

CANADA / JUDGMENT

Singh v. Reddy

2020 BCSC 448

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 448 Singh v. Reddy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Singh v. Reddy,

2020 BCSC 448

Date: 20200327

Docket: S123543

Registry: New Westminster

Between:

Priscilla Singh

Plaintiff

And

Dorothy Reddy also known as Sashi Reddy,

Then India Sanmarga Ikya Sangam Educational

and Cultural Society and Irmandade Portuguesa

Do D.E. Santo Cultural Society of B.C.

Defendants

Before: The Honourable Madam Justice Warren

Reasons for Judgment - Damages Assessment

Counsel for the Plaintiff:

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C. Cairns

J.T. Hamel

Place and Dates of Trial:

New Westminster, B.C.

July 8-12, 2019

July 15-19, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 27, 2020

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Introduction

- [1] These reasons for judgment pertain to a damages assessment for personal injuries suffered by the plaintiff, Priscilla Singh, in an assault committed by the defendant, Dr. Dorothy Reddy.
- [2] Ms. Singh sustained the injuries on November 17, 2007, at a dinner dance at a hall in Surrey owned by the Irmandade Portuguesa Do D.E. Santo Cultural Society of B.C. The dinner dance was a fundraiser hosted by the Then India Sanmarga Ikya Sangam Educational and Cultural Society (the "Sangam Society").
- [3] Ms. Singh's claim against the two societies was resolved. The question of Dr. Reddy's liability was severed from the assessment of Ms. Singh's damages. I presided over the trial of Dr. Reddy's liability. On February 22, 2018, I found that Dr. Reddy intentionally pushed Ms. Singh to the ground causing Ms. Singh to be injured, and that Dr. Reddy was liable for the damages suffered by Ms. Singh as a result. In reasons for judgment indexed as *Singh v. Reddy*, 2019 BCCA 79, the Court of Appeal dismissed Dr. Reddy's appeal of that order. The task, now, is to quantify Ms. Singh's damages.
- [4] Ms. Singh seeks an award of in excess of \$1 million. Specifically, she seeks \$200,000 in non-pecuniary damages; \$164,961 (gross) for past loss of income; \$547,184 for future loss of income earning capacity; \$93,371.56 for costs of future care; \$10,000 for loss of housekeeping capacity; \$4,895.01 for special damages; and \$35,000 in aggravated or punitive damages, plus special costs for the liability portion of the trial and costs at Scale B for the damages assessment. In addition, the provincial government asserts a claim in the amount of \$8,575.23 pursuant to the Health Care Costs Recovery Act, S.B.C. 2008, c. 27.
- [5] The defence submits that Ms. Singh has established a claim to damages of about \$140,000. Specifically, the defence says an award of non-pecuniary damages of \$70,000 is appropriate, but reduced by 15%, to \$59,500, to reflect Ms. Singh's failure to mitigate. The defence submits that Ms. Singh has established a claim for past loss of income of \$62,152.30. The defence concedes that Ms. Singh has established a claim for loss of past housekeeping capacity and submits that \$5,000 would be an appropriate award under that head. The defence concedes that Ms. Singh has established a claim for costs of future care, specifically, for the cost of ongoing medication, and submits that \$5,000 would be an appropriate award under that head. The defence submits that Ms. Singh has not established a claim for damages for loss of future earning capacity. The defence says Ms. Singh has established special damages of \$2,255.01. The defence concedes Dr. Reddy's liability for the provincial government's claim.

Background

- [6] Ms. Singh is 46 years old. She lives with her husband, Jaykumar Sharma, and their teenaged son in Surrey.

- [7] At the time of the assault, in November 2007, Ms. Singh was 33 years old. She was married to Mr. Sharma. Their son was three years old. Ms. Singh was employed in an administrative position with the Department of Fisheries and Oceans ("DFO"). Mr. Sharma owned a retail store called Sari-Wali Creations, which specialized in Indian-style clothing and jewelry.
- [8] The Sangam Society is a cultural, educational and religious society. Its members, or most of them, are immigrants from Fiji who are of Indian descent, adhere to the Hindu religion, and attend a temple operated by the Society.
- [9] Many of Mr. Sharma's customers at Sari-Wali were members of the Sangam Society. Neither Ms. Singh nor Mr. Sharma were members of the Sangam Society but, through his business, they had become acquainted with several of the members and had developed friendships with some of them.
- [10] Prior to the dinner dance in question, Mr. Sharma and Ms. Singh had attended several celebrations and dances hosted by the Sangam Society. They did so, in part, to promote Mr. Sharma's business. Mr. Sharma had also donated saris and jewelry to the Sangam Society for fundraising events.
- [11] Dr. Reddy and her husband were members of the Sangam Society. Ms. Singh and Mr. Sharma did not know Dr. Reddy or Mr. Reddy, but the two couples had mutual friends who were members of the Sangam Society.
- [12] At the dance on November 17, 2017, Ms. Singh and Mr. Sharma sat at a table with another couple, Jenny and Balraj Jagroop. Dr. Reddy and her husband sat at the table next to them, with two other couples. One of those couples, Ranjana and Bala Rangaiya, were friends of Ms. Singh and Mr. Sharma. Ms. Singh and Mr. Sharma were acquainted with the other couple, the Murtis.
- [13] On the evening in question, about 40 minutes after the dancing began, Dr. Reddy inexplicably walked up to Ms. Singh, on the dance floor, and pushed her to the ground. Ms. Singh landed on her left elbow. It was obvious that her arm was injured. She was in intense pain and was assisted off the dance floor by her husband and other on-lookers. Dr. Reddy denied having anything to do with Ms. Singh's fall, but I found otherwise.
- [14] There is no dispute that Ms. Singh broke her left elbow when she was pushed to the ground by Dr. Reddy and that she underwent surgery a couple of days later, during which a portion of her elbow was replaced with a steel prosthesis. The nature and seriousness of any associated injuries, and the extent of any ongoing symptoms and disability is in dispute.
- [15] An orthopedic surgeon, Dr. Robert Froh, performed Ms. Singh's surgery a few days after the assault. She spent about five days in the hospital. She testified that her recovery from the acute phase of her injury took about 18 months. She was unable to work during that time. She spent the first few weeks after the surgery with her parents because she could not care for herself, and her husband and son had gone to India to tend to her mother-in-law who had suffered a stroke. She took pain medication, both prescription and over-the-counter,

which included Vimovo, Tramadol and Cymbalta. She attended physiotherapy for about six months and did exercises to strengthen her arm.

- [16] Sari-Wali had been in business for about two years prior to the assault. Ms. Singh had assisted Mr. Sharma in the business. Among other things, she helped with business development by participating in community events, and she worked in the store on weekends providing customer assistance. She testified that she was unable to do any of that after the injury.
- [17] Mr. Sharma closed Sari-Wali in October 2018. Ms. Singh alleges that the assault destroyed the goodwill between her family and a large portion of the Fijian immigrant community, and the ill will ultimately ruined her husband's business. Ms. Singh's friendship with Mrs. Rangaiya ended three to four weeks after the dance, when Mrs. Rangaiya said she would not be a witness because she did not want to do anything inconsistent with the interests of the Sangam Society. Mr. Sharma's relationship with Mr. Rangaiya also came to an end, as did their friendship and association with other members of the Sangam Society. Since the incident, few if any members of the Sangam Society shopped in Mr. Sharma's store. Ms. Singh did not produce any business records for Sari-Wali and she does not seek a pecuniary award to compensate for this alleged loss. Nevertheless, she submits the loss of the business is a factor that is relevant to the assessment of her non-pecuniary damages.
- [18] Ms. Singh returned to work at the DFO in September of 2009, about 22 months after the assault. She participated in a month-long graduated return program. The DFO provided her with an ergonomic assessment and adapted her workstation and equipment accordingly. She continues to work at the DFO, but says she has lost opportunities for promotions because of her ongoing pain and its sequelae. Specifically, she says her injuries prevent her from working downtown, where there are far more opportunities for advancement.
- [19] Ms. Singh has a long history of epilepsy for which she has taken valproic acid for years. She suffered a whiplash type injury in a 2005 motor vehicle accident. Nevertheless, she was in good health before the assault and had no relevant pre-existing medical history.
- [20] Ms. Singh was in another motor vehicle accident in July 2015. Her vehicle was rear-ended. She testified that she sustained whiplash type injuries that resulted in pain in her neck and tightness in her shoulders and low back. She said she fully recovered from these injuries by about August 2015, and did not miss any work because of them, as she was on vacation at the time of the accident.
- [21] Ms. Singh was in a third motor vehicle accident in May 2018. She testified that this caused a flare-up of her 2015 whiplash injury. She was off work for about a week after this accident, with back pain. She aggravated her back pain at work in March or April of 2019, and again in May or June 2019 when playing badminton. She was off work for a week following each of those aggravations. She testified that she continues to suffer from mild back pain that is aggravated by swinging and twisting motions.

