kaur Gandham, Rajwinder Kaur Gandham,

Balwinder Kaur Somal and Amritpal Singh Somal

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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[Action #: M188543]

Counsel for the Defendants, Arshpreet Kaur Gandham, Rajwinder Kaur Gandham, Balwinder Kaur Somal and Amritpal Singh Somal [Action #: M213743]

J.L. Ingram, V. Wong

J.L. Ingram, V Wong

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Introduction

[1] The plaintiff, Parampal Kaur Sidhu, was injured in three motor vehicle accidents. The first accident occurred on March 17, 2015 when she was rear-ended near the intersection of 80th Avenue and King George Boulevard, in the city of Surrey, by a vehicle driven by the defendant, Wendy Alton (the "First Accident"). Ms. Sidhu commenced an action against Ms. Alton and the registered owner of the vehicle, Thomas Alton, seeking damages for the injuries she sustained in the First Accident. The defendants have admitted liability for the

First Accident.

[2] Ms. Sidhu was involved in a second accident on November 13, 2015 when her vehicle was hit while in the parking lot of Cedar Hills Shopping Centre, in the city of Surrey, by a vehicle driven by the defendant, Helen Lo (the "Second Accident"). Ms. Sidhu commenced an action against Ms. Lo seeking damages for the injuries she sustained in the Second Accident. The defendant has admitted liability for the Second Accident.

[3] Ms. Sidhu was involved in a third accident on October 19, 2017 when her vehicle was hit by the defendant, Arshpreet Kaur Gandham, who was turning left near the intersection of 126th Street and 88A Avenue, in the city of Surrey (the "Third Accident"). Ms. Sidhu commenced an action against the driver and against the defendants, Rajwinder Kaur Gandham and Balwinder Kaur Somal, the owners of the vehicle. The defendants have admitted liability for the Third Accident. I will refer collectively to the three accidents as the "Accidents".

[4] The defendants concede Ms. Sidhu was injured in the Accidents and suffered some physical injuries. However, the defendants disagree with the plaintiff about the nature, extent, and seriousness of the injuries she claims were caused by the Accidents. They dispute all heads of damages claimed. They assert that Ms. Sidhu's claim depends on the credibility of her subjective reports of pain and she is not credible. The parties have agreed that no party seeks apportionment of damages.

[5] The defendants further argue that Ms. Sidhu had pre-existing conditions and that she failed to mitigate by not returning to some form of work, not following the advice of her treating physicians, and failing to complete a pain management course.

Issues

[6] The issues raised by the pleadings, evidence, and submissions are:

1. What are the nature, extent, and duration of the injuries suffered by Ms. Sidhu as a result of the Accidents?
2. What is the appropriate award for general damages for pain and suffering?
3. Has Ms. Sidhu failed to mitigate her damages, and if so, what would the appropriate reduction in damages be?
4. What is the appropriate award for past wage loss or loss of earning capacity?
5. What is the appropriate award for loss of future earning capacity?
6. Should an award be made for loss of housekeeping capacity, and if so, in what amount?
7. What is the appropriate award for future care costs?
8. What is the appropriate award for special damages?

Background

Pre-Accident

[7] Ms. Sidhu was born in Punjab, India in 1974. She is currently 45 years old. She completed Grade 12 and moved to Canada in December, 1993. She has not taken any additional courses or training since. She got married and had three children. Her eldest daughter is currently 25 years old, the second daughter is currently 22 years old, and her son is currently 18 years old.

[8] In November 2010, Ms. Sidhu commenced working at Superstore as a part-time stocker on the night shift. In 2011, due to a sleeping disorder and on the recommendation of her treating psychiatrist, Dr. Rajreet Sidhu, she took a couple of months off work, commenced taking Ativan, and then returned to work on a part-time basis on the day shift.

[9] Ms. Sidhu does not recall having any issue with her right wrist in April 2012. She further does not recall having any neck pains and associated headaches in August and September of 2012.

[10] In 2013, Ms. Sidhu attended her family doctor complaining of low back pain. She testified that this pain lasted a few days or maybe a week or so. She missed a few days to a week off work due to back pain. She made a full recovery. In the few months prior to the First Accident she did not have any back pain.

[11] Ms. Sidhu also suffered from migraine headaches associated with her menstrual cycle. She would occasionally get headaches but she did not miss any work due to headaches prior to the First Accident. She also testified that in 2014 she had issues with fatigue. She saw her family doctor who diagnosed her with hyperglycemia and she was told to monitor her diet and to exercise. She did not miss any work due to fatigue and it did not impact her ability to do household chores. She testified that in the several months prior to the First Accident her overall state of health was "totally fine". She was able to work without any problems.

[12] Ms. Sidhu enjoyed work and the flexibility it offered. At the time of the First Accident she was working between 16 and 22 hours per week.

[13] Outside of work, Ms. Sidhu enjoyed spending time with her family, watching her son's soccer games, helping her children, and attending the temple on a weekly basis. At the temple she volunteered in preparing food for special events and festivals. She has a large family and enjoyed having them come to her home and cooking for them.

[14] At the time of the First Accident she was living with her husband and three children. She testified that her plan was to increase her work hours once her children had completed high school. Her youngest completed high school in June 2020.

Circumstances of the Accidents

[15] On March 17, 2015, Ms. Sidhu was returning home from work to pick up her children from school. Ms. Sidhu was driving a Honda Accord when she was rear-ended. No part of her body collided with the interior of her vehicle. The air bags of the vehicle that hit her deployed.

[16] Ms. Sidhu testified that she was hit with "quite some force". Right after the collision she felt very anxious and started to feel hot and stated that "I was like in shock". A passing ambulance stopped. The ambulance driver gave her some water. She immediately felt shoulder, neck, and lower back pains on her right side. She was able to drive home. Later that day the pain increased and she got more upset. She attended a walk-in clinic and some medication was prescribed.

[17] On November 13, 2015, Ms. Sidhu was looking for a parking spot in a parking lot. She was planning to attend the bank. She was driving a Mercedes. Another driver reversed from a parking spot and hit the front of her vehicle. The damage to both vehicles was minor. She testified that the severity of the impact was minor but her stress level increased due, in part, to her new vehicle being damaged. She exchanged identification with the other driver and then went into the bank where she started crying. She was able to drive to her mother's home. She suffered some pain on the left side of her neck and the pain on the right side increased, as well as her stress.

[18] On October 19, 2017, Ms. Sidhu was driving a Toyota Tacoma and was proceeding straight when a driver turned left from a stop sign and hit her vehicle on the left side. She described the severity of the impact as "quite a bit". She was unable to get out of her vehicle because the driver side door was jammed. An ambulance and fire truck attended. She was assisted out of the vehicle and taken to the hospital. She was discharged after a few hours. She immediately noticed an increase in her back pain and was very upset.

[19] Before canvassing each of the issues, I will first address the credibility and reliability of the plaintiff's evidence.

Credibility and Reliability of the Evidence

[20] The parties agree that the credibility of the plaintiff is a crucial issue to be addressed.

[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:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the

influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont. H.C.); Faryna v. Chorny, [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; R. v. S.(R.D.), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Faryna at para. 356).

[22] Justice Mayer echoed these principles and provided further guidance in Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd., 2019 BCSC 739, aff'd 2020 BCCA 130, leave to appeal to SCC requested, 39246 [Youyi]:

[89] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the sincerity of a witness and the accuracy of the evidence that the witness provides. In some cases it becomes apparent that a witness has made a conscious decision not to tell the truth. In other cases, a witness may be sincere but their evidence may not be accurate for a number of reasons.

[90] Evaluating the accuracy of a witness' evidence involves consideration of factors including the witness' ability and opportunity to observe events, the firmness of their memory, their objectivity, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his pre-trial evidence by the time of trial or their testimony at trial during direct and cross-examination, whether the witness' testimony seems implausible, and the demeanor of a witness generally.

[91] An acceptable methodology for assessing credibility is to first consider the testimony of a witness on its own followed by an analysis of whether the witness' story is inherently believable in the context of the facts of the entire case. Then, the testimony should be evaluated based upon the consistency of the evidence with that of other witnesses and with documentary evidence, with testimony of non-party, disinterested witnesses being particularly instructive. At the end, the court should determine which version of events is the most consistent with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[92] Some additional factors which may impact credibility include the following:

a) A series of inconsistencies, considered in their totality, may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness' testimony: see paras. 57-59, 86 of F.H. v. McDougall, 2008 SCC 53, adopting the comments of Rowles J.A. at paras. 28-29 in R. v. R.W.B. (1993), 24 B.C.A.C. 1.

b) Where a witness is found to have lied under oath, their credibility may be wholly undermined: Le v. Milburn, 1987 CarswellBC 2936 (W.L.) at para. 1; Jones v. Jones, 2008 BCSC 1401 at paras. 31, 32 and 60; Hardychuk v. Johnstone, 2012 BCSC 1359 at para. 9.

c) Collusion and deception between two or more witnesses in the course of a litigation may taint the entirety of a witness's evidence: Bradshaw at para. 190;

d) Credibility will be undermined when a witness seeks to rely on false documents regarding the issues at trial: Osayande v. Canada (Minister of Citizenship And Immigration), 2002 FCT 368 at paras. 19 and 21;

e) Credibility will be undermined when a witness (or party) has failed to produce documents: Bradshaw at para. 188; Pacific West Systems Supply Ltd. v. Vossenaar, 2012 BCSC 1610 at paras. 84 to 86;

f) Credibility will be in doubt when a witness's explanation defies business logic or common sense: R. v. Storey, 2010 NBQB 86 at para. 78; Wang v. Wang, 2017 BCSC 2395 at paras. 45-46 and 89-90; and

g) Credibility may be impacted when a witness is evasive, longwinded and argumentative in their responses to questions: Bradshaw at paras. 191 to 192.

[Emphasis in original]

[23] Since this case involves subjective complaints of pain, the resolution of the issues turns to a significant extent on Ms. Sidhu's credibility. It is particularly important to exercise caution and examine her evidence carefully. A useful summary of the authorities where there are little, if any, objective findings, is contained in Buttar v. Brennan, 2012 BCSC 531 at paras. 24-25:

[24] In a case such as this where there are little, if any, objective findings except some minor degenerative changes in the neck, back and knee, the following should be taken into account by the trier of fact:

· the assessment of damages in a moderate or moderately severe soft tissue injury is always difficult because the plaintiffs are usually genuine, decent people who honestly try to be as objective and factual as they can. Unfortunately every injured person has a different understanding of his own complaints and injuries, and it falls to judges to translate injuries to damages Price v. Kostryba (1982), 70 B.C.L.R. 397 at 397 (S.C.);

· the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery (Price at 399);

· an injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -- which could be just his own evidence if the surrounding circumstances are consistent -- that his complaints of pain are true reflections of a continuing injury (Price at 399);

· the doctor's function is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room Edmondson v. Payer, 2011 BCSC 118 at para. 77, aff'd 2012 BCCA 114;

· in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries Fan (Guardian ad litem of) v. Chana, 2009 BCSC 1127 at para. 73;

· in a case of this kind care must be taken in reaching conclusions about injury alleged to have continued long past the expected resolution. The task of the court is to assess the assertion in light of the surrounding circumstances including the medical evidence. The question is whether that evidence supported the plaintiff's assertion and, if not, whether a sound explanation for discounting it was given Tai v. De Busscher, 2007 BCCA 371 at para. 41.

[25] In light of the above, an assessment of the plaintiff's credibility is critical:

The test must reasonably subject his story to an examination of its consistency with the probabilities which surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Faryna v. Chorny, [1952] 2 D.L.R. 354 at 357.

Positions of the Parties

Plaintiff's Position

[24] The plaintiff submits that she testified in a credible manner and her evidence was corroborated by the evidence of Dr. Gulzar S. Cheema (her family doctor), Dr. Sidhu (her treating psychiatrist), her daughters, and the other lay witnesses. Various health care professionals made objective findings and confirmed in imaging an L5-S1 disc herniation which, even when reabsorbed, could irritate the S1 dermatome down her leg. There was consistency in her pain behaviors reported by the various medical professionals. The plaintiff argues that her pain presentation can be explained by the diagnosis of central sensitization made by Dr. Waspe, a treating physiatrist.

Defendants' Position

[25] The defendants submit that the plaintiff's evidence is not reliable for the following reasons:

a. She failed to disclose to various health care professionals that she had complained to her family doctor in 2012 about right forearm issues;

b. She could not recall seeing Dr. Cheema for complaints about her neck, mid-back, and low-back from August 2012 to October 2013 and denied having had physiotherapy in 2013 for her back, despite Dr. Cheema's clinical notes indicating that she was having physiotherapy;

c. A number of physicians found that the plaintiff had non-organic findings and pain behaviours on examination;

d. There was low effort in the functional capacity examination conducted by Hardip Jhaj, kinesiologist; and

e. There was inconsistency in the plaintiff's reports of pain and disability.

[26] The defendants submit that careful examination is required of the plaintiff's evidence respecting her complaints, continuing symptoms, and the impact of the accident-related injuries on her ability to perform her job. They argue that her complaints are unreliable in light of her abnormal pain behaviour.

Analysis

[27] I do not accept that the failure of Ms. Sidhu to recall a short period of time when she was experiencing some right forearm complaints, which did not require her to take any time off work, should impact her credibility. She attended her family doctor on April 24, 2012 complaining of some tingling sensation in her right wrist, which she had experienced for 4 weeks. She was seen by Dr. Rai, Dr. Cheema's associate. That doctor questioned if she had early right carpal tunnel syndrome and made a recommendation to use ergonomic "tech" at work and a wrist brace. The plaintiff did not use any of that equipment.

[28] Ms. Sidhu returned to her family doctor's office on May 28, 2012 and saw Dr. Rai. She did not make any complaints respecting her right wrist on that visit. No other visit to her family doctor, prior to the First Accident, made reference to any right forearm or wrist issues.

[29] Jasdeep Garcha, a co-worker at Superstore, testified that she did not witness Ms. Sidhu exhibiting any difficulties with carrying out her job duties, and she did not complain of any forearm issues before the First Accident. I conclude the issues with her right forearm resolved. The plaintiff was able to continue to perform all her job duties and household chores without any difficulty until the First Accident.

[30] Respecting the prior complaints of neck pain, there were two complaints of neck and upper thoracic pain on August 30, 2012 and September 7, 2012 to her family doctor. Ms. Sidhu did not recall attending her family doctor with these complaints. The doctor assessed her as

having muscular pain. There was no evidence that Ms. Sidhu required any time off work or any therapy, aside from Advil, for these complaints. The doctor ordered x-rays of her cervical spine. The fact that Ms. Sidhu does not recall seeing her doctor for these complaints does not impact her credibility.

[31] Ms. Sidhu did recall having some back pain in 2013 prior to the Accidents and attending her family doctor. She recalls that it only lasted a week or so and she was off work for a few days. She does not recall attending physiotherapy. Dr. Cheema saw Ms. Sidhu on October 7 and 23, 2013 for complaints of low back pain. At the October 7, 2013 visit, the plan was to x-ray her lumbar spine. Notes from the October 23, 2013 visit describe advice given to Ms. Sidhu:

Patient was advised to avoid lifting and bending forward.

Continue with physiotherapy.

In case of increasing pain patient should come back.

[32] This is the only note that references physiotherapy in 2013. I am not prepared to find Ms. Sidhu's evidence of not having physiotherapy in 2013 unreliable based on this note alone. I further note that Dr. Cheema asked Ms. Sidhu to return if the pain increased. There were no further visits recorded relating to back pain until after the First Accident.

[33] I accept that the plaintiff exhibited non-organic and abnormal pain behaviors to medical experts and treating physicians. In my view, the key issue is why she did so. I accept the evidence of Dr. Kim Waspe, treating physiatrist, that Ms. Sidhu developed "central sensitization windup phenomenon", a form of "learned helplessness" in response to pain. Dr. Waspe explained this diagnosis in the following manner:

· Pain is an experience of unpleasant perception of injury, or potential injury, to tissue;

· When damage occurs, such as tears to muscles, peripheral nerve endings take their message to the central nervous system;

· The central nervous system can amplify or downregulate that message, and it has an impact on the brain's memory of that pain and management of pain going forward;

· After 12 weeks of pain, or a chronic course of exposure, the threshold at the spinal cord drops, and that pain information is more readily sent to the central nervous system and brain;

· At the same time, peripheral nerve endings at the site of the pain can become sensitized, and light touch or other non-painful stimulation becomes painful. This occurs because slow, non-insulated "wiring of the nervous system" becomes primed to misinterpret information that should not be seen as painful, and tells the nervous system it is pain;

· All that information is taken up and interacts with the threshold drop in the spinal cord, and there is a rush of information up the spinal cord to the brain;

· These signals are sent to the "emotional limbic system, amygdala, memory centres", so a person learns to remember that when they experience a certain symptom they learn to expect pain. This is related to behavioural and planning patterns;

· This information is also sent to the prefrontal cortex and frontal lobe, where the brain makes decisions about activities that can reduce pain (taking medications, doing activities). The frontal lobe is bombarded, and it can result in "learned helplessness". The person's "fourth order neuron", meaning their capacity to "downregulate the tollgate that is letting all that pain information in", is decreased;

· The capacity to cause a dopamine release, for example from going for a run or receiving a hug, which would "wind" down the pain response at the spinal cord level, actually decreases;

· The result is that pain can happen at the site of discomfort, abnormalities can happen because of the proclivity for that pain to get sent to the central nervous system and brain, and behaviour and habitual patterns can develop in the brain.

[34] Dr. Zeeshan Waseem, physiatrist, provides a definition of central sensitization in his report at Appendix III, which is an index/glossary of technical terms. It reads:

A state in which decreased production of pain-inhibiting neurotransmitters and/or increased production of pain-augmenting pathways results in amplification of central nervous system sensory stimuli such as pain, touch, smell, sound and/or light. Over time, this increased sensory input causes structural changes to the central nervous system wherein the region of the spinal column that receives pain stimuli enlarges and the parts of the brain that perceive and process pain become increasingly active. Consequently, painful areas expand beyond the original territories of injury and pain can be experienced with little or no noxious stimuli.

[35] I do not find that the non-organic behaviours, commented on by many of the health care professionals, indicate that Ms. Sidhu is not credible or that she is not truly suffering pain. In my view, this diagnosis helps to explain why Ms. Sidhu continues to suffer ongoing pain though her initial soft tissue injuries have healed. Dr. Waseem also explained why Ms. Sidhu may be continuing to have lower back pain radiating into her leg even though the disc bulge has reabsorbed. As he explained, the L5-S1 disc protrusion placed pressure on the nerve root on the S1 dermatome. The nerve remained irritated after it reabsorbed.

[36] The defence argues that Ms. Sidhu demonstrated low effort on the functional testing examination completed by Ms. Jhaj. The defence points to the test result of the Complete Minnesota Dexterity Test, in which Ms. Sidhu scored in the first percentile, to suggest that Ms. Sidhu was putting in low effort. The evidence of Ms. Jhaj was that the test result did not indicate low effort. Ms. Jhaj explained that Ms. Sidhu was at a low pace for her hand dexterity, meaning how fast she could use her hands, but did not show any limitations for actual movement and grasp. She notes in her report that this test was terminated "due to successful test completion" and there was no issue with hand dexterity noted.

[37] The defence argues that Ms. Sidhu reported her pain level prior to the functional capacity evaluation as being very disabling, yet she was able to complete the 5 hour and 30 minute assessment. After the assessment, Ms. Sidhu reported her pain as severe disabling pain, where she cannot move or use the painful area, and yet she was able to gather her own belongings and walk out of the clinic. In my view, these facts support the conclusion that there is a psychological component to Ms. Sidhu's pain. She perceives that she is in more pain and has more of a disability than her true functional abilities. This does not support that Ms. Sidhu was deliberately exaggerating her pain with a view to misleading Ms. Jhaj on her functional abilities.

[38] Ms. Jhaj noted in her report that Ms. Sidhu completed the Tampa Scale for Kinesiophobia and the Pain Catastrophizing Scale and states:

It is important to note that Ms. Sidhu rates at high risk of psychosocial factors impacting pain related disability, and fear or [sic] re-injury or pain. Dr. Sidhu would be best suited to comment further on this.

[39] Ms. Jhaj testified that she administered these scales since patients with chronic pain often have high levels of kinesiophobia and pain catastrophization, which can impact their perceived abilities to function. In Ms. Jhaj's report, and during her testimony, she confirmed her view that Ms. Sidhu demonstrated a high effort level.

[40] Dr. Waspe noted in her consult report dated June 3, 2019 that Ms. Sidhu presented with a "great deal of guarding and kinesophobia that is really holding her back". This doctor testified that kinesiophobia is a fear of movement where a patient becomes afraid that movement will cause pain or tissue damage. My assessment is that Ms. Sidhu's kinesiophobia and guarding explain why she exhibited various non-organic pain behaviours during various assessments and examinations. She was afraid to try different movements, or she perceived examinations would cause her pain when they should not have. The psychological component of Ms. Sidhu's pain does not make her experiences of pain any less real, or her descriptions of pain any less accurate or credible.

[41] Finally, I find that Ms. Sidhu was candid about her symptoms despite some inconsistency in her reports of pain and her range of motion. She testified that the pain "increases and decreases" and "it goes up and down" depending on the physical activities she is doing. This was also supported by the testimony of her eldest daughter. The evidence supports that on some days Ms. Sidhu has more function and is in less pain than on other days. It is not inconsistent that on days when her neck pain is worse, she may have restricted range of motion. On other days, she may have more range of motion.

[42] My overall assessment of Ms. Sidhu was as a forthright and credible witness. I found her to be genuine and honest and I have no reason to doubt the veracity of her testimony. She did not exaggerate her symptoms or the impact on her life. Her evidence was supported by the testimony of the lay witnesses and experts. I accept that a number of physicians documented non-organic pain behaviors. Those behaviours do not detract from Ms. Sidhu's

evidence, that she was truly experiencing pain, as explained by Dr. Waspe's testimony. I reject the defendants' submissions that she is not a credible witness and that her evidence is unreliable. However, I do accept that all of her evidence must be closely scrutinized.

Issue 1: What are the Nature and Extent of the Injuries Suffered in the Accidents?

Positions of the Parties

Position of the Plaintiff

[43] As a result of the Accidents, Ms. Sidhu claims she suffered soft tissue injuries to her neck, upper back, both shoulders, right wrist, and forearm. She suffered a disc protrusion to her L5-S1 causing radiating pain down her right leg. In addition, she suffered some headaches and dizziness. She further suffered from psychological distress.

Position of the Defendants

[44] The defendants concede that Ms. Sidhu suffered soft tissue injuries as a result of the Accidents. They acknowledge that the injuries have had an impact on Ms. Sidhu's life. They argue that the "crumbling skull" doctrine applies to this case, in that she had pre-existing conditions. Those conditions were inherent in her original position, and the defendants are not required to place her in a better position than her original position. The defence argues that Ms. Sidhu would have experienced right forearm issues in any event and those issues would have prevented her from returning to her job at Superstore. They rely on the case of Amini v. Khania, 2014 BCSC 1671 [Amini #1] in submitting that any award of non-pecuniary damages should be reduced, since there was a real possibility that the plaintiff would have suffered losses regardless of the Accidents.

[45] The defence says that Ms. Sidhu had pre-existing lower back pain and degenerative changes in L5-S1 of her lumbar spine. They question whether the Accidents caused the disc protrusion.

[46] They further argue that Ms. Sidhu's reporting of lower back pain was unreliable, due to her exaggerated discomfort and presentation, as supported by the non-organic pain behaviour findings of Drs. Maloon, Nadeau, and Waseem.

[47] The defence further disputes the diagnosis of a major depressive disorder made by Dr. Sidhu, her psychiatrist, on the basis that the DSM diagnostic criteria were not met. They argue that Ms. Sidhu only started receiving counselling after her mother passed away and her self-reported symptoms relate to grief, not a major depressive disorder.

Applicable Law

[48] In order to establish that the Accidents caused her injuries, Ms. Sidhu must prove on a balance of probabilities that but for the Accidents, she would not have suffered the injuries: Clements v. Clements, 2012 SCC 32 at para. 8. The issue raised by the defendants is the extent to which the plaintiff's problems arise from a pre-existing condition in her lower back and right forearm.

[49] The defendants are only liable for the injuries caused by the Accidents. As noted in Athey v. Leonati, [1996] 3 S.C.R. 458 at para. 35, "if there is a measureable 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". See also Moore v. Kyba, 2012 BCCA 361 at para. 43.

[50] The extent of the risk relating to the pre-existing condition does not need to be proven on a balance of probabilities. Instead, the pre-existing condition is given weight relative to the likelihood that it would have affected the plaintiff in the future, regardless of the tortious act. As the Court of Appeal in T.W.N.A. v. Canada (Ministry of Indian Affairs), 2003 BCCA 670 stated:

[28] ... a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.

[48] ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.

Ms. Sidhu's Evidence

[51] Prior to the Accidents, Ms. Sidhu was physically healthy. The clinical records of her family doctor confirm that she complained of some tingling in her right wrist in April of 2012. It does not appear that this was an ongoing complaint and there is no evidence that she missed work as a result of this complaint. According to these clinical records she also had some complaints of low back pain in the time period of August 2013 to October 2013. Ms. Sidhu testified that she had some back pain but that it resolved. She only missed a few days of work. In the months prior to the First Accident she did not have any back pain. She also suffered from occasional migraine headaches associated with her menstrual cycle. She had been diagnosed with a sleeping disorder in 2011 which was addressed by changing from the night shift to the day shift. Once this change was made there is no evidence that she had problems sleeping until after the First Accident.

[52] Ms. Sidhu stated that she felt some symptoms immediately after the First Accident. The symptoms progressively got worse. In the first few weeks, the pain increased on her right side from "head to toe". Her ability to sit and stand was restricted to approximately 15 to 20 minutes. If she stood longer than 20 minutes she would develop shooting pain into her right leg. She had difficulty sleeping due to the pain. She became sad and very upset. She was not able to return to work.

[53] Later on the day of the First Accident, Ms. Sidhu attended a walk-in clinic and was prescribed some pain medication. She saw her family doctor, Dr. Cheema, the following day. Her family doctor checked her neck, shoulder, arm, and back. He told her that she was not able to work at this time. Ms. Sidhu continued to see her family doctor on a regular basis. She complained of a painful neck and low back. In April 2015 she reported a history of radiation of pain to the right lower leg.

[54] After the Second Accident, Ms. Sidhu testified that her stress increased, the left side of her neck was sore, and the pain on her right side increased.

[55] In August 2016, Ms. Sidhu's mother passed away and she got very stressed and sad. Her mother had helped her a lot after the First Accident and she felt her help had gone. She saw her family doctor who diagnosed her with depression and grief reaction and recommended supportive therapy. He further prescribed Ativan.

[56] After the Third Accident, Ms. Sidhu felt an immediate increase in back, neck, and shoulder pain. She felt like she could not walk. She was very upset. She attempted a number of different therapies, some of which have provided temporary relief. She has received injections to her right hip and lower back. The injections provided some temporary relief but the pain returned. She also had an injection to her right shoulder, which caused her pain to get worse. She has tried a series of different medications to relieve her pain and to assist her sleep. Some of the medications cause her stomach pain and upset. She continues to experience pain on the right side of her body that comes and goes.

[57] Ms. Sidhu is under the care of a psychiatrist, Dr. Sidhu, who prescribed her medication for depression. The most recent medication, Sertraline, has helped her with her mood. She attended counselling and obtained some strategies to assist with her anxiety.

[58] She tried to return to work for two shifts in late November and early December 2018. She was scheduled to work shifts of only four hours on light duties. She testified that the pain in her right hand and shoulder increased. Her right hand was swollen and she was limping. She has not worked since then.

Evidence of Ms. Sidhu's Daughters and Sister-in-law

[59] Before considering the medical evidence, I will briefly consider the plaintiff's daughters' and sister-in-law's evidence on Ms. Sidhu's physical condition before the First Accident.

[60] Mandeep Sidhu, the eldest daughter, testified that in the two years prior to March 2015 her mother was doing all the household chores and outdoor maintenance without any difficulty.

[61] Sandeep Sidhu, the younger daughter, testified that in the two years prior to March 2015, her mother was completely healthy, "100% okay", and doing everything for all of the family. Her mother did all the cleaning without any difficulty. She described her mother's personality during that time as "very social she liked talking to people, she was a fun person she was just happy overall."

[62] Satwinder Mahal, the plaintiff's sister-in-law, testified that prior to March 2015, Ms. Sidhu was very healthy and active both inside and outside of the home. Ms. Sidhu never requested any help with housekeeping and would be the one helping others.

[63] I turn now to a summary of the medical evidence.

Dr. Gulzar S. Cheema, Family Doctor

[64] Ms. Sidhu first saw Dr. Cheema after the First Accident on March 18, 2015. Dr. Cheema prepared a report dated January 18, 2018 and testified at trial on behalf of the plaintiff. He remains her family doctor. On the March 18, 2015 visit, Ms. Sidhu reported a history of a painful right wrist and right forearm pain. On examination, the range of motion in her neck and back were painful on flexion and extension and her flexion was slightly limited. She had a marked degree of tenderness in her right wrist. Her doctor diagnosed her with multiple soft tissue injuries, posttraumatic headaches, and muscular pain in the thoracic region. She was advised to continue Naprosyn twice a day and physiotherapy was initiated. Dr. Cheema provided her with a note confirming she was not able to return to work for two weeks. He continued to issue notes advising her to remain off work until mid-November 2018.

[65] Dr. Cheema saw Ms. Sidhu on an ongoing basis, and Dr. Cheema's opinion was that Ms. Sidhu had suffered soft tissue injuries to both shoulders, arthralgia (meaning joint pain) of the right shoulder secondary to a rotator cuff tear, lower back strain, muscular pain in the cervical and thoracic region, gastroenteritis reflux due to medication, posttraumatic headaches, and depression. He opined that her condition has become chronic due to the Accidents. Due to her ongoing chronic pain she has been unable to participate in daily household activities or any recreational activities.