- [22] Ms. Singh testified that since the assault she has suffered constant elbow pain that radiates from her elbow down her arm to her hand and, occasionally, up to her shoulder. Initially, she said the nature and severity of this pain has not changed since before the 2015 motor vehicle accident. Later, she said that the 2018 motor vehicle accident aggravated the pain in her left arm and the aggravation was so severe that she went to the hospital in June 2018 and had an x-ray. She said her left arm symptoms have returned to their pre-2018 motor vehicle accident level. She said the intensity of the pain varies and is exacerbated by movement, such as by filing, typing and cooking. She said that by the Friday of a work week, the pain approaches 6 out of 10 on a 10-point pain scale. She cannot fully extend her left elbow. When she extends both arms, her left hand is about 1 or 1 ½ hand lengths closer to her body than her right hand.
- [23] Ms. Singh continues to take over-the-counter pain medication to manage her symptoms. She also takes Cymbalta, which her doctor prescribed in 2009 or 2010 in response to her complaint that the pain was affecting her concentration and focus at work. She testified that she occasionally takes cyclobenzaprine on a Friday or Saturday night, which helps her sleep. She said that medication "knocks her out" and makes her groggy, so she does not take it during the week, when she has to get up early for work.
- [24] Before the assault, Ms. Singh was an active and social person. She said she was energetic and spontaneous. She slept well. She swam two to three times a month; played badminton; enjoyed cooking; hosted weekly dinners at her home; attended social functions, such as dances, with friends and family; and went to movies. She and Mr. Sharma went out together every Saturday night. As mentioned, she worked in her husband's store on weekends.
- [25] Ms. Singh testified that the pain and associated fatigue limits what she can do, and she is depressed and angry about the assault. She is exhausted by the pain, which affects her sleep, and has a decreased ability to concentrate. Although she is right-handed, the injury to her left arm has reduced her ability to lift and carry. She can no longer lift above her head. She cannot type as fast as she used to and computer work causes soreness in her left hand. She has more recently noticed tingling in her left arm and hand when typing. She must take frequent breaks at work.
- [26] Ms. Singh testified that she still goes swimming, but she can no longer perform proper strokes. She can no longer play badminton. She said she rarely goes out after work due to fatigue. She goes to movies less often than before the assault. She still hosts dinners with friends but only about once every two to three months, and she finds doing so to be a chore. Her ability to cook has been affected. For example, she enjoyed making roti, but now finds that after rolling out five or six pieces, her arm is too sore to continue. She stopped helping out in her husband's store on weekends. Her pain resulted in a cessation of her sexual relationship with her husband for several months after the assault, and although they have resumed sexual relations, the frequency is significantly reduced due to her fatigue.

- [27] Ms. Singh testified that her homemaking capacity has been affected by the injury to her left arm. She said she can still perform some homemaking tasks but everything takes her longer to complete and she leaves the heavier items for her husband, who now performs between 60% and 70% of the housework. She testified she can do the laundry but she needs help changing bedsheets. She said she can do light vacuuming with an upright vacuum, but her husband does the heavier vacuuming. She can no longer wash pots and pans. She does light dishwashing but leaves the heavy items for her husband. Her husband does the major cleaning of the bathrooms.

Medical Evidence

- [28] Ms. Singh relied on evidence from her family doctor, Dr. Jose Benitez-Lazo; Dr. Spencer Lui, an orthopedic surgeon who conducted medical/legal assessments of Ms. Singh on August 28, 2012 and February 26, 2019; Dr. Rhonda Shuckett, a rheumatologist who conducted a medical/legal assessment of Ms. Singh on March 22, 2019; and Mr. Dominic Shew, an occupational therapist who conducted functional capacity evaluations of Ms. Singh on August 29, 2012 and April 2, 2019.
- [29] The defence did not tender any expert medical evidence, but relied on the evidence of Deanna Bicego, Shanu Jadhvani, and Navjot Sarao, each of whom is a physiotherapist who has treated Ms. Singh.
- [30] There is no dispute about the nature and cause of Ms. Singh's injuries, although the severity of her ongoing symptoms is contested. As a result of the assault, Ms. Singh sustained a left radial head elbow fracture that required radial head excision and replacement with a steel prosthesis. In addition, the medical evidence as a whole establishes, on a balance of probabilities, that as a result of the assault she sustained:
- (a) ongoing pain in the left elbow;
 - (b) a nerve injury in the left elbow that is likely the cause of pain and tingling in the left forearm and hand;
 - (c) deformity of the left elbow and abnormal functional range of motion, described by Dr. Shuckett in cross-examination as "very impaired range of motion" in the left elbow;
 - (d) left shoulder injury with rotator cuff tendinosis and potential rotator cuff tendon tear causing pain, decreased range of motion and dysfunction in the shoulder; and
 - (e) myofascial pain in the left neck with mild decreased range of motion in the neck, likely due to continuous left-arm guarding, which may have been exacerbated to some degree by the 2018 motor vehicle accident.
- [31] In terms of prognosis, Dr. Shuckett expressed the opinion that improvement in Ms. Singh's left elbow and the symptoms in her left arm and shoulder is unlikely. In her view, Ms. Singh faces the possibility of future surgery to replace the left elbow. This surgery could attenuate

the elbow pain but it would be a major undertaking with significant risks including risks of ongoing deformity, loss of function, infection and even loss of the arm. Dr. Shuckett's opinion is that Ms. Singh is at high risk of osteoarthritis in the left elbow, and that the pain and loss of function will probably get worse. In her view, because of the structural changes in the elbow, muscle-strengthening exercise is not likely to reduce the risk of future osteoarthritis. She expressed the view that it is "highly tenable" that Ms. Singh may leave work prematurely as a result of the pain and decreased function in her left upper extremity.

- [32] Dr. Lui's prognosis is that there is little chance of any further improvement in Ms. Singh symptoms and she has been left with a permanent disability. In his first report dated September 13, 2012, following his assessment of Ms. Singh on August 28, 2012, Dr. Lui recommended anti-inflammatory and pain medication, physiotherapy to maintain range of motion and strength, and massage therapy. At trial, nearly seven years later, his view was that additional physiotherapy is unlikely to result in improvement, although ongoing stretching exercises could be beneficial. He also expressed the view that there is a possibility of future surgery to replace the left elbow but said that it is "difficult to predict at this point exactly what time in the future that further surgery would be necessary". He shared Dr. Shuckett's opinion that Ms. Singh is a high risk of osteoarthritis in the left elbow. In his view, Ms. Singh sustained damage to the cartilage in the elbow at the time of the assault, and this has contributed to the risk of future osteoarthritis.
- [33] Dr. Benitez-Lazo expressed the opinion that full recovery is unlikely and future osteoarthritis of the elbow is possible. In a report dated September 17, 2012, he recommended consultation with a kinesiologist for at least three months, stretching, heat, swimming and the use of Cymbalta. He said cortisone injections into the elbow could be tried to see if they provided symptomatic relief.
- [34] It is Dr. Shuckett's opinion that the 2018 motor vehicle accident did not affect the natural progression of Ms. Singh's elbow injury but may have temporarily aggravated her left shoulder pain. In her view, the 2018 motor vehicle accident resulted in a low back injury causing Ms. Singh to suffer low back pain and decreased range of motion in the lower back, which affects her sitting tolerance and general quality of life. Dr. Lui's opinion is that the 2015 and 2018 motor vehicle accidents resulted in injuries to Ms. Singh's neck and back that are unrelated to her current left elbow and shoulder symptoms.
- [35] Mr. Shew conducted two thorough functional capacity evaluations of Ms. Singh, which involved interviews, range of motion testing, and functional testing, including work simulation activities tailored to her work as an administrative assistant. He concluded that Ms. Singh completed both evaluations with high levels of physical effort such that the testing results accurately represent her physical and functional abilities and limitations.
- [36] In his first report following an assessment on August 29, 2012, Mr. Shew concluded, in part:

[Ms. Singh] consistently demonstrated restrictions tolerating tasks requiring vertical and horizontal reaching with her left upper extremity. In addition, she demonstrated restrictions tolerating tasks requiring static positioning of her head and neck while working overhead or in a seated position. There were measured restrictions in left upper extremity strength as well as one handed lifting with her left upper extremity. Overall there were restrictions in her mobility (cervical, left shoulder and left elbow/forearm).

With respect to avocational or unpaid tasks, test results and clinical observations indicate that she is capable of safely performing light homemaking chores such as cleaning countertops, dusting, et cetera, as long as she paces herself appropriately throughout the day and week.

Regarding her capacity to complete more physically demanding household activities such as manoeuvring furniture, cleaning the washrooms, seasonal cleaning, et cetera, test results and clinical observations suggest that she is capable of safely performing some of these tasks in a safe manner. However, she is likely to experience more difficulty with tasks requiring heavier demands and those that require vertical and horizontal reaching with her left upper extremity and awkward positioning of her head and neck for prolonged and repetitive periods. As such, in order to remain safe and functional she will require assistance with the manoeuvring of loads above her safe, measured capacity and those requiring awkward positioning of her left upper extremity and upper body.

Clinical observations indicate that she met the functional mobility and coordination to perform the short periods of the basic body positional demands typically required of [her] line of work. However, Ms. Singh demonstrated difficulties tolerating tasks requiring prolonged and repetitive positioning of her neck, head, upper body and left upper extremity while reaching in front and to the sides of her body in a seated position (e.g., static positioning of the spine while writing, using a computer, et cetera).

Overall, Ms. Singh is likely safe and gainfully employable at this occupation since she demonstrated the ability to safely perform the basic demands. However, her difficulties as described above indicate that she will require accommodations such as the ability to change positions and take breaks throughout her shift in order to manage her symptoms while attempting to remain productive. In addition, she will require ongoing ergonomic equipment and an appropriately set up workstation.

[37] Mr. Shew reassessed Ms. Singh on April 2, 2019. He found that the range of motion in her left arm and shoulder had decreased since his initial assessment nearly seven years earlier. In his second report following the reassessment, Mr. Shew concluded, in part:

[Ms. Singh] demonstrated functional restrictions with tasks that applied stress to her neck/upper back when completing activities requiring sustained head/neck positions and vertical reaching.

She also demonstrated functional restrictions with tasks that applied stress to her lower back when completing activities requiring prolonged stooping, repetitive bending, prolonged crouching, repetitive squatting, and prolonged "work-intensive" sitting.

Additionally, she demonstrated the most significant functional restrictions with tasks that applied stress to her left upper extremity when completing activities requiring horizontal reaching, and vertical reaching.

Given her restrictions involving her neck/upper back, lower back, and more so her left upper extremity, and the need for work modifications in order for her to remain employed in some capacity, Ms. Singh is likely at a competitive disadvantage compared to individuals that do not possess her same physical and functional limitations.

In terms of strength, Ms. Singh demonstrated sufficient strength to safely manage the demands of [her] line of work.