[66] In cross-examination, Dr. Cheema conceded that he did not include any of the prior complaints Ms. Sidhu had since in his view they were not relevant to the injuries she suffered in the Accidents. He testified that her prior complaints were common, not significant, and short-lived. He did not view them as significant, since Ms. Sidhu had completely recovered prior to the First Accident.

Dr. Rajreet Sidhu, Psychiatrist

[67] Dr. Sidhu is the plaintiff's treating psychiatrist. She prepared a report dated May 5, 2019 and testified at trial on behalf of the plaintiff. She first saw Ms. Sidhu in June 2011 when Ms. Sidhu presented with symptoms consistent with a diagnosis of adjustment disorder with anxious mood. Ms. Sidhu was working nightshifts and reported that she had difficulty keeping up with her responsibilities. She was prescribed Ativan and made a full recovery.

[68] Dr. Sidhu next saw Ms. Sidhu on June 23, 2017 when she reported she had developed feelings of sadness and anxiety after being involved in the First and Second Accidents. Dr. Sidhu was of the view that Ms. Sidhu had symptoms consistent with major depressive disorder. Ms. Sidhu reported that she was feeling better and was going to pursue counselling. Dr. Sidhu did not prescribe any medications or schedule a follow-up appointment.

[69] Dr. Sidhu next saw Ms. Sidhu, at the request of Dr. Cheema, on February 11, 2019. At that time Ms. Sidhu reported that she had been involved in the Third Accident. She described feelings of persistent sadness and anxiety. Dr. Sidhu diagnosed her with major depressive disorder of moderate severity with anxious distress. She started Ms. Sidhu on an antidepressant, Pristiq. On a return visit on March 4, 2019, Ms. Sidhu reported side effects from the medication and said she had discontinued it. Dr. Sidhu started her on Sertraline, a different antidepressant, which she has tolerated.

[70] Dr. Sidhu opined that her view was that the cause of the depressive disorder was probably the Accidents. Her opinion was that Ms. Sidhu will need to be monitored on an ongoing basis in view of her susceptibility to worsening in response to stressful situations. She will probably have to continue to take medications into the future.

[71] The defence argues that Dr. Sidhu's opinion should be given little weight due to the following reasons:

a. Dr. Sidhu did not review any collateral information or conduct any collateral interviews prior to writing her report;

b. She took the plaintiff's self-reporting at face value due to the therapeutic relationship;

c. Ms. Sidhu's reporting of symptoms was inconsistent to her various treatment providers, rendering assumptions in Dr. Sidhu's report unreliable;

d. Dr. Sidhu failed to adhere to the DSM-V diagnostic criteria of major depressive disorder; and

e. Dr. Sidhu only saw Ms. Sidhu on five occasions prior to writing her report.

[72] In cross-examination, Dr. Sidhu was challenged on whether Ms. Sidhu met the diagnostic criteria for major depressive disorder as outlined by the DSM-V. Dr. Sidhu testified that she made her diagnosis on a constellation of signs and symptoms. She confirmed that her opinion depended mostly on subjective self-reporting. She did not review any clinical records or interview any of Ms. Sidhu's family or friends.

[73] Dr. Sidhu explained that there is a role for collateral history but in this case she was of the view she had established a good rapport with Ms. Sidhu, and Ms. Sidhu was consistent throughout.

[74] There is some merit in the defence's submissions on the weight to be given to Dr. Sidhu's expert report on the diagnosis made. However, the psychological impact of the Accidents on Ms. Sidhu is not based only on Dr. Sidhu's report, but on the overall evidence from all the witnesses including Ms. Sidhu, her daughters, and the family doctor, on the emotional impact Ms. Sidhu experienced.

Dr. Zeeshan Waseem, Physical Medicine and Rehabilitation

[75] Dr. Waseem, a specialist in physical medicine and rehabilitation, provided a report and testified at trial on behalf of the plaintiff. Dr. Waseem assessed Ms. Sidhu on April 25, 2020 and prepared a report dated May 6, 2020. He opined that Ms. Sidhu "initially sustained sprain/strain soft tissues of the cervical, thoracic and lumbar spines and right shoulder" as a result of the First Accident. The Second Accident exacerbated her neck injury. The Third Accident aggravated all of the initial injuries. The injuries have resulted in chronic myofascial pain of the cervical and thoracic spine, chronic discogenic lower back pain with reported radicular pain in the distribution of the right S1 nerve root, and chronic non-specific right shoulder pain.

[76] Dr. Waseem opined that the physical complaints were attributable to the Accidents. He testified that a disc bulge at the L5-S1 region contracting the nerve root can cause pain. He explained that even after the reabsorption of the disc, the patient can still suffer pain indefinitely due to irritation of the nerve. His view is that Ms. Sidhu suffers from neuropathic pain as a result of the nerve having been irritated.

[77] Dr. Waseem noted one positive pain behaviour during his examination but was of the view that this behaviour supported that psychological factors were contributing to pain presentation. He also found objective findings on his examination including altered texture and tone of the muscles in the spine, reduced range of motion, and weakness in the muscles.

[78] In cross-examination, Dr. Waseem conceded that it was theoretically possible that the report of back pain radiating into her left leg in 2013 could have been caused by a disc protrusion, but that Ms. Sidhu reported to him that she did not have any left leg pain leading up to the First Accident.

[79] His view was that Ms. Sidhu was best suited to sedentary light work, where her reported reduced functional tolerances can be accommodated.

[80] Dr. Waseem's opinion on prognosis was that since Ms. Sidhu had been symptomatic for over five years, despite appropriate treatment, her recovery will probably be refractory to medical management. His view is that some further improvement is possible but she will continue to experience pain. He would consider her physical condition to be chronic, unremitting, and therefore permanent.

[81] He recommended intermittent chiropractic and massage, with six to eight sessions per year going forward, for flare-ups. He further recommended admission to a chronic pain program to "extinguish pain behaviours, improve self-efficacy and to allow her to better function despite being in pain."

Dr. Charles Telfer, Treating Orthopedic Surgeon

[82] Dr. Telfer, an orthopedic surgeon, testified as a treating physician, at the request of the defence. He first saw Ms. Sidhu on September 24, 2015, on referral by Dr. Cheema. Dr. Telfer's view was that Ms. Sidhu had sustained a "whiplash associated disorder causing muscle spasm and discomfort". He noted that her physical examination was difficult as she had a fair amount of abnormal pain behaviour. He did not see any signs of serious pathology in her right shoulder. He believed she may have some element of bursitis in her right shoulder. He encouraged her to get more active and stated that there was no surgical or serious pathology with regard to her neck and shoulder. He specifically instructed her to stop carrying her arm in a sling position and that she return to normal activities as soon as possible. Dr. Telfer recommended a cortisone shot to Ms. Sidhu's right shoulder.

[83] Ms. Sidhu returned to see Dr. Telfer for a follow-up visit on December 3, 2015. She reported that after the injection she could not move her arm for a week. She complained of severe pain. This reaction supported that Ms. Sidhu did not have any subacromial bursitis. He reassured her again that there was no significant pathology, she needed to do lots of stretching and range of motion, and to increase the use of her arm.

[84] Ms. Sidhu returned to see Dr. Telfer on May 12, 2016, on a referral by Dr. Cheema, for a reassessment. Dr. Telfer was of the view there was nothing more he could offer to Ms. Sidhu and that there was no surgical lesion in her shoulder. He recommended that she continue to do lots of range of motion and to use her arm as much as possible.

Dr. Kim Waspe, Physical Medicine and Rehabilitation

[85] Dr. Waspe, a specialist in physical medicine and rehabilitation, saw Ms. Sidhu at the request of Dr. Abeer Syal, orthopedic surgeon, on June 3, 2019. Dr. Waspe was asked to provide recommendations for management pertaining to chronic myofascial pain, kinesiophobia, and windup and central sensitization phenomenon. Dr. Waspe was called by the plaintiff. She recommended that Ms. Sidhu consider pharmacology management, with a potential referral to UBC Pharmacology due to her medication sensitivities. She noted that Ms. Sidhu was taking the medication on an as-needed basis, which was not how the medications

should be taken. She recommended some exercises that could be performed and suggested Ms. Sidhu take them to her treating professionals. She testified that it was important for Ms. Sidhu not to rely on passive modalities of treatment, but to focus on active exercise, such as swimming and mild cardiovascular exercise. Her view was that Ms. Sidhu had primarily soft tissue pain with central sensitization, and suggested a return to the pain clinic to review chronic pain pharmacology strategies. She recommended a multifaceted approach.

[86] Dr. Waspe explained central sensitization and kinesiophobia, as previously noted in these reasons at paras. 33 and 40.

Dr. Melissa Nadeau, Orthopaedic Surgeon

[87] Dr. Nadeau, an orthopaedic surgeon, saw Ms. Sidhu at the request of Dr. Cheema for the first time on November 4, 2016 for a history of right leg pain. This doctor was called on behalf of the plaintiff. Dr. Nadeau noted the MRI imaging of July 2015, which revealed a broad based disc herniation that touches on the bilateral S1 with no compression, and she requested that a further MRI be done. She was to reassess Ms. Sidhu after the further MRI of her lower spine had been completed. She provided Ms. Sidhu with a prescription for Gabapentin.

[88] Ms. Sidhu returned to see Dr. Nadeau on March 24, 2017 for a review of her lumbar spine MRI. It showed a mild broad based disc bulge at L5-S1. Dr. Nadeau noted that the bulge had decreased slightly in size. Ms. Sidhu reported that she tried the Gabapentin but it made her feel very dizzy and loopy and she could not function on it. She discontinued it. Dr. Nadeau recommended a local right S1 selective nerve root block to be performed and prescribed Lyrica.

[89] A right S1 selective nerve block was performed on December 21, 2017 by Dr. Mahesh Palanisamy. The purpose of the S1 nerve block was to help decrease inflammation and improve symptoms. The injection helped relieve her pain for two months.

[90] Ms. Sidhu returned to see Dr. Nadeau on January 2, 2019 on a re-referral from Dr. Cheema for a history of right leg pain that was worsening. Dr. Nadeau was of the view that Ms. Sidhu might benefit from a surgical procedure and ordered a further MRI of her lumbar spine. The plan was to reassess Ms. Sidhu after the further MRI. She recommended that Ms. Sidhu stay as active as possible.

[91] On January 7, 2019, Dr. Nadeau performed a right G1 bursa injection, which provided significant relief of her right "shooting" leg pain.

[92] On March 27, 2019, the MRI showed a "broad based mild disc bulge larger on the left than right", which was potentially compressing the S1 nerve roots. Dr. Nadeau noted that it was similar to the MRI images from November 2016.

[93] On March 27, 2019, Dr. Nadeau reassessed Ms. Sidhu. She was of the view that Ms. Sidhu might benefit from a surgical decompression and fusion of one of the vertebra. She was concerned that the surgery may not relieve all the pain and referred Ms. Sidhu to Dr. Maloon for a second opinion.

[94] Dr. Nadeau testified that Ms. Sidhu had an abnormal L5-S1 disc with degenerative changes and a disc bulge. She testified that Ms. Sidhu's presentation was closer to a disc bulge than a disc herniation.

[95] Dr. Nadeau noted in her consult report dated March 27, 2019 that: "There are tertiary gain issues, and her presentation does have non organic findings (eg leg tremor)." Dr. Nadeau testified that this meant secondary gain. Her view was that litigation has an influence on a patient's behaviour, in the sense that it adds a psychological component, and causes patients to focus excessively on their symptoms as they will potentially get monetary compensation. She noted that this was only one factor and it does not weigh that heavily.

[96] On May 13, 2019, Ms. Sidhu returned to Dr. Nadeau who advised that she was not a good surgical candidate at this time, and recommended ongoing conservative measures. At this visit Dr. Nadeau saw some improvement from the earlier visits. Once again this doctor recommended that Ms. Sidhu stay as physically active as possible and continue doing daily regular exercises.

[97] Dr. Nadeau conceded on cross-examination that she was not focused on the cause of Ms. Sidhu's mechanical back pain.

Dr. Stephen Maloon, Orthopaedic Surgeon

[98] Dr. Maloon, an orthopaedic surgeon, saw Ms. Sidhu at the request of Dr. Cheema for the first time on August 11, 2015 for evaluation of her low back pain. Dr. Maloon was called by the defence. At that visit, Ms. Sidhu reported pain in her low back radiating into her right buttock and down her right leg to her calf and foot. She reported the pain was continuous and was aggravated by prolonged sitting, standing, or walking. Dr. Maloon reassured Ms. Sidhu that there was no serious pathology in her back and encouraged her to keep active and work around her discomfort. His view was that she was not a surgical candidate at this time.

[99] Ms. Sidhu was referred back to Dr. Maloon, by Dr. Nadeau, for reassessment on April 8, 2019. Dr. Maloon noted multiple non-organic findings on assessment. He reassured Ms. Sidhu and her daughter that there was no serious pathology of her back. His view was that any surgery would be for the degenerative changes in her back and not due to any strain she sustained in the Accidents. Ms. Sidhu agreed that her symptoms were not severe enough to warrant a major surgical procedure and she would try some other modalities.

[100] The plaintiff submitted that Dr. Maloon was an argumentative witness and demonstrated an "alarming attitude" as a treating physician. In his consult reported dated April 8, 2019 he stated:

I have explained that if she felt that her symptoms were severe and incapacitating enough she may considered [sic] a candidate for surgery to fuse the L5-S1 motion segment. I have explained that the surgery would be for degenerative change and not for any strain that she may have sustained in the motor vehicle accidents. Of note is that she did have plain radiographs of her lumbar spine done in October 2013. These images reveal narrowing of the L5-S1 disc space.

[101] The plaintiff argues that Dr. Maloon made this statement without having any prior clinical records and without having questioned Ms. Sidhu on her condition in the months prior to the First Accident.

[102] Dr. Maloon was not being called as an expert and was not providing an opinion on what injuries were caused by the Accidents. Ms. Sidhu was referred to him by her family doctor to assess her for "back pain". Dr. Maloon noted that in the initial referral note, there was no reference to any accidents, just a referral for back pain. In order to give an expert opinion on what injuries were caused by the Accidents, Dr. Maloon would need to have access to the clinical records and have questioned the patient on her symptoms both before and after the Accidents. He did not do this. As such, I give no weight to the opinion expressed on causation by Dr. Maloon, reflected in his April 8, 2019 consult report.

Findings

[103] The defendants submit that the evidence supports a finding that Ms. Sidhu had a pre-existing injury to her L5-S1 disc from 2013. I accept that Ms. Sidhu had some degenerative changes to her L5-S1 disc that existed prior to the First Accident. Ms. Sidhu complained to her family doctor of left leg and back pain in the period of August to October 2013. Dr. Cheema referred her for x-rays. Those x-rays showed degenerative changes in her L5-S1 disc.

[104] The evidence does not support that these complaints continued or impacted Ms. Sidhu's function from October 2013 to the First Accident. The evidence of Ms. Sidhu and her daughters supports that she was able to complete all her job duties and home responsibilities without any difficulty prior to the First Accident. Ms. Sidhu had some degenerative changes to her lower back but that condition had not prevented Ms. Sidhu from being fully functional up until the First Accident.

[105] The expert evidence presented by the defendants did not support that the degenerative changes shown on the October 2013 x-ray were of such a nature that there was any likelihood of them causing problems in the future. The facts of Ms. Sidhu's injury are different from the case of Amini #1, where the family doctor opined that Mr. Amini's "cervical disc disease got worse" following his accident: para. 24.