Specific to the demands of her occupation, she did not demonstrate any significant functional limitations with tasks involving hand dexterity, grasping, horizontal reaching with her right upper extremity, and "casual" sitting. She, however, demonstrated neck and lower back restrictions with extended periods of "work-intensive" sitting (i.e., static positioning of the neck and spine while sitting to complete paper or computer tasks). She demonstrated more significant restrictions with tasks involving the use of her left upper extremity when reaching forward such as that required when completing "work-intensive", seated activity (i.e., reaching when typing, completing paperwork, et cetera). Thus, she requires breaks to accommodate for her neck and lower back restrictions, but more so for her left upper extremity limitations. Additionally, she requires appropriate ergonomic equipment and an appropriately set-up workstation to best manage her symptoms to remain functional.

Overall, Ms. Singh is likely safe and employable to continue in [her] line of work on a part and full time basis. However, due to her restrictions involving her neck, lower back, and left upper extremity, she will need the opportunity to take breaks to rest, stretch, and/or change positions, as well as suitable ergonomics when completing desk-type (paper and computer) activities.

In terms of her capacity to manage avocational tasks, although there were measured and observed restrictions related to tasks that stressed her neck/upper back and lower back, but more so involving her left upper extremity, her residual capacity is likely functional for most general, day-to-day demands .

Test results imply that if she is to participate in unpaid activities that require moderate to higher level physical demands and particularly those that apply substantial stress to her neck/upper back, lower back, and more so to her left upper extremity, there will likely be a severe aggravation of her symptoms resulting in a gradual reduction in her abilities over time. Examples would include, but not be limited to, extended periods of overhead activity when cleaning walls, handling moderate loads such as when grocery shopping, handling furniture, et cetera. During the completion of tasks, she will need to break up her activities to manage her symptoms, and receive assistance with activities that exceed her safe and durable capacity, adversely affect her ability to remain functional, and/or that significantly aggravates her symptoms.

- [38] After his first assessment in August 2012, Mr. Shew recommended that Ms. Singh remain as active as possible, within her tolerance; that she participate in a "short bout of update sessions" with a kinesiologist to assist her in creating an individualized, active exercise program; and that she thereafter continue to exercise at a gym or in her home. He also recommended some particular ergonomic equipment for her workstation. After his reassessment in April 2019, Mr. Shew continued to recommend update sessions with a kinesiologist to assist Ms. Singh in creating an individualized exercise program.
- [39] As mentioned, the defence relied on the evidence of three physiotherapists who treated Ms. Singh. Deanna Bicego treated Ms. Singh from late 2007 to May 2008. Her focus was Ms. Singh's elbow injury. She noted improvement in Ms. Singh's range of motion, grip strength and function over the course of treatment. Shanu Jadhvani treated Ms. Singh at Optimal Physiotherapy, in July and August 2018, for injuries she sustained in the May 2018 motor vehicle accident. Ms. Jadhvani stopped working at Optimal in September 2018, and Navjot Sarao took over Ms. Singh's treatment. She continues to treat Ms. Singh for the injuries Ms. Singh sustained in the 2018 motor vehicle accident.

Credibility

- [40] The defence urged me to find that Ms. Singh was not credible in her account of the nature and severity of the symptoms associated with the elbow injury, and the impact those symptoms have had on her life. Defence counsel submitted that there were inconsistencies in Ms. Singh's evidence with respect to the existence and progression of particular symptoms and that she downplayed the impact of the 2015 and 2018 motor vehicle accidents. Defence counsel emphasized that there were significant periods during which Ms. Singh saw her family doctor but did not complain about elbow pain, and submitted this calls into question the credibility of her current complaints.
- [41] There were some inconsistencies in Ms. Singh's evidence with respect to the existence and progression of particular symptoms. For example, she testified that her elbow pain has been constant since the assault; whereas, an entry in a physiotherapy clinical record for April 2008 noted that her left elbow pain was "intermittent" and a September 30, 2008 clinical record indicated she said her elbow pain was "precipitated and exacerbated with physical activity". There were also some inconsistencies in her evidence with respect to whether and to what extent the 2015 and 2018 motor vehicle accidents aggravated the symptoms in her left arm and shoulder. However, none of this affected my assessment of Ms. Singh's credibility or the reliability of her general account of her symptoms. Such inconsistencies are to be expected when a witness is trying to recount details of symptoms over more than a decade: *Edmondson v. Payer*, 2011 BCSC 118 at para. 35.

- [42] Similarly, the defence emphasized that, at trial, Ms. Singh complained of symptoms, such as headaches and problems with her memory and concentration, which she did not mention during her examination for discovery in 2012. At trial, Ms. Singh testified that she did not suffer from those symptoms prior to 2012. There is nothing in that explanation that gives rise to any credibility concerns.
- [43] Further, the fact that there were periods during which Ms. Singh saw her family doctor but did not complain about elbow pain is not, in itself, evidence of anything. There may be cases where a plaintiff's description of her symptoms is clearly inconsistent with the failure to seek medical attention, permitting the drawing of an adverse conclusion about the plaintiff's credibility. However, in other circumstances, a plaintiff's failure to continue to complain to her general practitioner may be entirely reasonable. For example, as observed by Justice Smith in *Edmondson* at para. 37, "a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment" and "a plaintiff who seeks medical attention for unrelated conditions is not obliged to recount the history of the accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it".
- [44] In this case, after about March 2010, Ms. Singh rarely complained of elbow symptoms to Dr. Benitez-Lazo, although she saw him for unrelated matters. Dr. Benitez-Lazo explained that during at least some of this period, Ms. Singh was taking Cymbalta for depression and pain relief. There is nothing to suggest that she had any reason to expect that anything further could be done for her elbow pain, and nothing to suggest that she had reason to continue to mention what had become a chronic condition.
- [45] I generally found Ms. Singh to be a credible witness and I accept her general account of the nature and severity of her symptoms, and their progression. In other words, I accept that since the assault, she has suffered from constant or nearly constant elbow pain, of varying intensity, and that over time the pain has interfered with her sleep and contributed to symptoms of low mood. However, she displayed a tendency to exaggerate the impact of the assault-related injuries on her life. I will give three examples.
- [46] Ms. Singh insisted that the loss of clientele after the assault caused the failure of her husband's business. However, she did not adequately explain the foundation for that conclusion given that Sari-Wali did not close until ten years after the assault. She did not reference any business records that would permit an analysis of the cause of the failure. In the circumstances, her claim that the assault was the primary, if not only, cause of the business failure was unreasonable.
- [47] Ms. Singh also overstated the impact her pain medication had on her decision to terminate a pregnancy in 2009, suggesting she would not have terminated the pregnancy but for the assault. She admitted that she has taken valproic acid for epilepsy, for years, and this is associated with an increased risk of a foetus developing spina bifida. Her son has mild spina

bifida. She claimed that her obstetrician was more concerned about her ongoing use of Tramadol for pain than he was about the risk of her having another child with spina bifida, but her testimony about her obstetrician's concern is hearsay and not admissible for the truth. No expert evidence was lead about the risks of using either valproic acid or Tramadol during pregnancy. However, it was apparent from Dr. Benitez-Lazo's evidence that Ms. Singh was resistant to discontinuing valproic acid when she learned she was pregnant, and this was at least a significant factor in the decision to abort the pregnancy. Again, in the circumstances, her claim that the use of pain medication for the injury she sustained in the assault was the primary, if not only, factor that resulted in her decision to undergo an abortion was unreasonable.

- [48] Finally, when describing the affect of her symptoms on her lifestyle, Ms. Singh did not try to isolate the effects of the elbow injury from those that resulted from the motor vehicle accidents in 2015 and 2018, and she minimized the affect of the motor vehicle accidents. It is apparent that she complained of and sought treatment for soft tissue injuries to her neck and back following each of those accidents. In his April 12, 2019 report, after his reassessment of Ms. Singh, Mr. Shew noted functional restrictions with tasks that applied stress to her neck, upper back and lower back. Ms. Singh attended physiotherapy for at least a year following the 2018 accident. In the circumstances, it was not reasonable for her to essentially ignore the impact of the motor vehicle accidents on her quality of life when giving her testimony at trial.
- [49] I did not form the view that Ms. Singh was deliberately dishonest. However, in some respects her testimony displayed an inability to resist being influenced by her interest. This may be due to the significant anger she still feels about having been assaulted. As justified as that anger is it has, in my view, clouded the reliability of her account of the impact of the elbow injury on her life. This in turn has affected my assessment of her claim and, in particular, her insistence that the injuries she sustained in the assault continue to negatively affect her earning capacity in a substantial way.

Causation

- [50] The general test for causation, established in *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, is the "but for" test: "but for" the accident, would the plaintiff have suffered the injury in question? In *Athey*, the Court also stated that a plaintiff need not establish that the defendant's negligence was the sole cause of the injury. If there are other potential causes, the defendants will still be found liable if the plaintiff can prove the accident was a cause of any ongoing harm. In other words, the plaintiff must show, on a balance of probabilities, that the injury or harm would not have occurred without the defendant's negligence: *Clements v. Clements*, 2012 SCC 32.

[51] From Ms. Singh's testimony and the medical evidence I have summarized above, I have no difficulty concluding that the assault caused a left radial head elbow fracture that required radial head excision and replacement with a steel prosthesis. I accept Ms. Singh's account of her pre-accident health as well as the initial severity and gradual progression of her symptoms. On the basis of her evidence and that of the medical experts, I make the following findings:

- (a) Ms. Singh was in good health prior to the assault and had no significant pre-existing pain or physical limitations.
- (b) In addition to the elbow fracture, Ms. Singh sustained an injury to the nerve in her elbow and a left shoulder injury when she was pushed to the ground.
- (c) At the time of the assault and in the immediate aftermath, Ms. Singh suffered from severe pain in her elbow that significantly interfered with her daily activities and prevented her from working.
- (d) Ms. Singh's recovery from the acute phase of her injury took about 18 months, but she has been left with ongoing, chronic elbow pain of varying intensity; pain and tingling in her left forearm and hand as a result of the nerve injury; deformity of the left elbow and significantly impaired range of motion in the left elbow; chronic pain of varying intensity in the left shoulder; decreased range of motion and dysfunction in the left shoulder; and myofascial pain in the left neck with mild decreased range of motion in the neck, likely due to continuous left-arm guarding, which may have been exacerbated to some degree by the 2018 motor vehicle accident.
- (e) In addition to the physical symptoms, Ms. Singh's sleep was interrupted, she became fatigued, and she ultimately suffered symptoms of depression.
- (f) By the time Ms. Singh returned to work in September of 2009, her symptoms were chronic but she was able to perform her job.
- (g) It is more likely than not that Ms. Singh's symptoms have plateaued and are permanent. She has been left with reduced strength and significantly reduced function in her left arm and shoulder.
- (h) It is more likely than not that Ms. Singh will develop osteoarthritis in her left elbow, which will result in an exacerbation of pain.
- (i) There is a real and substantial possibility that Ms. Singh will have to undergo a complete elbow replacement in the future, which will result in a significant period of convalescence and rehabilitation.

[52] As mentioned, there were some inconsistencies in Ms. Singh's evidence with respect to whether and to what extent the 2015 and 2018 motor vehicle accidents aggravated the symptoms in her left arm and shoulder. Dr. Benitez-Lazo reported that Ms. Singh claimed to have suffered an exacerbation of pain affecting her left arm after each of the two motor

vehicle accidents. An entry in a physiotherapy clinical record for July 21, 2015 indicated that Ms. Singh reported increased elbow pain after the 2015 accident. Ms. Singh acknowledged at trial that her elbow pain was exacerbated by the 2018 motor vehicle accident. In the circumstances, I find, on a balance of probabilities, that Ms. Singh did experience an exacerbation of the pain in her left arm following each motor vehicle accident. However, on the whole of the evidence, I am satisfied that on each occasion, the exacerbation was temporary. Neither of those temporary exacerbations has factored into my assessment of her damages from the assault.

- [53] The defence submitted that an adverse inference should be drawn from Ms. Singh's failure to call Dr. Froh as a witness. Again, he was the surgeon who performed the surgery on her elbow a few days after the assault. The nature of the inference that the defence urged me to draw from Ms. Singh's failure to call Dr. Froh was not clear. I emphasize that there is no dispute that Ms. Singh sustained a serious elbow injury as a result of the assault, which required surgical repair including the application of a steel prosthesis. There was evidence in the clinical records to the effect that, in late 2008, Dr. Froh expressed the view to Dr. Benitez-Lazo that Ms. Singh's shoulder symptoms were unrelated to the elbow injury. Leaving aside the hearsay nature of the statement, it could not be reasonably inferred that Dr. Froh would express the same opinion today.
- [54] An adverse inference may be drawn against a party if, without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence. However, it may be inappropriate to draw an adverse inference if the witness is equally available to both parties. I have no evidence that the defence was unable to or even tried to speak to Dr. Froh. In any event, there is other expert medical evidence from Dr. Shuckett and Dr. Lui, which I accept, that establishes, on a balance of probabilities, that the shoulder symptoms Ms. Singh complains of are causally related to the assault. In the circumstances, I decline to draw any inference from Ms. Singh's failure to call Dr. Froh.

Mitigation

- [55] The defence submits that Ms. Singh acted unreasonably in failing to attend physiotherapy and massage therapy, as recommended by Dr. Lui in his September 13, 2012 report, and by failing to consult a kinesiologist for assistance with the development of an active rehabilitation program, as recommended by Mr. Shew in his September 11, 2012 report, and that her losses would have been reduced had she done so. The defence advances the position that Ms. Singh's damages under all heads should be reduced to reflect her failure to mitigate.
- [56] In *Forghani-Esfahani v. Lester*, 2019 BCSC 332 at paras. 57-69, Justice Verhoeven analyzed the legal framework for assessing an alleged failure to mitigate. I agree with and adopt that analysis. To establish a failure to mitigate, the onus is on the defendant to prove the plaintiff could have avoided all or a portion of her loss. In a personal injury case in which the plaintiff has not pursued a medical recommendation, the defendant must prove, on a

balance of probabilities, that the plaintiff acted unreasonably in eschewing the recommended treatment. Having done that, the defendant must establish a real and substantial possibility that some part of the losses could have been avoided had the treatment been undertaken. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly.

- [57] As mentioned, in his September 13, 2012 report, Dr. Lui recommended physiotherapy to maintain range of motion and strength as well as massage therapy to relieve some of the muscle tension.
- [58] Again, in his September 11, 2012 report, Mr. Shew recommended that Ms. Singh consult a kinesiologist for assistance with the development of an active rehabilitation program. In cross-examination at trial, he testified that an active rehabilitation program could help by improving or even just maintaining function, but that the response depends on the patient and nature of the injury. He agreed that, in his experience, a majority of patients who are diligent in following an active rehabilitation program improve to some degree. However, he emphasized that he is not a physician and could not say whether Ms. Singh would have improved had she followed his recommendation in 2012.
- [59] Ms. Singh acknowledged Dr. Lui's recommendations and conceded that she did not consult a kinesiologist as he recommended. She said the treatment was too expensive, but she acknowledged that she has a substantial benefits package available to her through her work. In the circumstances, it was unreasonable for Ms. Singh not to follow Dr. Lui's and Mr. Shew's 2012 recommendations.
- [60] The next question is whether the defence has established a real and substantial possibility that some part of Ms. Singh's losses would have been avoided had she done so.
- [61] In my view, the fact that both Dr. Lui and Mr. Shew recommended active rehabilitation in 2012 is sufficient to establish a real and substantial possibility that Ms. Singh's condition would have improved, to some extent, with active rehabilitation. It is reasonable to infer that they made the recommendations because they believed there was a reasonable prospect of active rehabilitation benefitting Ms. Singh.
- [62] The more difficult task is determining the degree of probability that the loss or some part thereof would have been avoided. The evidence as to the likelihood of benefit from active rehabilitation several years after the injury is weak. The medical evidence is not directed to this question. While I am satisfied that active rehabilitation and ongoing exercise would likely have improved the range of motion in Ms. Singh's elbow and therefore her functionality, given the dearth of medical evidence on the point, and balancing all relevant possibilities, only a small deduction against Ms. Singh's non-pecuniary losses is appropriate. I assess this at 10%. The defence has not established a real and substantial possibility that Ms. Singh's losses under any of the other heads of damage could have been avoided had Ms. Singh participated in active rehabilitation and ongoing exercise as recommended.

Assessment of Damages

Non-pecuniary Damages

- [63] An award of non-pecuniary damages is intended to compensate for pain, suffering and loss of enjoyment of life prior to the trial and into the future. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the Court of Appeal set out a non-exhaustive list of factors to be considered in determining the amount of non-pecuniary damages to award. That list includes the age of the plaintiff, the nature of the injury, the severity and duration of the pain, the extent of disability, the existence of emotional suffering, the loss or impairment of life, the impairment of relationships, the impairment of physical and mental abilities, and the loss of lifestyle.
- [64] I conclude that as a result of the injuries she sustained in the assault, Ms. Singh suffered pain and a loss of enjoyment of life, which will likely continue into the foreseeable future, and from which she is unlikely to ever fully recover.
- [65] Ms. Singh endured about a year and a half of severe suffering from pain and fatigue. During that initial acute phase, she was unable to work and unable to enjoy many normal daily activities. She had to undergo surgery and spend five days in hospital. She had to stay with her parents and rely on them for help after being discharged from hospital. Even after she went home, she found it difficult to care for her son and had to continue to rely on her mother to help with childcare. Her sexual relationship with her husband was affected by her pain.
- [66] The pain in Ms. Singh's arm did improve over time but it has now plateaued and is permanent. The pain in Ms. Singh's arm interfered with her sleep, causing her to become fatigued and depressed. These symptoms wax and wane but they are ongoing some 13 years after the assault.
- [67] The pain in Ms. Singh's left arm and shoulder is aggravated with any repetitive activity using her left arm. Because of the nature of her work, which includes typing and reaching, she experiences such aggravation on a regular, ongoing basis.
- [68] Ms. Singh has had to make adjustments in her lifestyle to try to minimize her symptoms. She is not as active as she used to be. She refrains from certain physical activities, such as playing badminton. She has adjusted the way she swims, no longer performing proper strokes. She does not go out as often as she used to go out. She had to stop helping her husband in his store. She does not entertain as much as she used to entertain. She is even limited in her ability to cook certain types of food. She is limited in her ability to perform heavy housework.
- [69] Ms. Singh has been left with a permanent partial disability, which will last for the duration of her life and likely worsened as she ages with the onset of osteoarthritis. She faces the risk of a further significant surgery.