[106] In Amini #1, the expert family doctor clearly stated that the plaintiff had a pre-existing condition and would have experienced some level of back pain during his life, likely starting in his 50's. The Court reproduced a lengthy excerpt of the family doctor's evidence at para. 30. The family doctor was asked during trial how long "that level of pain would have taken to develop if there had not been an accident". He speculated that it "would have taken a year or more maximum two years", though the plaintiff "may not have reached the same level of pain". The family doctor was then asked when Mr. Amini would have started experiencing symptoms of his degenerative disc disease based on his age and activity level. The doctor speculated, based on his clinical experiences, that the particular plaintiff in Amini #1 would likely have experienced symptoms starting in his mid-50's regardless of the accident.

[107] The type of expert evidence relied on in Amini #1 was missing in the testimony before me. The whole of the evidence that I accept falls significantly short of establishing that Ms. Sidhu's symptoms post-Accidents relate to the degenerative changes in her lumbar spine. There is no evidentiary foundation in this case for the theory that Ms. Sidhu would have developed the same type of symptoms she currently experiences. The defendants did not meet the onus of showing a measurable risk.

[108] Based on the medical evidence, I find that Ms. Sidhu suffered soft tissue injuries to her neck, shoulders, upper back, lower back, right wrist, and arm. She suffered headaches. She has been left with ongoing pain and discomfort. She further suffered a disc protrusion in her lower back which has resulted in radiating pain down her right leg. She also developed psychological distress arising from the Accidents. Most of Ms. Sidhu's pain symptoms are explained by Dr. Waspe's evidence on central sensitization.

Issue 2: What is the Appropriate Award of General Damages for Pain and Suffering?

[109] Ms. Sidhu seeks an award in the range of $225,000 to $275,000. The defendants submit that an award for general damages should be in the range of $50,000 to $75,000, taking into consideration Ms. Sidhu's pre-existing conditions.

[110] I note that the parties are significantly apart on the non-pecuniary range, as they are on all the other heads of damages.

Applicable Law

[111] A plaintiff is entitled to reasonable damages for pain and suffering. The plaintiff should be placed in the same position she would have been in if the Accidents had not occurred, but not in a better position.

[112] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: Trites v. Penner, 2010 BCSC 882 at paras. 188-89.

[113] In Stapley v. Hejslet, 2006 BCCA 34, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

[46] The inexhaustive list of common factors cited in Boyd [v. Harris, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

(a) age of the plaintiff;

(b) nature of the injury;

(c) severity and duration of pain;

(d) disability;

(e) emotional suffering; and

(f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

(g) impairment of family, marital and social relationships;

(h) impairment of physical and mental abilities;

(i) loss of lifestyle; and

(j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: Giang v. Clayton, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[114] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experience in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate those experiences: Dilello v. Montgomery, 2005 BCCA 56 at para. 25.

Analysis and Findings of Fact

[115] Ms. Sidhu relies on Khashei v. Pirro, 2020 BCSC 1048 and Felix v. Hearne, 2011 BCSC 1236 to support an argument that the appropriate award for general damages is in the range of $225,000 to $275,000. Ms. Sidhu submits that the plaintiffs in those cases had slightly better functioning than she has.

[116] I do not find that the cases cited by Ms. Sidhu are comparable. In Khashei, the plaintiff was 29 years old and underwent two back surgeries. Mr. Khashei was diagnosed with a disc prolapse and central canal stenosis at L4-5. That disc was bulging against and compressing the nerves running through the thecal sack from the spinal cord towards the legs, causing pain. This is not the situation that Ms. Sidhu experienced. She did have a disc bulge, but it was reabsorbed, and she was not a candidate for surgery. Mr. Khashei then developed complications after the first surgery and a second surgery was performed. After both surgeries, Mr. Khashei was in considerable pain for months. A further impact of the surgeries was that portions of Mr. Khashei's lower back were removed, making his spine less stable. As a result, he may need a third surgery in the form of a spinal fusion. Ms. Sidhu is not facing this risk. In addition, he had a psychiatric condition that made him competitively unemployable. Ms. Sidhu is not so severely impacted. The award of non-pecuniary damages was $200,000 in Khashei.

[117] In Felix, the plaintiff was 44 years old when she was involved in a roll over accident that killed her boyfriend. She suffered a concussion, recurrent headaches, tinnitus, and loss of equilibrium. There were tears in the ligaments of her shoulder and ankle. She underwent arthroscopic surgery to repair her wrist, which was unsuccessful. She was diagnosed with posttraumatic stress disorder and significant depressive symptoms. Her future psychiatric recovery was poor. She was suffering from chronic pain in her neck and wrist and a loss of function of her left wrist. The award of non-pecuniary damages was $200,000, approximately $230,000 when adjusted for inflation.

[118] The defendants rely on Sharifi v. Chaklader, 2012 BCSC 685, Bhandal v. Charlebois, 2015 BCSC 2315, Jiang v. Pappas, 2016 BCSC 1015, Sahota v. Choongh, 2014 BCSC 2415, and Torchia v. Siegrist, 2015 BCSC 57 to support their argument that the appropriate award for general damages should be in the range of $50,000 to $75,000. A significant theme in many of the cases cited by the defence were issues relating to the reliability and credibility of the plaintiff.

[119] In Sharifi, the plaintiff's testimony was coloured by her "unreliability as a witness" (at para. 96), a pre-existent left shoulder injury, and a history of neck pain. The Court did not accept that Ms. Sharifi was disabled from her clerical employment. An award of $50,000 was made.

[120] In Bhandal, the Court found "significant shortcomings" in the plaintiff's evidence (at para. 68), that some aspects of his evidence were unreasonable, and that he had a tendency to exaggerate and embellish. Justice Warren was left with "a general concern that Mr. Bhandal's evidence was motivated more by his interest in the outcome of this case than the desire to be candid at all times": para. 88. The Court found that the soft tissue injuries had largely resolved within one year of the accident. An award of $60,000 was made.

[121] In Jiang, the Court found that the plaintiff was likely exaggerating the effect of his injuries on his future work prospects. He suffered from some neck pain, low back pain, and left shoulder pain. He was able to return to part-time work. An award of $75,000 was made.

[122] In Sahota, the Court was concerned that the 49-year-old plaintiff had a tendency to exaggerate the effects of his injuries and their impact on his work prospects. The soft tissue injuries to his neck, upper and mid back, right shoulder, and right arm had all completely resolved within six months of the accident. He was left with chronic pain and dysfunction in his lower back and left leg. This plaintiff was able to return to work on lighter duties and would be able to continue to work indefinitely. An award of $70,000 was made.

[123] In Torchia, it was initially suspected that Mr. Torchia had a disc herniation but that was ruled out after a surgery. Mr. Torchia had not suffered any neurological injuries in the accident. The injuries Mr. Torchia suffered in the accident were neck and shoulder injuries, which cleared up in three weeks. The most significant injury was the soft tissue injury to his back with pain down his left leg. The Court found Mr. Torchia was not truthful in a number of instances when reporting to some doctors and ICBC. Further, the Court found that Mr. Torchia had not mitigated his damages. He was able to continue working as an assistant manager at Walmart. An award of $65,000 was made prior to the reduction for lack of mitigation.

[124] In my view, the nature and impact of the injuries in the defendants' cases are much less than those Ms. Sidhu experienced, both in terms of severity and persistence of symptoms. In addition, I found Ms. Sidhu to be a credible and reliable witness who is experiencing the pain she testified about. I am not convinced that she has deliberately exaggerated or amplified any of her symptoms.

[125] While all of these cases are helpful to provide a general framework, as noted in Stapley at para. 45, the impact on Ms. Sidhu as an individual is the key.

Ms. Sidhu's Evidence

[126] Ms. Sidhu testified that she suffered soft tissue injuries to her neck, shoulders, upper back, wrist, and arm, predominantly on her right side. She continues to suffer ongoing pain on her right side which goes up and down. Prolonged sitting or standing aggravates her pain. This was evident in the witness box when Ms. Sidhu would sit, stand, and then return to sitting throughout her two days of testimony. I found her behaviour consistent with her assertions of pain and discomfort.

[127] Ms. Sidhu's mood has improved but it is still impacted by pain. Her sleep continues to be affected. The amount of sleep she gets depends on her level of pain.

[128] Ms. Sidhu's ongoing symptoms have affected her ability to complete household chores and carry out gardening. Her ongoing pain has impacted her social life in that she can no longer cook for guests and does not invite people to her home. She does not like going out. She no longer volunteers at the temple but only goes to pray. Ms. Sidhu's condition has impacted her family in that they are also upset since she does not want to go out due to the pain.

[129] She tried to return to work for two shifts but was unsuccessful. She continues to be off work.

[130] Ms. Sidhu was active in a variety of rehabilitative treatments. She testified that she has had injections to her right shoulder, hip, and back. She has attended "hundreds" of physiotherapy, massage, and chiropractic treatments. She has tried different medications to help manage her pain and mood. Some medications have caused her to develop gastric issues.

[131] Ms. Sidhu described how she improved over time, in that she no longer holds her right arm, and the swelling in her right hand is less. She is limping less and the right leg numbness has decreased. She feels her mood has improved in that she is no longer crying over "every little thing like before".

Mandeep Sidhu, Eldest Daughter

[132] Mandeep Sidhu, the eldest daughter, testified to her mother being in good health prior to the Accident. She described her mother's personality as being very happy and loud. She was known as "head office" at one point since she was very social and knew everything about everyone. Her mother did all of the household chores, cooking, grocery shopping, as well as the yard maintenance.

[133] After the First Accident, Mandeep noticed her mother experiencing increasing pain. She was not able to do household chores. The chores were performed by Mandeep's grandmother, aunt, and other family members. Mandeep testified that on a family vacation to Mexico in 2017 her mother participated in some limited dancing and socializing on the first day. For the rest of the holiday, her mother was sick, in pain, and rested in her room.

[134] She recalls that after her mother tried to return to work in November 2018 she came home exhausted and her right hand was swollen. Her observation is that her mother is in pain seven days a week, with the pain going up and down. There has been some improvement in her mother's mood in that she is now less emotional.

Sandeep Sidhu, Younger Daughter

[135] Sandeep Sidhu, the younger daughter, testified that her mother had some problems in 2011 when she was working the graveyard shift. She had trouble sleeping. The problem lasted for a couple of months and then she was fine. Before March 2015 her mother was completely healthy and was able to care for the family. She described her mother "as a fun person to be around" and "she was happy". Her mother was responsible for all the housekeeping, cooking, and yard work. She had no difficulty completing the household chores. She would attend her son's soccer games and would go to the temple.

[136] After the First Accident, her mother was in pain. The pain kept going "up and up". She was no longer able to do household chores due to the pain. Her mother can now only minimally help out in the garden. Her father does most of the yard work. On the first day of the Mexico holiday her mother was able to do a bit of dancing and talking to family members. After that she was miserable and she did not enjoy herself.

[137] Sandeep attended at the accident scene of the Third Accident. Her mother was still in the vehicle and appeared shocked, upset, and in pain. The Third Accident aggravated everything. Her mother can drive but Sandeep would generally drive her to most doctor's visits. She recalls seeing her mother after she returned from work in November 2018. Her mother looked exhausted, was limping, and she complained her right arm was hurting. Her mother is always in pain, mostly on her right side, but sometimes on her left since she is overusing that side. Her mother has been anxious, stressed, and has needed medication to help her sleep.

Shannon Jameson, Occupational Therapist

[138] Shannon Jameson was Ms. Sidhu's treating occupational therapist from June 2016 to April 2018. Ms. Jameson conducted a job site visit on June 14, 2016. She concluded that Ms. Sidhu was not capable of meeting her job demands. Her views remained the same at the end of her involvement. Ms. Jameson administered a number of questionnaires in which Ms. Sidhu reported having difficulty with shopping, laundry, cleaning, and house maintenance. Ms. Jameson noted little improvement in Ms. Sidhu's physical symptoms and some improvement in her mood. Ms. Sidhu was very compliant during the sessions. Ms. Jameson understood that pain significantly dominated Ms. Sidhu's presentation.

Pearl Emmanuel, Employer

[139] Pearl Emmanuel is a former operations manager at Superstore. In November and December 2018, she was the manager on duty when Ms. Sidhu returned for one of two scheduled shifts. Ms. Sidhu was assigned light duties for a four hour shift. The work consisted of scanning labels and putting on signs. These were the lightest duties available. Ms. Emmanuel testified that Ms. Sidhu came to see her halfway through the shift. She was limping and her forearm was red and swollen. She was having a hard time holding on to the handheld scanning gun. Ms. Sidhu was given permission to leave but she took some medication and then stayed the whole shift. Ms. Sidhu went home early from the second shift.

Jasdeep Kaur Garcha, Former Co-worker

[140] Jasdeep Garcha worked at Superstore with Ms. Sidhu. Before the accident she testified that Ms. Sidhu did "good work." She would do more work in a four hour shift than others did in an eight hour shift. Ms. Sidhu's personality was "good" and "happy". In 2011 she recalls that Ms. Sidhu told her that she was having problems sleeping due to being on the night shift.

She recalls that Ms. Sidhu then started working on the day shift. Prior to the First Accident, Ms. Sidhu never complained of any fatigue, tiredness, or problems with her right wrist or back pain.

[141] After the accident, they worked one shift together in 2018. She testified that Ms. Sidhu was not able to work fast. She was only doing labelling and her hand was swollen. She recalls Ms. Sidhu took some medication and returned to work. She also observed Ms. Sidhu not walking properly. It appeared to her that Ms. Sidhu's back or leg was hurting and she was walking "very differently".

Satwinder Mahal, Sister-in-law

[142] Satwinder Mahal, the plaintiff's sister-in-law, testified that before the accident Ms. Sidhu was a "very healthy and active" and "very social" person. Ms. Mahal never had to help her and Ms. Sidhu was always helping others. After the First Accident, Ms. Mahal described Ms. Sidhu as having "lost all the charm in her face." She was in pain, always sad, and did not talk or socialize much. Ms. Mahal would come to the home about three to four times a week to help with cleaning the house, cooking, and laundry. She continued until the fall of 2019 when Ms. Sidhu's daughters took over.

Angela Pallan, Registered Clinical Counsellor

[143] Angela Pallan was Ms. Sidhu's counsellor from November 2016 to January 2017 and again from August 2017 to October 2017. Ms. Pallan focused on helping Ms. Sidhu manage her anxiety and pain, and in developing communication skills. Ms. Pallan identified anxiety and depressive mood as big features during their sessions. Ms. Sidhu expressed the impact on her family life, in that she no longer attended family gatherings. Ms. Sidhu was an "active" participant in her sessions and was willing to engage in the recovery process. Ms. Pallan testified that Ms. Sidhu was highly motivated to get back to work and to get better.

Findings

[144] As previously noted, a number of the plaintiff's treating physicians and the medical experts noted that Ms. Sidhu presented with non-organic pain behaviours. In my view, Ms. Sidhu does have some underlying psychological issues that impact how she behaves and expresses her pain. This does not detract from the fact that she continues to suffer pain.