- [70] For reasons I have already expressed, I am not persuaded that the assault contributed, in a material way, to the failure of Mr. Sharma's business, Sari-Wali. Accordingly, the failure of the business has not factored into my assessment of Ms. Singh's non-pecuniary damages. Having said that, I do accept that the injuries Ms. Singh sustained in the assault prevented her from helping out in the store and that had a negative impact on her enjoyment of life.
- [71] Similarly, for the reasons expressed later, I am not persuaded that the assault prevented Ms. Singh from working downtown, where there are far more opportunities for career advancement. Nevertheless, I do accept that the injuries she sustained in the assault made her commute downtown less pleasant and that had a negative impact on her enjoyment of life.
- [72] As mentioned, Ms. Singh seeks an award of \$200,000 for non-pecuniary damages. I considered the following cases cited by her counsel: *Bhatti v. Ethier*, 2018 1779 BCSC (\$200,000 assessed as non-pecuniary damages, but reduced by 10% for failure to mitigate); *Zawadzki v. Calimoso*, 2011 BCSC 45 (\$180,000 assessed as non-pecuniary damages, but reduced by 20% for failure to mitigate); *Kalstrom v. Yip*, 2016 BCSC 829 (\$180,000 awarded in non-pecuniary damages); and *Jafferi v. Hardcastle*, 2018 BCSC 486 (\$150,000 awarded in non-pecuniary damages).
- [73] The defence submits that the cases Ms. Singh's counsel relied on are not comparable and concern plaintiffs with more serious injuries. The defence argues that it would be appropriate to award Ms. Singh non-pecuniary damages on the low end of the range for cases with left elbow fractures. The defence relies on the following cases: *Rycroft v. Rego*, 2017 BCSC 373 (\$70,000 awarded in non-pecuniary damages); *Besic v. Kerenyi*, 2011 BCSC 1277 (\$70,000 assessed as non-pecuniary damages, but reduced by 10% for failure to mitigate); *Culver v. 624671 B.C. Ltd.*, 2006 BCSC 1241 (\$40,000 awarded in non-pecuniary damages); *Mathroo v. Edge-Partington*, 2015 BCSC 122 (\$60,000 awarded in non-pecuniary damages); and *Schipilow v. Minch*, 2006 BCSC 1786 (\$75,000 assessed as non-pecuniary damages, but reduced by 40% for contributory negligence).
- [74] Some of the authorities to which I was referred were generally instructive. However, the assessment of non-pecuniary damages involves not simply a comparison of cases and injuries but also an appreciation of the impact of the injury on the particular plaintiff given his or her particular circumstances.
- [75] Some of the cases relied on by Ms. Singh concern plaintiffs who suffered more profound life impacts because of their injuries. This is particularly so of the plaintiffs in *Bhatti* and *Kalstrom*. Most of the cases relied on by the defence concerned plaintiffs who sustained injuries that were very different from those sustained by Ms. Singh, and whose lives were not as significantly impacted by them.
- [76] The two cases I found most helpful are *Zawadzki* and *Mathroo*, which appear to represent the high and low water marks for an injury of this type.

- [77] In Zawadzki, the plaintiff suffered injuries that were similar to those sustained by Ms. Singh. In particular, he sustained a similar elbow injury. However, the impact of the injury on his life was significantly more severe. He underwent three elbow surgeries and suffered from significantly debilitating mood disorders and alcoholism, which were attributed to the accident. In addition, he lost the ability to work in his pre-accident occupation, which had been personally rewarding to him. As mentioned, his non-pecuniary damages were assessed at \$180,000 before a 20% reduction for his failure to mitigate.
- [78] In Mathroo, the plaintiff sustained an elbow injury similar to that sustained by Ms. Singh. While he continued to experience pain, the range of motion in his elbow was not as severely limited as is Ms. Singh's range of motion, it appears that he did not suffer from associated injuries similar to the shoulder injury sustained by Ms. Singh, and the impact on his pre-accident activities was minimal. As mentioned, he was awarded non-pecuniary damages of \$60,000.
- [79] The most significant of the Stapley factors in this case are the severity and duration of Ms. Singh's pain, the extent of her permanent disability, and the changes to her lifestyle. She suffered from severe pain for about one and one-half years. She has lived with chronic pain, of varying intensity, since then. Her condition is almost certainly permanent. The pain has not prevented her from working in her previous occupation as an administrative assistant. However, she has suffered a significant loss of function in her elbow, and the ongoing pain and loss of function have had a considerable impact on her social life and her relationship with her husband. In addition, the injuries Ms. Singh sustained in the assault prevented her from helping out in her husband's store, which she previously enjoyed. She faces the prospect of further surgery followed by a period of convalescence and rehabilitation.
- [80] Having considered all the authorities and the factors discussed in Stapley, I assess Ms. Singh's non-pecuniary damages at \$120,000 before a reduction of 10% for her failure to mitigate. I award Ms. Singh non-pecuniary damages of \$108,000.

Past Loss of Income Earning Capacity

- [81] A claim for past loss of income earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of the injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.
- [82] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, taking into account all realistic contingencies, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period. In doing so, it is necessary to weigh possibilities and probabilities of hypothetical events, which are given weight according to their relative likelihood: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101.

- [83] Projecting what a plaintiff would have earned in the past had she not been injured is a hypothetical exercise. While the standard of proof relating to actual past events is a balance of probabilities, a hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.
- [84] There is no dispute that Ms. Singh was off work from November 17, 2007 to September 14, 2009, because of the injuries she sustained in the assault. She returned to work gradually, commencing full-time hours on October 12, 2009. She received long-term disability benefits of \$59,067.05 from Sun Life to compensate her for her lost income. Sun Life has a subrogated claim to that amount.
- [85] There is a hierarchy of administrative positions in the DFO, which is reflected in an alpha-numeric classification system. Clerical positions are classified with the designation "CR", while administrative positions (generally speaking, these are senior to clerical positions) are classified with the designation "AS". Each of the CR and AS classifications has several levels, and each level has its own pay scale. The top CR classification (CR-05) is roughly the equivalent of the bottom AS classification (AS-01), and CR-05 and AS-01 positions have the same pay scale.
- [86] DFO employees are classified to reflect their permanent positions but are occasionally given the opportunity to "act" in a position with a higher classification (for example, to cover a superior's position during vacation or other leave). When acting in a position with a higher classification, the employee receives the higher pay associated with the higher classification.
- [87] Ms. Singh started working with the DFO in 1998, at an office on Annacis Island. A couple years later, she moved to a DFO office in downtown Vancouver, on West Hastings Street. She worked there until the assault in November 2007.
- [88] At the time of the assault, Ms. Singh's position was classified as AS-01, but she had been acting in an AS-02 position for about six years. She was earning about \$52,000 per year. She testified that her aspiration was to progress to an AS-05 position by 2012. She said her co-worker, Christina Barausse, was working in an AS-02 position in 2007 and she eventually progressed to an AS-05 position. Ms. Singh suggested she would have had the same opportunities as Ms. Barausse, but for the injuries she sustained in the assault.
- [89] By the time Ms. Singh returned to work, in September 2009, her AS-02 acting position had been filled by someone else. She was placed at the DFO's regional headquarters office on Burrard Street in downtown Vancouver. That office was referred to at the trial as "RHQ". She returned to a CR-05 position, at a pay rate equivalent to an AS-01 position. In other words, she returned at a pay rate below that applicable to the position she was "acting" in prior to the assault. Her new position was subsequently reclassified as AS-01 but this did not affect the rate of pay.

- [90] In late 2010 or early 2011, Ms. Singh requested and obtained a transfer from RHQ to the DFO's Annacis Island office. Her new position at the Annacis Island office was an AS-01 position. Ms. Singh continued to work in that position until August 2016, although during that period she had several opportunities to act in AS-02 positions. These were relatively short-term assignments, for as short as a week and as long as a few months. The first such assignment commenced on July 4, 2011 and lasted for two weeks. In addition, she spent one week, in July 2012, acting in an AS-05 position.
- [91] In August 2016, Ms. Singh took an AS-04 role, in an acting capacity, at the RHQ office downtown. That assignment was renewed a couple of times. The last renewal covered the period from April 2017 to April 2018. However, in August 2017, Ms. Singh requested and obtained a transfer back to Annacis Island. She returned to her permanent AS-01 position.
- [92] In December 2018, Ms. Singh secured an acting AS-02 position at Annacis Island. She was working in that position at the time of the trial, and she acknowledged that there was a significant prospect of her being confirmed, as permanent, in that position.
- [93] In summary, when Ms. Singh returned to work at the DFO in September 2009, she was placed in a position one level below her pre-assault position. She worked downtown for about a year, then at Annacis Island for about five and one-half years, then downtown for about a year, and then back at Annacis Island for the two years preceding the trial. While she acted in more senior roles for brief stints, she did not regain a long-term AS-02 position (i.e. a position at her pre-assault level) until December 2018, although she did secure an AS-04 position downtown, in August 2016, which she gave up, a year later.
- [94] The defence submits that Ms. Singh has established a claim for past loss of income earning capacity in the amount of \$62,152.30, comprised of the following components:
- (a) the amount of Sun Life's subrogated claim (\$59,067.05); and
 - (b) the difference in pay between an AS-01 position and an AS-02 position for the 21 months from September 2009, when Ms. Singh returned to work, to July 4, 2011, when the defence says she was promoted to an AS-02 position.
- [95] I do not agree with the defence approach. With respect to the first component, the evidence does not establish that the disability benefits Ms. Singh received while she was off work fully replaced the income she lost during that period. With respect to the second component, as discussed, Ms. Singh was not "promoted" to an AS-02 position on July 4, 2011. Rather, she took an opportunity to act in an AS-02 role for a two-week period commencing July 4, 2011. She did not regain a long-term AS-02 position until December 2018.
- [96] Ms. Singh's approach to her loss of income earning capacity claim has three aspects. First, she has a straightforward claim in relation to the 22 months she did not work after the assault, during which she says she would have worked in an AS-02 position. Second, she says that, as a result of being off work for nearly two years, she lost her pre-assault AS-02 position and had to take the lower paying CR-05/AS-01 position when she returned. For the period

from her return to work to the end of 2012, she seeks the difference between her actual earnings and the amount she would have earned had she worked consistently in an AS-02 position. Third, she says, but for the assault, she was on track for promotions and would have secured an AS-04 position by the end of 2012. For the period from the beginning of 2013 to trial, she seeks the difference between her actual earnings and the amount she would have earned in an AS-04 position. As mentioned, adopting this approach she quantifies her claim at \$164,961 (gross).

[97] Ms. Singh relied on an analysis of her lost income earning capacity prepared by Mr. Robert Carson, who is an economist. Mr. Carson performed calculations pertaining to Ms. Singh's claims for past and future loss of income earning capacity.

[98] In relation to Ms. Singh's claim for past loss of income earning capacity, Mr. Carson analyzed Ms. Singh's income tax records to isolate the pay she received from the DFO from the time of the assault to the trial (after accounting for periods of unpaid leave she took in 2015 and 2016 that were unrelated to the assault). From published pay rates applicable to the DFO's AS-02, AS-04 and AS-05 positions, Mr. Carson also projected the income Ms. Singh would have earned each year during that period under three scenarios: first, assuming she worked in an AS-02 position to the trial; second, assuming she worked in an AS-02 position to November 2010 and then in an AS-04 position to the trial; and third, assuming she worked in an AS-02 position to November 2010, then in an AS-04 position to the end of 2016, and then in an AS-05 position to the trial.

[99] Mr. Carson's tabulations and projections can also be used to quantify Ms. Singh's view of her past loss of income earning capacity claim; that is, the difference between her actual earnings and what she would have earned had she remained in an AS-02 position to the end of 2012 and then worked in an AS-04 position to the trial. The outcome of that approach is as follows:

- Projected AS-02 earnings less actual earnings from the DFO during the period from the assault to December 31, 2012 = \$100,884

- Projected AS-04 earnings less actual earnings from the DFO during the period from January 1, 2013 to trial = \$79,592.

The sum of the two is \$180,476. It was not made clear to me why Ms. Singh quantified her past loss of earning capacity claim at \$164,961; that is, in an amount less than that based on Mr. Carson's projections.

[100] Although my quantification of Ms. Singh's past loss of earning capacity claim approaches the amount she sought under this head of damages, I do not agree with the analysis urged upon me by her counsel. As explained below, to adopt that approach, I would have to accept that, but for the assault, Ms. Singh would have continued to work downtown. I do not accept that proposition. Rather, in my view, Ms. Singh would have relocated to Annacis Island in any event. I accept that but for the injuries Ms. Singh sustained in the assault, she

would likely have continued to work in an AS-02 position, but I am not persuaded that, after she returned to work in September 2009, her injuries prevented her from accepting opportunities to work in more senior positions as they became available. She tendered no evidence of any particular promotion that she would have had a reasonable prospect of securing but for the assault.

- [101] As I have already discussed, when Ms. Singh returned to work in September 2009, her pre-assault AS-02 position had been filled by someone else and she had to take what was, effectively, an AS-01 position. After she returned to work, she was offered opportunities to act in more senior roles from time to time; she took those opportunities, and she succeeded. Almost without exception, her performance reviews have been very good, including during the year between August 2016 and August 2017 when she worked in an AS-04 role. Ms. Barausse, who was Ms. Singh's co-worker and, for a time, her supervisor, testified that Ms. Singh was a very competent employee and that, with one temporary exception, her performance reviews were all very good.
- [102] The evidence, especially that of Mr. Shew, establishes that Ms. Singh has some functional limitations due to her elbow injury, particularly in relation to tasks that require her to reach forward with her left arm when typing and completing paperwork. As a result, she requires accommodations such as frequent breaks and ergonomically appropriate equipment. However, Ms. Singh admitted that the DFO is an accommodating employer and she has been accommodated at work. Mr. Shew concluded that, notwithstanding her functional limitations, Ms. Singh is likely able to continue in her work. Again, there is no evidence that Ms. Singh was denied any promotion due to any functional limitation.
- [103] Accordingly, I have no difficulty concluding that, since September 2009, the injuries Ms. Singh sustained in the assault have not prevented or hindered her from fulfilling her duties at the DFO in all positions she has sought out, including the AS-04 position she filled for nearly a year between August 2016 and August 2017.
- [104] It is clear that the advancement opportunities available to Ms. Singh are largely limited to positions located at the DFO's downtown offices. The DFO office at Annacis Island is one of five or six regional DFO offices. According to Ms. Singh, there are about 500 employees at RHQ and only about 35 to 40 employees at the Annacis Island office, with far more opportunities for promotions at RHQ. For example, she estimated that there are about 20 AS-05 positions at RHQ.
- [105] According to Ms. Barausse, prior to July 2016, there was one AS-05 position at each of the DFO's regional offices. She said there are no AS-04 positions in the regional offices. Between 2014 and July 2016, Ms. Barausse filled the AS-05 position at Annacis Island, which covered the Lower Fraser Region. In July 2016, a reorganization resulted in a reduction in the AS-05 positions in the regional offices to three: one in Kamloops, one in Prince Rupert, and one on Vancouver Island. The AS-05 position at Annacis Island was combined with the AS-05 position in Kamloops, and the person who previously filled the position in Kamloops

secured the new position. In the result, Ms. Barausse was demoted, and she subsequently resigned from the DFO.

- [106] Given the dearth of advancement opportunities at the DFO's Annacis Island office, the crux of this aspect of Ms. Singh's claim is her assertion that her injuries prevent her from working downtown where such opportunities exist.
- [107] As noted, Ms. Singh worked downtown for years prior to the assault and for more than a year after the assault. In late 2010 or early 2011, she requested a transfer from RHQ to the Annacis Island office. She testified that she found the lengthy Skytrain commute from her home in Surrey to RHQ downtown too difficult. She said she was exhausted by her chronic pain and the commute added one and one-half hours to her workday, which she found intolerable. In addition, she said the jostling and vibrations of the Skytrain exacerbated her pain.
- [108] In August 2016, Ms. Singh resumed working downtown in order to take the acting AS-04 position. That position was available to her until at least April 30, 2018, but she voluntarily gave it up in August 2017 and returned to her permanent position at Annacis Island. She acknowledged that her performance reviews were very good but she claimed to have been too exhausted by her chronic pain to tolerate the increase in the length of her workday associated with the longer commute and the exacerbation of her pain caused by the jostling on the Skytrain.
- [109] I am not persuaded that the injuries Ms. Singh sustained in the assault prevent her from working downtown. In my view, this was another example of Ms. Singh's tendency to exaggerate the impact of the injuries on her life.
- [110] It is undisputed that even after the assault, Ms. Singh performed well at work during the relatively long periods during which she was posted downtown. No medical witness expressed the view that Ms. Singh's commute downtown was harmful or exacerbated her condition. Although the longer commute may have made working downtown more difficult, the evidence falls far short of establishing that it effectively prevented her from doing so. Ms. Singh acknowledged that the difficulties associated with the commute could have been mitigated by driving instead of relying on public transit but she claimed that driving downtown was not an option because, after a full day of work, she is exhausted and unable to focus sufficiently to drive safely. However, she drives to work at Annacis Island and she did not claim to have any difficulty driving home after working a full day there. In my view, it is far more likely that Ms. Singh simply prefers the shorter commute to Annacis Island over the longer commute downtown. That may be a reasonable preference, but any resulting limitation on her opportunity to advance in her career cannot be laid at the feet of the defendant.
- [111] The assessment of Ms. Singh's claim for past loss of income earning capacity must start with a projection of the income she would have earned in the period between the assault and the trial had the assault not occurred. That projection must take into account all real and

substantial possibilities and contingencies, in accordance with their relative likelihood. In my view, there is a substantial likelihood that, had the assault not occurred, Ms. Singh would have continued to work in her pre-assault, AS-02 position, she would have taken the opportunities to act in more senior roles, and at some point she would have requested a transfer to Annacis Island, where the opportunities to advance were far more limited. Her career trajectory would have essentially been the same, except that she would have worked consistently in an AS-02 position or higher until about August 2017, by which time she would have chosen a transfer to Annacis Island due to personal preference. In other words, from August 2016, when she took the AS-04 position, her without injury income likely would have been the same as her with injury income.

- [112] I recognize that Ms. Singh's pre-assault AS-02 position was not a permanent one and there is a real and substantial possibility that, even in the absence of the assault, she might have been demoted to an AS-01. However, given she had been working on the AS-02 position for several years prior to the assault, the likelihood of that is small and more than offset by the much more likely possibility that she would have had opportunities to serve in AS-04 and AS-05 positions in the period between the assault and her return to work in September 2009.
- [113] Accordingly, in projecting the income Ms. Singh would have earned in the period between the assault and the trial had the assault not occurred, I start with Mr. Carson's calculations of what she would have earned at an AS-02 salary from the assault to the end of July 2016, when she took the AS-04 position. This is \$476,882 (from column 3 of table 2 of Mr. Carson's report, with the amount for 2016 prorated for the seven months to July 31). I would gross that up by 5%, to \$500,726, to account for the real and substantial possibility that during the time Ms. Singh was off work after the assault she would have had some opportunities to act, temporarily, in positions senior to AS-02. To that amount, I would add the income Ms. Singh did earn in the period from the beginning of August 2016, when she assumed the AS-04 position, to the trial. According to Mr. Carson's calculations that is \$168,642 (from column 2 of table 2 of his report, with the amount for 2016 prorated for the five months from August 1). This approach results in a projected without injury pre-trial income, after accounting for all realistic contingencies, of \$669,368.
- [114] The next step is to deduct Ms. Singh's actual income from her employment over the same period. According to Mr. Carson's calculations, that is \$539,196 (from column 2 of table 2 of his report). The difference between the projected income and the actual income is \$130,172.
- [115] On the foregoing basis, I assess Ms. Singh damages for past loss of income earning capacity in the amount of \$130,172.

Future Loss of Income Earning Capacity

- [116] To establish a claim for future loss of income earning capacity, a plaintiff must first prove a real and substantial possibility of a future event leading to a loss of income, as opposed to a speculative loss: *Tisalona v. Easton*, 2017 BCCA 272 at para. 47; *Perren v. Lalari*, 2010 BCCA

140 at para. 32. As stated in Tisalona at para. 51, "[t]his is the threshold finding necessary to establish entitlement to damages for loss of earnings capacity -- a real and substantial possibility that future employment will be foreclosed to the plaintiff by reason of the injuries". If the plaintiff discharges that burden, then the loss must be assessed, taking into account all realistic positive and negative contingencies.