[145] There was also objective evidence of muscle spasms, reduced range of motion, and altered tone. Her imaging supported a disc bulge at her L5-S1 disc.

[146] I am prepared to accept Ms. Sidhu's evidence as a true reflection of what she experiences.

[147] The Accidents have caused a significant change in Ms. Sidhu's ability to work at Superstore. She is currently not working. She tried to return to work on two occasions. There is some support in the evidence that, with the proper medication and active rehabilitation, coupled with psychiatric support, there is a real prospect of some improvement. There is also

support for the inference that, since the symptoms have now become entrenched, any improvement will be difficult and there remains a significant risk that Ms. Sidhu will continue to experience some symptoms in the future.

[148] While I accept Ms. Sidhu is experiencing central sensitization, this finding does not mean that Ms. Sidhu is completely incapacitated for life. She has shown the capacity to improve her situation. As she testified, she initially held her right arm as if it was in a sling and she was able to stop this conduct once advised by her treating physicians that she did not need to do so. She is also limping less now. It is clear that she has been, to a degree, successful in addressing the psychological component of her pain.

[149] I have reviewed the cases. In assessing the particular circumstances of Ms. Sidhu, I am of the view that the appropriate award for non-pecuniary damages is $145,000. I do not find that the crumbling skull doctrine applies to Ms. Sidhu. Her prior complaints of pain and discomfort were all short-lived and did not impact her ability to work or perform household chores. As such there is no cogent basis for reducing her damages due to a pre-existing condition.

Issue 3: Has Ms. Sidhu failed to mitigate her damages, and if so, what is the appropriate reduction?

Applicable Law

[150] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: Danicek v. Alexander Holburn Beaudin & Lang, 2010 BCSC 1111 at para. 234.

[151] Once the plaintiff has proved the defendants' liability, in order to succeed on a mitigation defence the defendants must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: Gilbert v. Bottle, 2011 BCSC 1389 at para. 202.

[152] The test for failure to mitigate is set out in Chiu v. Chiu, 2002 BCCA 618 at para. 57:

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

Position of Parties

Defendants' Position

[153] The defendants submit that Ms. Sidhu failed to mitigate in the following four aspects, in failing:

a. to follow Dr. Maloon's recommendations to keep active and continue with physiotherapy;

b. to continue with counselling sessions after October 2017;

c. to complete four classes at the Jim Pattison pain management course; and

d. to retrain or seek alternative work.

Plaintiff's Position

[154] The plaintiff's position is that she has attended countless treatments over the years. She has had three injections to her shoulder, hip, and back. She has pursued counselling and has attended, and continues to attend, a psychiatrist. She has done everything to try and mitigate her losses.

Analysis

[155] I will deal with the issue relating to the failure to retrain or seek alternative employment under the analysis relating to past wage loss.

[156] The defendants submit that Ms. Sidhu attended at Allcare Physio between April 13, 2015 and November 29, 2018 for physiotherapy. This is not accurate. The plaintiff attended Allcare Physio between those periods of time for massage therapy treatments and not physiotherapy treatments.

[157] It appears Ms. Sidhu first attended for physiotherapy in 2015 but it is not clear when she started. Dr. Maloon notes this in his consult report of August 11, 2015. According to the report of Dr. Cheema, he notes that Ms. Sidhu was to continue with physiotherapy after the August 2015 visit with Dr. Maloon for the remainder of 2015, 2016, 2017 and 2018. Dr. Waseem states in his report that Ms. Sidhu had physiotherapy treatments for a few years from 2015 to 2018. She attended for physiotherapy treatment at Total Care Chiropractic & Rehab Inc. from March 20, 2018 to August 27, 2018. It appears she had attended this clinic earlier but the records were not entered as exhibits at trial.

[158] Ms. Sidhu testified that the therapies she received, being physiotherapy, massage, and chiropractic, provided only temporary improvement. The impact would last some hours or some days.

[159] There is no merit in the allegation that Ms. Sidhu did not follow the advice she recalls receiving from Dr. Maloon in August 2015 to continue physiotherapy. The evidence supports that she did so. I note that Dr. Waseem does not recommend that Ms. Sidhu continue with physiotherapy as a future treatment recommendation.

[160] There is also no evidence that more physiotherapy sessions would have reduced Ms. Sidhu's symptoms. The fact that earlier treatment or additional treatment may have been efficacious is insufficient; there must be some evidence to show the treatment would have reduced the plaintiff's symptoms: Smith v. Both, 2013 BCSC 1995 at paras. 110-11; Manson v. Kalar, 2011 BCSC 373 at para. 40.

[161] There is no merit in the defence submission that Ms. Sidhu failed to mitigate by failing to comply with Dr. Maloon's recommendations to continue physiotherapy.

[162] With respect to Dr. Maloon's recommendation to "keep active and work around the discomfort", Ms. Sidhu testified that she attempted to stay as active as she could tolerate. The evidence of her daughters is that their mother does try and do housekeeping chores and some yard clean-up. I am not persuaded that Ms. Sidhu has acted unreasonably in her attempts to "keep active".

[163] The second allegation is that Ms. Sidhu stopped counselling in October 2017 and that she failed to mitigate her damages by not continuing her counselling. On September 26, 2016, Dr. Cheema advised Ms. Sidhu to see a psychologist. Ms. Sidhu testified that she started counselling in November 2016 and after her trip to Mexico in February 2017 she had noticed an improvement in her symptomatology. Her last counselling session with Ms. Pallan was in October 2017.

[164] Ms. Pallan notes in her clinical notes of the final counselling session on October 21, 2017 that Ms. Sidhu reported her anxiety was not as severe and she was using the skills learned to reduce her anxiety. There was no evidence from Ms. Pallan that Ms. Sidhu ended the counselling sessions early, or any recommendation that Ms. Sidhu should have continued them.

[165] Ms. Sidhu was seen by Dr. Sidhu on June 23, 2017, who noted that Ms. Sidhu was doing better and was of the view that Ms. Sidhu did not need to be seen for any follow up appointments.

[166] Ms. Sidhu returned to see Dr. Sidhu on February 11, 2019, reporting a six month period of worsening mood. Dr. Sidhu prescribed an antidepressant which helped improve Ms. Sidhu's mood. Dr. Sidhu noted that Ms. Sidhu would need to be monitored on an ongoing basis and will probably continue to need medications. Ms. Sidhu has continued to see her treating psychiatrist throughout 2019 and in 2020. Dr. Sidhu testified that she continues to monitor Ms. Sidhu's symptoms and her medication. There was no recommendation made that Ms. Sidhu should have counselling alongside the ongoing care provided by her treating psychiatrist. I note that Dr. Waseem also did not recommend any ongoing counselling.

[167] There is no evidentiary foundation to show that more counselling would have resolved Ms. Sidhu's mood issues. The defendants have not met their onus of showing that Ms. Sidhu acted unreasonably in not attending for more counselling, and that her damages would have been reduced if she had received such counselling.

[168] The defence argues that Ms. Sidhu failed to attend the remaining four sessions at the Jim Pattison pain management course and her failure to complete this course is a failure to mitigate her losses. Ms. Sidhu was not asked during her testimony why she had failed to return to the last four sessions.

[169] According to Ms. Jameson's records, Ms. Sidhu attended at the Jim Pattison pain management course in September and early October 2017, and had not attended the remaining four classes. There was no evidence lead on the nature of the four remaining sessions. I note that Ms. Sidhu was involved in the Third Accident on October 17, 2017, which may explain why she did not return to the remaining classes at that time. This is supported by the comment in the consult report of Dr. Waspe dated June 3, 2019 in which the doctor notes:

She [Ms. Sidhu] tells me she did receive education sessions on chronic pain. She struggled somewhat with the higher level content in English second language and was unfortunately involved in a subsequent accident at some point which placed the pain clinic on hold. She has not returned there but continues to follow with an OT chiropractor and massage therapist at this point, to my understanding.

[170] I am unable to find that attending these last four classes would have reduced Ms. Sidhu's damages.

[171] I am not persuaded that the defendants have discharged their burden of proving that Ms. Sidhu has failed to mitigate with respect to the first three allegations. In my view, Ms. Sidhu acted in a reasonable manner when considering the medical advice she received. For these reasons, I am not prepared to reduce any non-pecuniary damages due to a failure to mitigate.

Issue 4: What is the Appropriate Award for Past Wage Loss or Income Earning Capacity?

Applicable Law

[172] In Karim v. Li, 2015 BCSC 498 at paras. 130-33, Justice Abrioux (as he then was) discussed the purpose and framework for determining the appropriate award for past loss of earning capacity, and the task for awarding compensation for any pecuniary loss resulting from an inability to work.

[173] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: Rowe v. Bobell Express Ltd., 2005 BCCA 141 at para. 30; M.B. v. British Columbia, 2003 SCC 53 at para. 49.

[174] A number of cases state that the exercise is not a mathematical formula: Luck v. Shack, 2019 BCSC 1172 at para. 170. When making this assessment, it is appropriate to consider the likelihood of hypothetical events in the same manner as when assessing future losses, rather than applying the balance of probabilities test that is applied to past actual events: Smith v. Knudsen, 2004 BCCA 613 at para. 29.

[175] In Gao v. Dietrich, 2018 BCCA 372, the court set out the appropriate methodology for assessing past losses:

[34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

[35] In Athey v. Leonati, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed "the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events" (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.

[36] A hypothetical or future event will be taken into consideration "as long as it is a real and substantial possibility and not mere speculation" (Athey at para. 27; see also Rousta v. MacKay, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: Graydon v. Harris, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff's claim: Morlan v. Barrett, 2012 BCCA 66 at para. 59.

[37] If the plaintiff establishes a real and substantial possibility, then the court must weigh the hypothetical or future event according to its relative likelihood: Athey at para. 27. For example, "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk" (Athey at para. 27). In determining a fair and reasonable damage award, a court should make an assessment rather than a purely mathematical calculation: Grewal v. Naumann, 2017 BCCA 158 at para. 54.

[38] In contrast, past events must be proved on the balance of probabilities, and once they are proved, they are treated as certainties: Athey at para. 28; Rousta at para. 17. A court's conclusion regarding past events cannot be weighted according to its likelihood or probability: Athey at para. 28.

[39] The rationale for distinct standards of proof for past actual events and past hypothetical events was explained by Madam Justice Rowles in Smith v. Knudsen, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

Position of Parties

Plaintiff's Position

[176] Ms. Sidhu submits that she was totally disabled from working up to the date of trial. She attempted a trial return to work as recommended by her doctor. She was unsuccessful.

[177] The plaintiff submits that the calculation of her past wage loss should be based on her T4 earnings in 2014 of $12,310. This equates to a daily rate of $33.73 per day. There were approximately 1,979 days between the date of the First Accident (March 17, 2015) and the date of trial (August 17, 2020). Her gross income loss would amount to $66,751.67. From that needs to be subtracted her earnings in 2018 of $243.04 and an application of a 15% tax rate for a loss of $56,532.37.

Defendants' Position

[178] The defendants submit that the amount to use as the past wage loss is the net income of $13,975.50 per year. This was calculated using the average of the plaintiff's net income in years 2013 and 2014, using line 236 of the tax returns. I note that the figures used by the defendants are ones that include RRSP income earned in both those years.

[179] They argue that evidence supports that any wage loss was caused by pre-existing wrist issues. Or, in the alternative, there should be a 50% reduction due to the plaintiff's failure to follow the advice of her family doctor to wear a wrist brace and failure to advise Superstore of the need for ergonomic equipment from 2012 onwards. If an award of past wage loss is granted the defendants submit the award should be $34,938.75.

Analysis

[180] I will first deal with the defendants' argument that Ms. Sidhu has failed to mitigate her wage loss. The onus of proving a failure to mitigate rests on the defendants, who must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. I canvassed the applicable legal principles earlier in these reasons.

[181] The defence argues that Ms. Sidhu had pre-existing wrist symptoms which manifested in April 2012 when she complained to her family doctor of tingling in her right wrist. The defence argues that, quoting from their written submissions:

the Plaintiff ceased work on her unsuccessful return to work in 2018 largely due to, if not entirely due to, pre-existing wrist issues that were not disclosed to her caregivers beyond Dr. Cheema, or experts at trial.

[182] They also argue that the plaintiff failed to use ergonomic equipment that was recommended in April 2012.

[183] The defendants' submission ignores that Ms. Sidhu did not require any time off work due to some "tingling" in her right wrist in April 2012. She was able to work from April 2012 to March 2015 without any problems with her right wrist. I find it more likely that the reason Ms. Sidhu did not use a wrist brace or seek any accommodation at work was because her right wrist issues resolved and did not impact her ability to perform her job duties. There is no evidence that Ms. Sidhu had any wrist symptoms in the almost three years prior to the First Accident. She did not return to her family doctor with any type of wrist complaints until after the First Accident. She was able to complete all of her household chores without assistance from her family or relatives. There is no expert evidence linking the April 2012 incident to what Ms. Sidhu experienced in November and December 2018, when she attempted to return to work.

[184] In addition, Ms. Sidhu's inability to work not only arose from a swollen right hand. Ms. Sidhu first tried to return to work in approximately late November 2018. During this return to work she experienced swelling in her right hand, issues with pain in her right arm and shoulder, and pain in her right leg.

[185] The weight of the evidence supports that Ms. Sidhu was not able to return to her original occupation as of the date of trial. Her family doctor recommended she try returning to work on a part-time basis in mid-November 2018. She followed his advice but was unsuccessful in her return to work. I am not convinced she should have sought some alternative employment or tried to retrain at that point in time. She remained hopeful that her condition would improve and she would be able to return to her former job.

[186] For these reasons, I am not prepared to reduce any past wage loss due to a failure to mitigate or any pre-existing wrist condition. The award for net past wage loss is $56,500.

Issue 5: What is the Appropriate Award for Loss of Future Earning Capacity?

Applicable Law

[187] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by her injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?

[188] The decision in Pololos v. Cinnamon-Lopez, 2016 BCSC 81, provides an excellent summary of the applicable leading principles on the assessment of loss of future earning capacity:

[133] The relevant legal principles are well-established:

a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; Lines v. W & D Logging Co. Ltd., 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;

b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 32;

c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; Rosvold v. Dunlop, 2001 BCCA 1 at para. 18;

d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and Perren v. Lalari, 2010 BCCA 140 at paras. 11-12;

e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; Perren at para. 33;

f) The earnings approach will be more appropriate when the loss is more easily measurable; Westbroek v. Brizuela, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; Jurczak v. Mauro, 2013 BCCA 507 at paras. 36-37.

g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para. 11.

[189] In Grewal v. Naumann, 2017 BCCA 158 at paras. 48-49, the Court of Appeal provided a summary of the assessment of loss of future earning capacity and the application of the "real and substantial possibility" standard:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: Perren v. Lalari, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: Dunbar v. Mendez, 2016 BCCA 211 at para. 21.

Position of Parties

Plaintiff's Position

[190] Ms. Sidhu is advancing a claim for loss of future earning capacity on the basis that, but for the Accidents, she would have continued to work part-time at Superstore until the summer of 2020. At that time her youngest child would have graduated from high school and she would be seeking more hours. The plaintiff submits it is reasonable to assume that she would have worked about 28 hours per week until retirement at age 65. She claims that she can no longer work at her job and she is likely unable to work at any job for the remainder of her life. She argues that any retraining is unlikely, due to her language barriers and educational background.

[191] She submits that she remains markedly symptomatic, continues to be under the care of a psychiatrist, and must use powerful opioid medication and antidepressants. As a result of her ongoing pain issues, with very little improvement, it is unlikely that she will return to paid employment.

[192] The plaintiff submits that any residual earning capacity is speculative. Her current prognosis remains poor and although she has tried multiple types of treatment she continues to suffer pain. She argues there is not a real and substantial possibility she will be able to return to competitive employment. As such, the plaintiff claims that no reduction should be made for any residual earning capacity. Alternatively, any reduction should be modest, in the range of 5% to 10%.

[193] The plaintiff submits that the appropriate approach is the earnings approach since Ms. Sidhu had been employed for many years at the same job. She had established her career path.

[194] The plaintiff submits that future wage loss should be calculated on the basis that she would likely have been earning minimum wage, at $14.60 per hour, for 28 hours a week for the next 20 years. This amounts to a yearly income of $21,257.60. The plaintiff calculates the net present value of the future wage loss at $364,963.

Defendants' Position

[195] The defendants adopt the same arguments made in support of a reduction of the past wage loss.

[196] The defendants also argue that Ms. Jhaj's opinion should not be given any weight. Ms. Jhaj opined that the plaintiff's demonstrated physical abilities do not meet the critical physical demands of her former job. They claim that Ms. Jhaj's opinion was based on an inaccurate assessment of Ms. Sidhu's job, at para. 118 of their submissions:

118. The Plaintiff was assessed by Ms. Hardip Jhaj, a kinesiologist, on May 7, 2019, for a functional capacity evaluation. In cross-examination, Ms. Jhaj testified that she used the job demand descriptions of a "stock person" from National Occupational Classification (NOC) in her assessment. She described these job demands to be standardized demands if a job site

visit is not available. She further stated that she would prefer a job demands analysis and that her opinion may change if the job demands are inaccurate. She confirmed that she did not ask the Plaintiff for her specific job demands at Superstore. When Ms. Jhaj was shown a job site visit report written by the Plaintiff's treating occupational therapist, she confirmed the following:

a) The lifting strength demand identified by the job site visit report is significantly lower than the job demand Ms. Jhaj identified in her FCE;

b) The job demand of "carrying" that Ms. Jhaj identified in her FCE is more strenuous than what was described in the job site visit report;

c) The job demand that Ms. Jhaj identified in her FCE for pushing and pulling is more demanding than what was described in the job site visit report; and

d) Ms. Jhaj identified the Plaintiff's job to be medium physical demand level while the job site visit report identified the Plaintiff's job to be of limited strength, which puts the strength rating of this position to be 0 - 5 kg.

[197] The defendants submit that the plaintiff should be able to perform the job of operations clerk at Superstore, which has a strength demand of "limited", being from 0-5 kg.

[198] The defendants dispute that the plaintiff has been rendered incapable of future employment. They point to Dr. Telfer's advice, in early September 2015, that Ms. Sidhu should return to her normal activities. They also point out Dr. Maloon's advice, in April 2019, who encouraged Ms. Sidhu to continue with normal work and recreational activities.

[199] They argue the wages paid to the plaintiff at Superstore were modest and that other opportunities for employment are available at the levels of work capacity demonstrated by the plaintiff in Ms. Jhaj's functional capacity evaluation. As such, the plaintiff retains a residual working capacity sufficient to command the same income she was obtaining prior to the First Accident, and it is open to the Court to find that the plaintiff has no real and substantial possibility of future income loss.

[200] The defendants reiterate their argument on the pre-existing wrist issues that they assert would have arisen absent the Accidents.

[201] In the alternative, the defendants submit that any award of future loss of earning capacity should be reduced by half on the basis that the plaintiff failed to follow the advice of her family doctor in wearing a wrist brace and advising Superstore of the need for ergonomic equipment from 2012 onwards.

[202] If an award of future loss of earning capacity is provided, the defendants submit that the evidence does not support that Ms. Sidhu could have increased her hours by simply requesting more hours. They submit that her job was a union one, and the suggestion that she could simply increase her hours is speculative.

[203] The defendants' position is that Ms. Sidhu's future loss should be assessed, not on an earnings based approach, but on a capital asset approach, given the plaintiff's original position. They claim her original position included pre-existing health issues and restrictions on work capacity, a history of only part-time employment, and lack of evidence of full-time employment. They also claim she has some residual work capacity. On that basis they argue an appropriate award would be $24,549, which is approximately equivalent to two years of part-time minimum wage earnings. From this amount a deduction for a failure to mitigate should be made.

[204] The defendants' position is that the plaintiff has not discussed any return to work with Superstore since December 2018 and has not applied for any other jobs at Superstore or anywhere else. The plaintiff has not sought any retraining or post-secondary study. Further, the plaintiff is responsible for furthering her language abilities to enable her to obtain alternative employment. They argue the plaintiff is obliged to improve her English skills if they are a barrier to other employment. In support they rely on the decision in Pan v. Lau and Tai, 2020 BCSC 288 at para. 71, where Justice Ehrcke held that a plaintiff's language abilities, to the extent they are a barrier to other employment, are not the fault of the defendants, and should not be considered in assessing loss of earning capacity.

[205] The defendants argue that the plaintiff further turned down assistance in finding employment or a volunteer position and has been declared safe to return to work by her treating physicians. The defendants submit that at minimum a 50% reduction should be made for the plaintiff's residual employability and her choice to avoid alternative employment.

Analysis

[206] In assessing Ms. Sidhu's future loss, I need to consider which approach is appropriate: the earnings approach or the capital asset approach.

[207] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years, and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: Pallos v. Insurance Co. of British Columbia (1995), 100 B.C.L.R. (2d) 260 at para. 43; Gilbert at para. 233.

[208] The capital asset approach, on the other hand, involves considering factors such as: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market: Hoy v. Williams, 2014 BCSC 234 at para. 158; Gilbert at para 233.

[209] The capital asset approach is more useful when the loss is not easily measurable: Perren v. Lalari, 2010 BCCA 140 at para. 32. Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: Morgan v. Galbraith, 2013 BCCA 305 at para. 56.

[210] In my view, the earnings approach should be used since Ms. Sidhu had embarked on her career path and had an established earnings history prior to the Accidents. The evidence supports a real and substantial possibility that, without the Accidents, Ms. Sidhu would have continued working at Superstore until her retirement.

[211] The first issue to address is whether Ms. Sidhu would have increased her work hours in the future. She had been working part-time since 2005. She performed all housework responsibilities and cooking. Her daughters testified that Ms. Sidhu alone would be expected to do all cooking and housework, regardless of her children's ages. Her husband and children would not be expected to help out, according to cultural customs. In addition, her children would continue to live at home until they are married, and indeed still lived at home as of the date of trial. The only reason the husband and daughters are now assisting is because their mother needs help and the family decided to help her.

[212] In my view, Ms. Sidhu would not have sought to increase her hours but instead would have maintained the same number of hours she was working.

[213] I think a reasonable assumption is that Ms. Sidhu would have worked at the high end of the hours she worked in the past, at 22 hours per week.

[214] Ms. Sidhu had some pre-existing issues that impacted her ability to work in the past. In 2011 she had to take two months off due to anxiety and stress created by working the night shift. There is no evidence that Ms. Sidhu would be able to return to the night shift in the future. There is no evidence to suggest these issues recurred once Ms. Sidhu switched to working the day shift.

[215] In addition, Ms. Sidhu complained of neck and back issues. She took some time off in 2013 for her back problems. The imaging supports degenerative changes in her lumbar spine, which was present since 2013. I accept that all of these limitations indicate Ms. Sidhu would not have sought more hours, and likely would have retired at 60 years old.

[216] I have calculated the plaintiff's net future wage loss based on working 22 hours/per week x $14.60 hour = $321, which equates to $16,692 per year. The present value of this amount, at a discount rate of 1.5% in accordance with s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and s. 1(a) of the Law and Equity Regulation, B.C. Reg. 352/81, using the present value multipliers in the CIVJI civil jury instructions at Appendix E of 13.3432, is $222,724 for future loss of income. I used Appendix E as there was no expert testimony as to the appropriate present value multipliers. The use of Appendix B was applied by Justice Branch in MacGregor v. Bergen, 2019 BCSC 315: see footnote 1, referenced at para. 116.

[217] I now turn to the issue of any residual earning capacity.

[218] With respect to her residual employability, some improvement in her mood and her physical condition can be expected. The evidence is that Ms. Sidhu should be encouraged to be physically active and to return to normal activities. As Dr. Waspe put it, Ms. Sidhu is suffering from "learned helplessness". As Drs. Telfer, Maloon, and Nadeau noted, she is not going to further damage herself if she becomes more active. In fact, she is encouraged to do so.

[219] I further accept that Ms. Sidhu has a better degree of functionality than she perceives in herself. The functional capacity testing supports that she is able to carry out job demands in what is described as a light category. Dr. Waseem was of the view that Ms. Sidhu was best suited to sedentary to light work, where her reported reduced functional tolerances can be accommodated. He did not opine she was permanently disabled from all work. There was no expert evidence that supported such a conclusion.

[220] Ms. Sidhu faces challenges due to her lack of skills and the impact of her language limitations on her ability to retrain. The defendants submit that Ms. Sidhu failed to mitigate her losses by not improving her English language skills, and that furthering her language abilities would assist her in seeking employment. They also submit that the plaintiff's language abilities are not the fault of the defendants, and should not be considered in assessing a loss of earning capacity. They rely on Pan at para. 71 for that argument.

[221] Turning to their first argument, I find no support in Pan for the claim that Ms. Sidhu failed to mitigate her damages by not improving her English language skills. In Pan, Ehrcke J. found that the plaintiff was capable of employment and had mostly recovered from her injuries arising from the accident but had not made efforts to obtain employment. The plaintiff's limited English skills presented an obstacle, but otherwise the plaintiff was "well-suited to any occupation requiring light or heavy physical work" (para. 69). The defendant was not required to compensate the plaintiff on the basis that her limited English was on the only barrier to future employment. Since there was no award of damages in Pan there was also no discussion of reducing that award on allegations of the plaintiff's failure to mitigate by not improving her English skills.

[222] Other cases do not support the principle that a plaintiff must improve their English language skills, in order to mitigate their damages, if their English skills are a barrier to employment. A similar argument was made in Diep v. Cunha, 2015 BCSC 819 at paras. 98-112. In that case the plaintiff had limited English skills and a limited academic capacity for learning English. The plaintiff's limited language skills and limited capacity to learn English were considered as part of the thin skull principle:

98 The defendant also argues that the plaintiff has not made reasonable efforts to learn English in the more than 18 years since she came to Canada, and more particularly, in the four years since the accident, and that her job opportunities would be enhanced if she made greater efforts to learn English. This may be so, but in my view the plaintiff simply does not have the academic capacity to learn English. This was an aspect of the plaintiff's condition when she was injured. It can be likened to a thin skull condition, as discussed in Athey at para. 34:

The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.

[223] Similarly, in Tan v. Mintzler and Miller, 2016 BCSC 1183, the Court declined to reduce the award for loss of future earning on the basis of the plaintiff's limited language skills. At para. 104, the Court noted that "[the plaintiff's] limited language skills do not limit the defendants' liability". The plaintiff in that case was left with only a "light strength capacity" for work, which presented a significant barrier to employment when combined with her limited English language skills. In other cases, courts have addressed language skills in applying contingencies.

[224] Turning to the defendants' second argument, they appear to be arguing that the plaintiff's pre-existing English skills limited her capacity for employment prior to the First Accident. Therefore, her earning capacity was already limited even prior to trial, and that factor should be reflected in assessing her loss of earning capacity due to the Accidents. Justice Ehrcke's findings in Pan indicated that the plaintiff's limited English skills were her only barrier to employment by the time of trial. In that context, it was appropriate to note that her limited English skills were unrelated to the accident and not the fault of the defendants. In other contexts, it is open to the court to consider a plaintiff's language skills in assessing the loss of earning capacity. This appears particularly relevant when the court relies on the capital asset approach, as was the case in Pan. In Kim v. Lin, 2016 BCSC 2405 [Kim BCSC], also assessed on the capital asset approach, the Court considered Ms. Kim's limited ability to communicate in English and the likelihood that she would have learned English as negative contingencies in assessing whether she would have met her stated career objective of becoming a dietician, but for the accident.

[225] There is support in the case law for the defendants' argument that an award for Ms. Sidhu's loss of earning capacity should reflect that capacity prior to the accident, including her language skills. In Teixeira v. Logue, [1998] B.C.J. No. 286, 78 A.C.W.S. (3d) 72, the plaintiff's loss of future income was calculated solely on the basis of her projected future earnings (as a cleaner), and there was no additional loss of capacity factored into the award. Her working capacity was limited to cleaning or other physical labour because of her limited language skills and her age, education, and work experience. In this case, I have calculated Ms. Sidhu's earnings based on what she would have earned working at Superstore.

[226] In my view, it is appropriate to take into account the limitations that Ms. Sidhu has with respect to retraining due to her language abilities. Ms. Sidhu is not required to mitigate by improving her English language skills, and it is appropriate to calculate her future earnings based on her established work history at Superstore. This is the approach taken by the Court in Teixeira: the plaintiff's work history as a cleaner represented her capacity for earning, and she did not have any additional capacity for earning more than that given her limited skill set and limited English.

[227] There remains the issue of whether Ms. Sidhu's symptoms may improve to the extent that she could return to her previous occupation, or some other type of occupation, if she engages in continuing treatment.

[228] There is some hope, since as Ms. Sidhu acknowledged the current antidepressant has improved her mood and her daughters corroborated that statement. There has been some improvement in her physical symptoms. This bodes well for the future.

[229] The medical advice indicates that Ms. Sidhu should be encouraged to engage in normal activities and to return to some type of occupation.

[230] I am not convinced that Ms. Sidhu is permanently disabled for the rest of her life from all occupations. I do accept she will have challenges finding alternative employment due to her age, language abilities, and skills.

[231] Bearing in mind the applicable principles, in light of the evidence and weighing the pertinent contingencies, I assess a fair and reasonable amount is a 30% reduction of the net future income loss. This results in an award of $156,000 for loss of future income earning capacity.

Issue 6: Should an Award be made for Loss of Housekeeping Capacity, and if so, in what amount?

Applicable Law

[232] Housekeeping services have an economic value. The loss or impairment of a plaintiff's capacity to perform them is, therefore, compensable: Harrington v. Sangha, 2011 BCSC 1035 at paras. 155-56.

[233] The governing principles that apply to awards for loss or impairment of housekeeping capacity were summarised by Justice Newbury in Dykeman v. Porohowski, 2010 BCCA 36 at para. 29, where she noted that these claims must be carefully scrutinized.

[234] There is no obligation to demonstrate that replacement housekeeping costs were actually incurred since the award reflects a loss of a personal capacity: O'Connell v. Yung, 2012 BCCA 57 at para. 67.