- [117] There is more than one way to assess a loss of future income earning capacity: see Perren at paras. 11-12. The "earnings approach", which is generally appropriate where the court can more easily measure the loss mathematically, typically involves a determination of the plaintiff's estimated annual income loss, multiplied by the remaining years of work, and then discounted to reflect current value. The "capital asset approach", which is typically used when the loss is not as easily measurable, involves the consideration of a number of factors such as whether the plaintiff has been rendered less capable overall of earning income from all types of employment, is less marketable or attractive as a potential employee, has lost the ability to take advantage of all job opportunities that might otherwise have been open, and is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).
- [118] Irrespective of the approach used, the Court is required to quantify a pecuniary loss, and the quantification must be grounded in the evidence and the particular facts of the case. There must be a "reasoned analysis to explain and justify the award": *Schenker v. Scott*, 2014 BCCA 203 at para. 56. The loss need not be calculated with mathematical precision but mathematical, statistical, and/or economic evidence will inform the assessment. This reflects the fact that an award for loss of earning capacity, irrespective of the quantification approach adopted, is "not simply at large": *Dunbar v. Mendez*, 2016 BCCA 211 at para. 20.
- [119] As already noted, the standard of proof relating to hypothetical events, which, of course, includes future events, is simple probability. Such events are to be given weight according to their relative likelihood.
- [120] Ms. Singh testified that she currently plans to work at the DFO until August 1, 2033, which is when she is entitled to her maximum pension (having attained 35 years of service). She will be 59 years old at that time. She will receive a bridge benefit between ages 60 and 65, and thereafter a smaller pension. The quantum of her pension benefits will be based on her earnings in her top five years.
- [121] Ms. Singh submits that but for her assault-related injuries, she likely would have continued to work in the AS-04 position at RHQ and from there she would likely have graduated to an acting AS-05 position by 2019. According to Mr. Carson's calculations, the present value of the difference between what Ms. Singh will make assuming she remains in an AS-02 position to retirement and what she would have made had she secured an AS-05 position by 2019 is \$312,184. In addition, Ms. Singh submits that, but for her assault-related injuries, her pension benefits would likely have been based on five years of earnings at an AS-05 level and now they will likely be based on five years of earnings at an AS-02 level. According to

Mr. Carson's calculations, the present value of the difference between Ms. Singh's future pension benefits if she retires as an AS-05 and her future pension benefits if she retires as an AS-02 is \$212,500. Ms. Singh seeks \$175,000 to compensate her for this possibility. Finally, she submits that, but for the assault, she likely would have engaged in gainful employment after retirement and she seeks an additional \$30,000 a year for two years to compensate her for this loss. On this basis, she claims a total of \$547,184 for loss of future earning capacity.

[122] The defence submits Ms. Singh has not established any claim for damages for loss of future earning capacity.

[123] I do not agree with either Ms. Singh's position or the position advanced by the defence. Ms. Singh's position is based on the loss of opportunity to advance at the DFO. For the reasons I have already expressed, I am not persuaded that any real and substantial possibility of a promotion was lost because of Ms. Singh's assault-related injuries. Nevertheless, Ms. Singh has met the threshold of establishing a real and substantial possibility of a future event leading to a loss of income. Specifically, the evidence of Dr. Shuckett and Dr. Lui establishes a real and substantial possibility that Ms. Singh will develop osteoarthritis in her elbow, which will increase her pain and decrease her function, and a real and substantial possibility that Ms. Singh will have to undergo a full elbow replacement, which will result in a period of convalescence. As a result, there is a real and substantial possibility that Ms. Singh will have to be absent from work due to increased pain and/or following a future surgery, and a real and substantial possibility that she will have to retire earlier than currently planned due to increased pain.

[124] Having found that there is a real and substantial possibility of a future event leading to an income loss, it is necessary to quantify that loss. In *Dunbar*, at para. 21, the Court of Appeal described this task in these terms:

The assessment of future loss requires a court to estimate a pecuniary loss by weighing (even if not assigning specific numeric values to) possibilities and probabilities of future events and relating evidence and findings of fact to the quantification of the loss: *Schenker* at paras. 53, 69; *Ostrioff v. Oliveira*, 2015 BCCA 351 at para. 29; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 53-55. The usefulness of economic and statistical evidence does not turn an assessment into a calculation. It does, however provide a useful tool to assist in determining what is fair and reasonable in the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70.

[125] The task of weighing hypothetical possibilities is always difficult. It is particularly challenging here because I was not provided with very specific evidence concerning the likely implications of osteoarthritis (such as the extent to which Ms. Singh's pain would likely increase and her function likely decrease) or the specific likelihood of a future surgery and the duration of the resulting period of convalescence. There is substantial uncertainty about when and how severely her earning capacity would be reduced as a result of these real possibilities.

- [126] Nevertheless, the evidence is sufficient, even if not as complete as it might have been, for me to find that Ms. Singh faces a real chance of her pain increasing, her function decreasing, and a future elbow replacement surgery. Since retuning to work in September 2009, Ms. Singh has not missed work due to her assault-related injuries, but given her high risk of developing osteoarthritis, there is a real risk that she will miss periods of work in future and a real risk she will retire early. There is also a real albeit unquantified risk of future surgery that will require a period of convalescence.
- [127] In my view, if Ms. Singh develops osteoarthritis, it is reasonable to project that she will retire one year earlier than she otherwise would. She is 46 years old and will be 59 years old at her normal retirement date. In other words, she has 13 years left to work, assuming she makes it to her normal retirement date. She has worked steadily for about ten years since the initial 22-month period of convalescence following the assault. This bodes well for the future, and suggests that one-year's early retirement accurately estimates the probabilities, after accounting for any offsetting contingencies. According to Mr. Carson, if Ms. Singh retires one year early, on August 1, 2032, the present value of the associated loss of future earnings at the AS-02 pay rate is about \$48,000.
- [128] If Ms. Singh develops osteoarthritis, it is reasonable to project a loss of two weeks work per year due to periods of increased pain. The risk of osteoarthritis is high, but its effects are likely to worsen over time. Accordingly, two weeks per year might overstate her loss in the near term but that is offset by the prospect of two weeks understating her loss in the far term. Given Ms. Singh's preference for working at the DFO's Annacis Island office, and given the absence of opportunities for promotion at that location, she is likely to continue to work there in an AS-02 position. The most current AS-02 pay rate translates into a salary of \$61,887 per year (Mr. Carson's report, section 3.2). A loss of two weeks of work per year equates to an annual loss of \$2,380. According to Mr. Carson, the present value (adjusted for survival) of an annual income loss of \$2,380 per year to retirement on August 1, 2032 (i.e., one year early) is about \$28,000.
- [129] Lastly, the risk of future surgery is real but unquantified. Ms. Singh was off work for 22 months following the initial surgery. In the absence of any other relevant evidence, this is the best predictor of the duration of a future period of convalescence if she does undergo another surgery. A loss of 22 months of work, at the most current AS-02 pay rate of \$61,887 per year, equates to a one-time loss of about \$113,500. The present value multipliers in column 7 of table 4 in Mr. Carson's report can be used to calculate the present value of future sums in single years. However, it is not all certain when Ms. Singh would have any future surgery, and the period of convalescence would span more than one year.
- [130] The present value multipliers in column 7 range from a low of \$801 for a \$1,000 loss in 2032 (the year of Ms. Singh's likely retirement) to a high of \$984 for a \$1,000 loss in the current year, 2020. The average of the two is \$892.50. In my view, this is a reasonable multiplier to use given the state of the record. Using that multiplier, a future loss of \$113,500 has a present value of about \$101,300. However, I have not yet accounted for the real possibility

that future surgery will not be indicated or, even if indicated, Ms. Singh will not proceed with it. According to Dr. Shuckett, the risks associated with a full elbow replacement are significant, including even a risk of losing the arm. In my view, Ms. Singh's symptoms would have to worsen very significantly to render a full elbow replacement reasonable. In the circumstances, I assess the likelihood of future surgery at 20%. With a 20% probability of the loss occurring, I quantify this aspect of Ms. Singh's claim at \$20,260 (20% of \$101,300).

- [131] For the foregoing reasons I award Ms. Singh damages of \$96,260 for her future loss of earning capacity. That amount comprises \$48,000 as the present value of the loss from early retirement; \$28,000 as the present value of the loss from periods off work due to increased pain associated with the onset of osteoarthritis; and \$20,260 as the present value of the loss from a period off work following a future surgery.