[235] In Hardychuk v. Johnstone, 2012 BCSC 1359, Justice Dickson made the following comment:

[168] When housekeeping services have been provided by other household members a claim for compensation must be scrutinised carefully. Although grievous injury need not be established, the court should ask whether the services went above and beyond the ordinary give and take to be expected in a home and were required by the plaintiff's injuries or would have been performed in any event. A relatively minor adjustment of duties within a household will not justify a discrete award under this head of damages: Dykeman, Campbell v. Banman, 2009 BCCA 484.

[236] In Kim v. Lin, 2018 BCCA 77 [Kim BCCA], the Court of Appeal considered the principles related to a loss of housekeeping capacity:

[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.

[237] In many cases the loss of an ability to do housekeeping chores are included as a component of the cost of future care and not as a loss of capacity claim. The distinction between the two awards was explained by the Court of Appeal in Westbroek v. Brizuela, 2014 BCCA 48, where the court stated:

[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]

[238] In this case the plaintiff has not made any claim for future care costs for the cost of housekeeping services.

Position of Parties

Plaintiff's Position

[239] The plaintiff advances both a past and future claim for loss of housekeeping capacity on the basis that she has not been able to return to the majority of housekeeping services that she did before the Accidents. She claims that the interference with her housekeeping capacity has been "large and substantial" such that it justifies a separate award. The claim advanced for past loss of housekeeping capacity is based on 40 hours a week at a rate of $25 per hour for 282.86 weeks amounting to $282,260.

[240] The claim advanced for future loss of housekeeping services is based on 35 hours a week for 12 years and then 32 hours a week until age 84, being the average life expectancy for females in Canada. This amounts to a present net value of approximately $1.2 million. The combined claims for past and future loss of housekeeping capacity amounts to just under $1.5 million.

[241] Ms. Sidhu claims that she performed the following tasks before the Accidents:

Cooking (3x/day, 1 hour each, extra hour for snacks)

28

Deep cleaning (2x/week, 2 hours each time)

4

Laundry (averaged to 2.5x/week, 2 hours each)

5

Outdoor maintenance (avg 1.5x/week, avg 2.5hrs each time)

3.75

Driving kids to school (5x/week, 30 mins each)

2.5

Driving kids to games (3x/week, estimated 30 mins)

1.5

Going to bank (every 2 weeks, estimated 30 mins each)

0.25

Extra hour grocery shopping

1

[242] The total services the plaintiff claims she was performing on a weekly basis adds up to 46 hours per week. She makes the claim for past housekeeping services on the basis of 40 hours, accounting for her ability to still do some limited tasks such as driving. The plaintiff

submits that the balance of the medical evidence supports that her housekeeping disability is justified. She references the scoring that Ms. Jameson recorded on her housekeeping as mostly requiring some assistance. Since the Accidents, the plaintiff has required assistance in most aspects of housekeeping.

[243] The plaintiff argues that her ability to do housekeeping is unpredictable and she can only half perform many tasks such as only doing half the laundry, sweeping the floor but not mopping it, and sitting in the shower to clean it.

[244] The plaintiff seeks to quantify this loss using the value of $25 per hour based on the amount used in Amini v. Mondragon, 2014 BCSC 1590 at para. 138 [Amini #2].

Defendants' Position

[245] The defendants submit that the plaintiff is still capable of performing nearly all of the same domestic chores that she did before the First Accident but is doing so with pacing techniques. They further argue that the plaintiff's self-perceived function is inconsistent with her ability to perform housekeeping duties. The defendants argue that any award should be reflected as a nominal sum under the non-pecuniary heading.

Analysis

[246] I begin my analysis with the warning made by the Court of Appeal in Westbroek, that trial courts should adopt a "cautionary approach" to the assessment of loss of ability to perform household tasks "lest it unleash a flood of excessive claims": para. 77. The plaintiff's claim for just under $1.5 million comes within the language of an "excessive" claim. As the Court of Appeal noted in Kim BCCA, there needs to be a "regime of reasonableness" when future losses are predicated upon the uncertain happening of future events: para. 36; see also Kroeker v. Jansen (1995), 4 B.C.L.R. (3d) 178, [1995] 6 W.W.R. 5 (C.A.) at para. 29. There is nothing reasonable about the plaintiff's approach to the loss of housekeeping capacity in this case.

[247] In cases where the plaintiff is not catastrophically injured, awards for loss of housekeeping capacity are modest, particularly where the plaintiff requires some assistance with cooking, cleaning, grocery shopping, laundry, and other tasks, but is not completely incapacitated. As I noted above, in some cases the plaintiff's suffering is compensated as part of the award for non-pecuniary damages. In Amini #2, the case relied upon by the plaintiff for the number of $25 per hour for replacement housekeeping services, the total award for loss of housekeeping capacity was $12,000. The Court found that the plaintiff continued to suffer pain in her neck and shoulders as a result of the accident, and that her condition would continue to improve over time. The plaintiff's husband and daughter performed most of the housekeeping tasks. That award was based on two hours of housekeeping services per week for three years prior to trial and one to two years into the future, at paras. 137-139.

[248] In Broad v. Clark, 2018 BCSC 1068, the plaintiff suffered an injury to her back, which expert opinion indicated would continue to cause her chronic pain. She would require assistance with housekeeping tasks and caring for her child. The Court awarded $1,500 per year until the child turned 18, for a total of $24,000 (para. 332). An award for cost of future care of $199,585 was also made, though it is not clear how much of that award was for housekeeping assistance and how much was for other future care costs (para. 322).

[249] In Farand v. Seidel, 2013 BCSC 323, an award of $51,471 was made on the basis that the plaintiff would require three hours of assistance with heavy housekeeping tasks, every two weeks, extending indefinitely (para. 123). The plaintiff suffered several fractures, including to her tibial plateau and pelvis, as well as soft tissue injuries for which she continued to suffer chronic pain.

[250] The plaintiff relies on Broomfield v. Lof, 2019 BCSC 1155. In that case the Court awarded $80,000 in loss of future housekeeping capacity, based on $3,000 per year for the plaintiff's anticipated life span of 38.4 years. The plaintiff had returned to work part-time but was still limited by her chronic pain. The evidence indicated that she was a fastidious housekeeper prior to the accident. The plaintiff's condition had gradually improved from complete incapacitation to being able to perform some housekeeping tasks with pain at the time of trial. The Court accepted medical evidence that she would need 2 hours of assistance per week (paras. 101-115).

[251] In Kellett v. Stam, 2018 BCSC 1127, the medical experts all agreed that the plaintiff's symptoms would not completely resolve, and even with surgery she would be left with a 15-20% loss of grip, grasp, and pinch strength. She would have permanent limitations with respect to heavy labour, heavy lifting, and sustained or repetitive bending. The plaintiff returned to work but with accommodations and was still not able to meet the physical demands of her job as a social worker. The plaintiff did her own laundry, shopped, and did some of the cooking, and there was potential for improvement with surgery. An award of $45,400 for future loss of capacity was made on the basis that she would continue to be limited in doing heavier chores, and would require 5 hours of assistance per week at a rate of $15 per hour until age 75.

[252] Courts can consider the age at which the plaintiff's children will no longer require care and attention from the plaintiff in making an award for loss of housekeeping capacity. In Jantzi v. Moore, 2020 BCSC 1489, the plaintiff was a homemaker who cared for three children, with the youngest in middle school at the time of the trial. She performed all the childcare, chores, and domestic work prior to the accident, and her husband had since taken on most of those tasks. The Court awarded $90,000 in loss of future housekeeping capacity, reasoning that the plaintiff could still complete a variety of household tasks, would take on more as she improved, and the number of chores would decrease in volume and intensity as her children aged (paras. 186-189).

[253] The plaintiff relies heavily on Kim BCSC and Kim BCCA for her claim of slightly under $1.5 million in loss of past and future homemaking capacity. The evidence in Kim BCSC was that the plaintiff was entirely incapable of caring for her two young children, one born prior to the accident and one after, from the time of the accident up until the time of trial. She suffered soft tissue injuries to her back and SI joints and developed psychiatric disorders, including depression (para. 128). She spent a substantial amount of time in Korea following the accident where her mother and sister could care for the children (paras. 42-44, 50-51, 54-55, and 65-67). She contemplated throwing herself off the balcony of her family's Port Moody apartment at one point because she felt so overwhelmed by the task of caring for her two young children. Her husband quit his job to care for the children and the family burned through their savings. He was still not able to provide sufficient childcare and domestic assistance because of a disability to his left hand that made him unable to grip or carry anything. Ms. Kim's mother-in-law spent 16-20 hours a week cooking, cleaning, and caring for Ms. Kim's second child. The family moved in with Ms. Kim's mother-in-law so they could be closer to her for childcare and housekeeping support, but the strain caused the mother-in-law to drink and express her resentment. Eventually the mother-in-law sold her house and gave some of the proceeds to Mr. Kim so that the family could purchase a house in Nanaimo. At the time of trial, Ms. Kim still spent most of her time in her room instead of caring for her family, and the state of the house was described as messy, dirty, disorganized, and incomprehensible. Ms. Kim's mother-in-law still visited once a month to clean the entire house and stock the freezer with meals, and the family ate instant food if there were no more frozen meals (paras. 64-86).

[254] The loss of past housekeeping awarded in Kim BCSC included an award for daycare costs, as Ms. Kim had put her children in daycare since she could not care for them. That cost was estimated at $1,000 per month for a total of 63 months. Up to the time of trial, the Court concluded that Ms. Kim required $1,000 per month in housekeeping assistance in addition to the daycare costs. The total past loss of housekeeping capacity was $168,000 (paras. 197-200).

[255] In assessing the future loss of housekeeping capacity, the Court found that Ms. Kim would need $1,000 per month in housekeeping assistance, based on an estimate of two to three hours per day at $15 per hour. The Court started with a present value for future loss of housekeeping capacity of $312,360, and then reduced that amount to account for contingencies, including that Ms. Kim's condition might improve and that she would not have devoted as much time to domestic tasks as her children aged. The final award for future loss of housekeeping capacity was $250,000 (paras. 201-206).

[256] On appeal, the court noted that the amount awarded at trial was "very substantial" and "exceeds by a significant amount awards made by other courts in this province." The court repeated its comments in Liu v. Bains, 2016 BCCA 374, where it described an award of $70,000 as being at the high end of the range. There is "no set range or cap on damages" for an award under this head, and Ms. Kim's circumstances were striking when compared to those in Liu (para. 38).

[257] The Court of Appeal reiterated several principles of law in that case. As previously noted, a trial judge has discretion to compensate loss of housekeeping capacity under its own head of damages or as part of the award for non-pecuniary damages, but must pay attention to the rationales underlying each approach. If making an award under a separate head of damages, a court may consider the cost of replacement services but should ensure that the award is commensurate with the plaintiff's loss. The Court described Kroeker as standing for the principle that all awards based on uncertain future events should fall under the regime of reasonableness (paras. 33-36).

[258] The conservative approach to such awards does not require the trial judge to apply some global deduction out of caution (para. 43). It is appropriate for a trial judge to use labour force information when assessing the amount of the award, though such awards are generally assessed rather than calculated (para. 44).

[259] The Court of Appeal held that there was enough evidence before the trial judge to justify the finding that Ms. Kim required two to three hour of assistance per day, at para. 54:

There is no question that the award for loss of housekeeping capacity in this case is significant, but I return to the point that each case turns on its facts. This case involves a plaintiff who was 27 years old at the time of her injury. She has two small children. She had no pre-existing conditions that would have had an adverse effect on her health or capacity. She now has severe and likely permanent physical and psychological injuries. She has suffered a profound loss of capacity to perform housework. Her husband is himself disabled. The trial judge found that she needed between two and three hours of housekeeping services per day until age 70. Given the plaintiff's age, the cost of two to three hours of services per day at $15 per hour until age 70 would undoubtedly be substantial, even deducting for contingences as the trial judge properly did.

[260] In my view there are some serious flaws in the plaintiff's presentation of the loss of housekeeping claim and they fall into the following categories:

a. The value of the replacement housekeeping services being claimed at $25 per hour without any evidentiary foundation;

b. The nature of the services claimed and the hours spent weekly;

c. The evidence of the residual abilities of the plaintiff to do some housekeeping chores; and

d. The claim for housekeeping services to age 84, the anticipated age of death of the average Canadian female.

[261] I will deal with each of these issues below.

Evidence of the Value of Housekeeping Services

[262] There was no evidence led on the part of Ms. Sidhu on the cost of replacement housekeeping services. The plaintiff relied on the case of Amini #2, in which a rate of $25 per hour was used: see para. 138. In this case the trial judge acknowledged that there was no evidence before the Court on the costs of such services but used the $25 per hour rate. The loss of housekeeping capacity awarded was $12,000. The award in Amini #2 pales significantly in respect to the claim being advanced by Ms. Sidhu of just under $1.5 million.

[263] In the case of Amini #1, the plaintiff sought an award based on an hourly rate of $15 per hour for housekeeping services. The Court noted as follows:

[78] There was no evidence led on behalf of Mr. Amini in that regard. I cannot be satisfied that it is appropriate to make a finding that $15 is a reasonable cost for housekeeping services when no evidence was presented and where the only reference to $15 is to decisions reached in other litigation where there was evidence before the Court as to what was a reasonable sum to be paid for household assistance.

[79] In Musgrove v. Elliot, 2013 BCSC 1707, the court recognized the importance of leading sufficient evidence on the cost of housekeeping services. The plaintiff suffered injuries that prevented him from doing laundry since the accident and cooking and doing dishes for a time after the accident.

Measuring this loss presents a different problem in this case. There was no evidence as to the value of any of these services, whether cooking, laundry or otherwise, and so no basis on which to evaluate either the replacement cost or opportunity cost. I note that the court in McTavish expressed a preference for the replacement cost approach over opportunity cost, at paras. 48-49.

Also, nothing has been paid out to replace Mr. Musgrove's contributions to household tasks, so that measure is not available.

I am not prepared to pick a figure out of the air, for either an hourly rate, or for length of time for which replacement services might be reasonable. In Rezaei v. Piedade, 2012 BCSC 1782 (CanLII), 2012 BCSC 1782, the court accepted $15 per hour, partly because it had been used as a measure in earlier decisions, but also because it accorded with evidence in that case of what a witness paid for similar services. In Smusz v. Wolfe Chevrolet Ltd., 2010 BCSC 82 (CanLII), 2010 BCSC 82, the court had some evidence based on the plaintiffs previous work as a housekeeper on which to value housekeeping or cleaning services. I do not have such evidence in this case.

I do not read either Kroeker or McTavish as preventing me from assessing damages for this aspect of Mr. Musgrove's loss as though it were the loss of amenity. If that method of measuring the loss short changes Mr. Musgrove, it is because of his failure to provide more satisfactory evidence by which to quantify his damages.

With that, I award $5,000 for loss of housekeeping capacity.

(at paras. 92-96)

[80] I adopt the reasoning set out in Musgrove, supra. I am satisfied that I should make some assessment with respect to loss of past and future housekeeping capacity. In the circumstances, I award $10,000 for this loss.

[264] In my view, if a plaintiff is going to be advancing a claim of such a magnitude then it is incumbent that they provide evidence to support such a claim. Evidence allows the defendants to properly cross-examine on the claim being made. In this case, the $25 per hour cost of replacement services came up as part of the plaintiff's closing submissions. The defendants had no opportunity to cross-examine or adduce evidence to challenge this valuation. The suggestion that $25 per hour should be used across the board for all the various components of housekeeping services that the plaintiff says have been lost is unrealistic. The claims encompass preparing snacks, driving children to school, going to a bank, and heavier household duties.

[265] I further note that in the Kim BCCA decision, the Court of Appeal accepted the trial judge's cost of $15 per hour as the appropriate measure: para. 54. In Kellett, at para. 101, the Court also accepted a cost of $15 per hour based on Kim BCCA and on the use of $15 per hour in Campbell v. Banman, 2009 BCCA 484.

[266] I see no basis to accept the $25 per hour figure as advocated by the plaintiff without any evidentiary foundation.

Nature of Services Claimed and Hours Spent Weekly

[267] I am also not convinced that the plaintiff is impaired from going to the bank since the First Accident. Her evidence was that the Second Accident occurred when she was going to the bank. It is not clear to me what aspect of banking the plaintiff cannot do. Her evidence is that she can drive to run errands.

[268] The plaintiff claims she spends an hour each day preparing breakfast, lunch, dinner, and snacks for a total of four hours everyday. There was no evidence to support how this amount of time could be spent doing such activities. At the time of the First Accident, none of her children were young. Her husband was apparently off on long distance hauls and not home many days of the month.

[269] I further question the need to spend between 2 to 6 hours, or an average of 3.75 hours, a week doing outdoor maintenance every week of the year. There was no evidence on the size of the lot or of the gardens being maintained. I accept that in spring and summer months more time would be spent doing yard maintenance than in the fall and winter months. The plaintiff's evidence was that her husband assisted with yard work prior to the First Accident. There is no evidentiary foundation for the number of hours being sought.

[270] Once the children have moved out of the home, the amount of household chores should significantly diminish, such as laundry, cooking, and cleaning, since then only the plaintiff and her husband will remain.

Residual Abilities

[271] The plaintiff asserts that being able to sweep but not mop is akin to leaving the floor still dirty or "half clean". It is not clear to me on what basis such an assertion is made. There can be many instances that one sweeps, for example a kitchen floor, but does not also mop it.

[272] The evidence does not support that Ms. Sidhu is permanently disabled from doing household chores. She has to pace herself and for some tasks she needs the assistance of her daughters. I accept that, with her current symptoms, she would not be able to do a full cleaning of the home in the two hours in which she used to accomplish this. She would have to break it down into smaller chunks and in some cases would have to accommodate her symptoms, for example by using her left arm to do some chores such as vacuuming.

[273] Ms. Sidhu advised Ms. Jhaj that she was able to sweep the floors and clean out the sink, and use pacing strategies to do laundry and clean the shower. It appears from Ms. Jhaj's notes she accomplishes those tasks with the assistance of her daughters. The evidence does not support that she cannot carry out those functions.

[274] I accept that Ms. Sidhu perceives herself as being unable to do much and that due the central sensitization diagnosis she feels pain when she tries. However, the global views of the medical experts are that she needs to return to normal activities or she simply will not recover.

[275] I am not convinced that Ms. Sidhu is permanently disabled from performing all household chores. I accept that she needed assistance in doing deep cleaning chores, some laundry, and heavier yard maintenance. I further accept that some assistance in preparing larger meals such as dinner was required. I further note that the heavier yard maintenance would not be required for all the months of the year and that prior to the First Accident, her husband was assisting in these duties. In my view, a more realistic number would be approximately eight hours of assistance a week up to the date of trial.

[276] When dealing with a loss of housekeeping capacity one is assessing a loss of an asset and it is not a precise mathematical calculation: S.R. v. Trasolini, 2013 BCSC 1135 at para. 241.

[277] I am not convinced that the evidence in this case met the same threshold as in the Kim BCSC case. I do not find that Ms. Sidhu has suffered a "profound loss of capacity, both to perform household tasks and to carry out childcare responsibilities: Kim BCSC at para. 190. I find that a fair and reasonable award for the loss of past housekeeping capacity is $40,000.

Length of the Claim

[278] Ms. Sidhu's future improvements depend on her receiving appropriate treatment and continuing to be active. In my view, Ms. Sidhu is likely to continue to have some impairment in household chores while she continues her treatment.

[279] There is no merit in the claim that Ms. Sidhu should be compensated the sum of $25 an hour for 32 to 35 hours a week of housekeeping until she dies, for a total of $1,213,488. At some point in the future Ms. Sidhu would have had to reduce the amount of housekeeping she physically could do as she aged. As already noted, the amount of housekeeping will significantly decline once the children have left home. As counsel for the plaintiff admitted during his submissions, he is unaware of a case that awards anything close to the amount being sought here for loss of housekeeping services.

[280] I note that this quantum of claim is generally advanced in plaintiffs who have been catastrophically injured and who have lost all abilities to do any housekeeping chores. In Kim BCSC, the award for future loss of housekeeping capacity was $250,000 and the plaintiff in that case was completely incapable of caring of doing any household tasks or providing any care for her children. The duration of that claim was from the plaintiff's age at the time of trial, 36, until age 70 (para. 201).

[281] In my view a more reasonable approach would be to compensate Ms. Sidhu for the loss of capacity of carrying out the heavier aspects of home cleaning and yard work up to age 65. A reasonable number of hours would be four hours a week when factoring in that for many months of the year, heavier yard work is not required, and her husband was assisting with yard work prior to the First Accident. A reasonable cost to use would be $20 per hour. There was no evidence adduced as to the costs of these types of services so I have chosen a replacement cost of $5 less than the cost that the plaintiff put forward and $5 more than the cost used in the Kim BCSC case. I note that this is more than $6 over what the plaintiff says she would have earned in the future if she was working. Assuming she would need that assistance until age 65, that is for a further 20 years. In my view, with Ms. Sidhu's pre-existing issues she would have needed assistance with these types of chores in any event of the Accidents by that age. Using the 1.5% discount rate, and the weekly amount of $80, this amounts to an annual expense of $4,160. Using a multiplier of 17.1686 this amounts to a present value of just over $70,000.

[282] In light of all of the evidence, I would assess the future loss of housekeeping capacity at $75,000.

Issue 7: What is the Appropriate Award for the Cost of Future Care?

[283] Ms. Sidhu advances a claim for cost of future care of $56,840. This is based on claims for medication in the amount of $15,000, costs of attending a pain clinic of $20,000 based on the amount awarded in Bhatti v. Ethier, 2018 BCSC 1779, and the costs of seven sessions of either chiropractic or massage every year, at $80 per session, for the next 39 years, being the number of years left until the average age of death of a Canadian female at 84.

[284] The defendants submit that some amount for medication would be reasonable. They suggested it should be in the "few thousands". In addition, a sum of $5,000 to $10,000 should be awarded for some of the other care costs claimed.

Applicable Law

[285] The plaintiff 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. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: Milina v. Bartsch (1985), 49 B.C.L.R. (2d) 33 (S.C.); Spehar et al. v. Beazley et al., 2002 BCSC 1104 at para. 55; Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras. 29-30.

[286] Cost of future care is established if there is medical justification for the claim and if the claim is reasonable: Aberdeen v. Zanatta, 2008 BCCA 420 at para. 42; Milina at para. 84; Tsalamandris v. McLeod, 2012 BCCA 239 at paras. 62-63.

[287] Future care costs are "justified" if they are justified in the medical sense and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services are reasonably expected to be required and likely to be incurred, the plaintiff can recover for such services: Izony v. Weidlich, 2006 BCSC 1315 at para. 74; O'Connell at paras. 55, 60, 68-70.

[288] In Penner v. Insurance Corporation of British Columbia, 2011 BCCA 135 at para. 13, the court noted that common sense should inform awards for cost of future care.

Analysis

[289] Ms. Sidhu did not tender a report from a future care expert. The evidence of her needs comes from some of the expert reports and from the actual treatments that she has had over the years.

Pain Management Clinic

[290] Dr. Waseem was the only expert to recommend attendance at a chronic pain program. I note that it does not appear that Dr. Waseem was aware of Ms. Sidhu's participation in the Jim Pattison pain management course since it is not listed in his report under the heading of "Rehabilitation & Treatments To-Date".

[291] There was no explanation provided by Ms. Sidhu in her testimony as to why she did not attend the last four sessions of the Jim Pattison pain management course. As I previously noted in these reasons, there is some indication that the reason for the non-attendance was the Third Accident. However, since the Third Accident it does not appear that Ms. Sidhu has made any attempt to finish this program. There was no evidence from Ms. Sidhu that she would attend some other type of chronic pain program. There was also no evidence of costs of the program or the specific components any particular pain program is comprised of.

[292] The plaintiff has equated the costs of a pain clinic as granted in Bhatti to the program recommended by Dr. Waseem. I have no evidence that what was recommended in Bhatti at para. 47, being the "attendance at a chronic pain clinic", is the same as a chronic pain program. In Bhatti, although there was no evidence of the cost of a pain clinic or psychotherapy, the defendants conceded the amount of $25,000s, at para. 141. Given that concession, the Court awarded the pain clinic expense at $20,000. There is no such concession in this case.

[293] I am not satisfied on the evidence before me that an award of $20,000 for the attendance at a chronic pain clinic should be made. The plaintiff has already partially attended some pain management courses at Jim Pattison and there is no evidence that she cannot return to complete the classes that she failed to complete in the fall of 2017.

Chiropractic or Massage Therapy

[294] The plaintiff seeks funding for seven sessions of massage or chiropractic until age 84, the average age of death of a Canadian female.

[295] The support for this claim comes from a comment made in Dr. Waseem's report that "Intermittent access to chiropractic and massage therapy are reasonable interventions to help quell her pain when it is exacerbated." In cross-examination, he stated that six to eight sessions of chiropractic and massage therapy per year is necessary to treat flare-ups in the future.

[296] Ms. Sidhu testified that these passive therapies do provide her with some temporary relief.

[297] I am not convinced that funding for these therapies until the average age of death of a Canadian female is warranted. As Ms. Sidhu ages she, like many, will experience the normal aging aches and pains. I am of the view that funding should be provided until the age Ms. Sidhu is likely to retire, which I have found to be 60 years old.

[298] This would consist of 15 years of seven sessions at $80. The defence did not dispute that the cost of $80 was unreasonable. I further note that the amount claimed by the plaintiff of $21,840 was not a present value figure. The plaintiff took the costs of $560 and multiplied it by 39 years to get the $21,840. Using a 2% discount rate and a multiplier of 26.9026 the present value of the plaintiff's amount should be $15,065.

[299] I have calculated the present value of $560 annually for 15 years, using the 2% discount rate and a multiplier of 12.8493 amounting to a present value sum of $7,195 which is the amount I award.

Medications

[300] Ms. Sidhu is currently taking a number of different medications. In 2019 she spent approximately $150 on prescription medication. This was what she paid but the total costs of the medications in 2019 amounted to approximately $553 annually. Assuming the medications cost an equivalent amount until age 84, this amounts to a present value of $14,875. Dr. Sidhu was of the view that Ms. Sidhu would probably need medications in the future. There is also the potential Ms. Sidhu may decrease or may need to increase the amount of pain medication she is taking. There was also evidence that she takes Advil and Tylenol when needed. Taking into consideration all of the evidence, in my view, a reasonable award for future medication expenses would be $10,000.

[301] The total amounted awarded for future care costs is $17,195.

Issue 8: What Amount Should be Awarded for Special Damages?

[302] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: X. v. Y., 2011 BCSC 944 at para. 281; Milina at para. 78.

[303] Ms. Sidhu has actively sought treatment using a number of different therapies. She has attended for massage therapy, physiotherapy, acupuncture, and counselling. She also incurred medication costs. She had a private MRI of her shoulder, cervical spine, and lumbar spine by Fraser Valley MRI on July 9, 2015 at a cost of $2,700. She had a further MRI of her lumbar spine on November 25, 2016 at Surrey MRI Services Inc. at a cost of $888.28. Mileage is claimed for the various visits to health care professionals at $0.50/km as per para. 60 of Grewal-Cheema v. Tassone, 2010 BCSC 1182. The total claim for special damages presented is $27,082.97.

[304] The defendants dispute that the $3,588.28 for the private MRIs should be reimbursed. They rely on the decision of Scelsa v. Taylor, 2016 BCSC 1122, where Justice Brown disallowed the cost claimed for a private MRI as the plaintiff failed to show an urgent need to obtain a private MRI when a publically funded option was available: see para. 237. The defendants

also rely on Lewis v. Rubboli, 2018 BCSC 17, Owen v. Peljhan, 2017 BCSC 423, and Cooknell v. Quinn, 2013 BCSC 1653 to argue that the costs for a private MRI should be disallowed on the grounds that the evidence was insufficient to justify recovery of the cost. In this case, the defendants argue there was no evidence of the need for a private MRI and as such the costs should be disallowed.

[305] They further dispute the amount of $472.50 for family counselling on the basis that there was no statement or invoice produced to support this amount.

[306] The plaintiff submits that the MRIs were recommended by Dr. Nadeau as part of her consult reports and Ms. Sidhu should not have had to "languish" on a wait list.

[307] I note in the consult report of Dr. Nadeau dated November 4, 2016 that a repeat MRI of Ms. Sidhu's lumbar spine was needed to reassess her disc herniation. Dr. Nadeau notes: "We have given the patient a FHA MRI request. This is an ICBC claim and there she will get an expedited MRI through her case manager/lawyer". I accept that the November 26, 2016 MRI was done to assist Dr. Nadeau in her assessment of the patient.

[308] It is not clear to me on what basis the July 9, 2015 MRIs were ordered. There was no evidence adduced on the wait times for MRIs in the summer of 2015, or any reason why these MRIs had to be performed privately. If a plaintiff wishes to use the private MRI clinics and seek reimbursement for their costs, some evidence should be adduced to support the need to go privately.

[309] As such, I am of the view there was some evidence before me to justify the costs of the private lumbar MRI conducted on November 26, 2016, but not the MRI on July 9, 2015.

[310] There was no reference to the need for family counselling in the evidence of the plaintiff and no invoice provided in support. This amount will not be awarded.

[311] Ms. Sidhu is entitled to be reimbursed for the other special damages claimed. The amount awarded is $23,910.47.

Conclusion

[312] In summary, Ms. Sidhu is entitled to the following damages:

a.

Non-pecuniary damages:

$145,000

b.

Past wage loss:

$56,500

c.

Future loss of earning capacity:

$156,000

d.

Cost of future care:

$17,195

e.

Past loss of housekeeping capacity:

$40,000

f.

Future loss of housekeeping capacity:

$75,000

g.

Special damages:

$23,910.47

TOTAL

$513,605.47

[313] The plaintiff is entitled to interest on the past wage loss and special damages.

[314] If the plaintiff seeks an award for tax gross up and management fees, and if the parties cannot agree on these issues, further written submissions can be made. Those submissions would be covered by the same timelines set out below respecting any cost submissions.

[315] If the parties cannot agree on costs, the plaintiff is at liberty to submit written submissions within 60 days of the date of these reasons. The defendants are to submit written submissions within 15 days of the receipt of the plaintiff's submissions. Any reply submissions must be submitted within 10 days of the receipt of the defendants' written submissions.

"Forth J."

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