Loss of Housekeeping Capacity

- [132] Ms. Singh seeks \$10,000 for loss of housekeeping capacity as a segregated pecuniary award. The defence position is that \$5,000 is an appropriate award under this head of damage.
- [133] Ms. Singh testified that her homemaking capacity has been affected by the assault-related injuries. Before the assault, she performed most of the housekeeping tasks for her family. In the first few months after the assault, Mr. Sharma did almost everything, including cooking, cleaning and shopping. Overtime, Ms. Singh has resumed responsibility for some homemaking tasks but everything takes her longer to complete and she leaves the heavier items for her husband, who now performs between 60% and 70% of the housework. She testified she can do the laundry but she needs help changing bedsheets. She said she can do light vacuuming with an upright vacuum, but her husband does the heavier vacuuming. She can no longer wash pots and pans. She does light dishwashing but leaves the heavy items for her husband. Her husband does the major cleaning of the bathrooms.
- [134] I have discretion whether to address a claim for lost housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage: *Kim v. Lin*, 2018 BCCA 77, at para. 33; *Riley v. Ritsco*, 2018 BCCA 366 at para. 100.
- [135] In *Riley*, Groberman J.A. observed that evidence that family members or friends routinely undertake functions that would otherwise have to be paid for could support a segregated award of pecuniary damages on the basis of *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; (1995) 4 B.C.L.R. (3d) 178 (C.A.).
- [136] Similarly, in *Liu v. Bains*, 2016 BCCA 374, the Court upheld a claim for pecuniary damages for loss of housekeeping capacity. It said:

- [25] Since the decision in *Kroeker*, it has been well-established in this province that domestic services have value and an injured party may justifiably claim for loss of housekeeping capacity, even if these services are provided gratuitously by family members: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63.
- [26] 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. In *McTavish* at paras. 68-69, the Court suggested that treating loss of housekeeping capacity as non-pecuniary loss may be best suited to cases in which the plaintiff is still able to perform household tasks with difficulty or decides they need not be done, while remuneration in pecuniary terms is preferable where family members gratuitously perform the lost services, thereby avoiding necessary replacement costs.
- [137] Duplication must be avoided. Where potential costs for housekeeping assistance are awarded in the context of costs of future care, then the case for a separate pecuniary award for loss of housekeeping capacity is lessened and perhaps eliminated, depending on the specific facts of the case: *Firman v. Asadi*, 2019 BCSC 270 at para. 236.
- [138] There is no evidence that Ms. Singh has had to pay someone else to perform housekeeping tasks or that she expects to do so in the future. However, there is evidence that there are tasks she can no longer do, that the tasks she can do are performed with more difficulty, and, most importantly, that Mr. Sharma now routinely performs tasks that she used to perform. His willingness to do so has allowed Ms. Singh to avoid paying someone else to perform housekeeping for her. For the reasons I have already expressed, Ms. Singh's functionality is unlikely to improve and likely to worsen. In the circumstances, I am satisfied that a segregated pecuniary award is appropriate.
- [139] Ms. Singh's counsel submits that \$40 per week would be modest compensation under this head of damage. At \$40 per week, Ms. Singh's counsel estimates the value of her past and future loss of housekeeping capacity at in excess of \$70,000, but she seeks only \$10,000. Viewed in this context, her claim of \$10,000 under this head of damages is reasonable.
- [140] I award Ms. Singh damages of \$10,000 for past and future loss of housekeeping capacity.

Cost of Future Care

- [141] The Court of Appeal summarized the principles applicable to a claim for the costs of future care in *Gao v. Dietrich*, 2018 BCCA 372, at paras. 68-70:

68 An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and

permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

69 An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

70 In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[142] It is necessary to consider the likelihood that an expense will be incurred in the future: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 251. No award should be made in relation to an expense that the plaintiff will not actually incur: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[143] Ms. Singh seeks a total award of \$93,371.56 under this head of damage. This breaks down as follows:

- (a) one time costs for a series of sessions with a kinesiologist at the present time (\$705.50);
- (b) one time costs for a series of sessions with a kinesiologist following a future elbow replacement surgery (\$705.50);
- (c) the present value of an annual cost of \$440 for a gym membership to age 75 (\$9,871.26);
- (d) the present value of the annual cost of 100 Tylenol tablets per month to age 75 (\$5,346);
- (e) the present value of the annual cost of one Cymbalta tablet per day to age 75 (\$14,481.03);
- (f) the present value of an annual cost of \$700 for "seasonal cleaning" to age 75 (\$15,677.55); and
- (g) the present value of the annual cost of two hours of housecleaning services per week to age 75 (\$46,584.72).

[144] Ms. Singh bears the burden of establishing her claim. For the most part, she has failed to do so in relation to this head of damage.

- [145] While there is evidence in the record concerning the cost of kinesiologist sessions (\$50 to \$60 per hour) and a recommendation from Mr. Shew that Ms. Singh have a series of eight update sessions, there is no evidence that Ms. Singh intends to incur this expense. As already discussed, she did not follow Mr. Shew's recommendation in 2012. There is no basis in the evidence for me to conclude that she will follow his recommendation now. I am satisfied that if she has to undergo a full elbow replacement in the future, she will need a series of physiotherapy sessions, but her counsel acknowledged that these would be covered by the Medical Services Plan.
- [146] Similarly, while there is evidence in the record concerning the cost of a gym membership, there is no current recommendation for a gym membership. Mr. Shew did make this recommendation in 2012, but in his 2019 report, he did not. Further, there is no evidence that Ms. Singh intends to incur the expense of a gym membership in order to treat her assault-related injuries.
- [147] The evidentiary record does not support a claim for 100 Tylenol tablets per month. Ms. Singh testified that she takes Tylenol "on and off" instead of prescription pain medication. She did not attempt to quantify her use of Tylenol with any more precision. There is no evidence in the record of the cost of Tylenol. The medical evidence does establish a justification for pain medication. However, given the lack of specificity concerning Ms. Singh's actual use of Tylenol and the absence of evidence of cost, only a modest amount is justified. I award \$1,000 for the future cost of Tylenol.
- [148] There is no evidence of the cost of Cymbalta. Further, Ms. Singh's disability benefits provider, Sun Life, covers the cost of this medication. There is no evidence about whether Sun Life will continue to do so after Ms. Singh retires. While I accept that a medical justification for Cymbalta has been established, there is nothing in the record that allows me to reasonably assess the likely quantum of Ms. Singh's future cost of Cymbalta.
- [149] Finally, while Mr. Shew did express the view that Ms. Singh would need help with heavier housekeeping tasks, there is no evidence of the cost of "seasonal cleaning" or even the going rate for regular housecleaning. Further, there is no evidence that Ms. Singh has any intention of incurring expenses for housecleaning or seasonal cleaning. She and Mr. Sharma live in a condominium and there was no evidence of any need for them to perform outdoor maintenance. As already discussed, Mr. Sharma does the heavier housework, and Ms. Singh has been awarded damages for loss of housekeeping capacity as a result.
- [150] For the foregoing reasons, I award Ms. Singh \$1,000 for cost of future care.

Special Damages

- [151] Ms. Singh claims \$4,895.01 in special damages. However, her counsel double counted the amount of \$1,320 for over-the-counter pain medication, such as Tylenol. With that corrected, her claim amounts to \$3,575.01, which breaks down as follows:

- (a) \$600.01 for prescription drugs;
- (b) \$1,320 for over-the-counter pain medication;
- (c) \$1,530 for physiotherapy;
- (d) \$90 for a doctor's note; and
- (e) \$35 for parking.

[152] The defence concedes that the expenses for which Ms. Singh has presented documentary evidence such receipts are properly recoverable, but contests any claim for which there is no documentary support.

[153] Ms. Singh has substantiated her claims for prescription drugs, physiotherapy, the doctor's note, and for parking. I award her damages in the amounts she has claimed for those items.

[154] Ms. Singh has not provided any documentary evidence of the cost to her of over-the-counter pain medication. The amount claimed seems to be her counsel's view of what would be appropriate. While it is not necessary, in my view, for a plaintiff to produce documentary evidence to establish a claim for special damages, a plaintiff must tender some evidence of an expense having been incurred. Ms. Singh's evidence about her use of over-the-counter pain medication was vague. She did not attempt to even estimate the amount she has spent on over-the-counter medication. While I accept that Ms. Singh has purchased Tylenol to treat the pain associated with her assault-related injuries, the evidentiary record supports only a nominal award. I award her \$200 for over-the-counter pain medication.

[155] I award Ms. Singh special damages of \$2,455.01.

Aggravated and Punitive Damages

[156] Ms. Singh seeks \$35,000 in "punitive" damages. Her counsel submitted that there are parallels between this case and that of *Morrow v. Outerbridge*, 2009 BCSC 433, a medical negligence case. However, in *Morrow* aggravated but not punitive damages were awarded. Ms. Singh's counsel did not distinguish between the principles applicable to a claim for aggravated damages and those applicable to a claim of punitive damages.

[157] The distinction between these two types of damages is well known. See *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at para. 16; *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (CA) at 299; *Norberg v. Wynrib*, [1992] 2 S.C.R. 266 at 263-4; and *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at paras. 188-191. Put simply, aggravated damages are compensatory; punitive damages are not. While there may be some overlap in the facts relevant to establishing each of these heads of damage, each rests upon a different foundation and the purpose of awarding each is different.

- [158] Aggravated damages are awarded to compensate a plaintiff for actual damage that is aggravated by the defendant's high-handed conduct. Intangible elements such as grief, humiliation or embarrassment can provide the foundation for such an award. They are measured by the plaintiff's suffering: *Huff* at 299.
- [159] In contrast, the objects of punitive damages are retribution, deterrence and denunciation as opposed to compensation. In *Bowen Contracting Ltd. v. B.C. Log Spill Recovery Co-operative Association*, 2009 BCCA 457 at para. 23, the Court of Appeal summarized the following ten principles which the Supreme Court of Canada found, in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, to apply when considering punitive damages:
1. Punitive damages are not limited to particular "categories" of wrongs, although by their nature they will "largely be restricted to intentional torts";
 2. The general objectives of punitive damages are punishment, deterrence of the wrongdoer and others, and denunciation;
 3. Since the primary vehicle of punishment is criminal law, punitive damages should be resorted to only in "exceptional cases and with restraint";
 4. The use of pejoratives such as "high-handed" or "oppressive" does not provide useful guidance (or discipline) to judges or juries and a more principled approach is desirable. (Notwithstanding this, the Court said at para. 94 that punitive damages are to be imposed only if there has been "high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour.");
 5. In setting punitive damages, the court should ask itself "in particular" how an award would further one or other of the objectives of the law and what is the lowest award that would serve the purpose;
 6. It is "rational" to use punitive damages to relieve a wrongdoer of its profits where compensatory damages would amount to "nothing more than a licence fee to earn greater profits through outrageous disregard of the legal or equitable rights of others."
 7. A "formulaic" approach should be avoided. The court should focus not on the plaintiff's loss but on the defendant's misconduct;
 8. The overall award should be rationally related to the objectives for which punitive damages are awarded;
 9. Juries should receive more help from judges concerning the function of punitive damages and factors governing such awards and the assessment of a proper amount;
 10. Punitive damages are not "at large" and an appellate court may intervene if an award exceeds the outer boundaries of a rational and measured response to the facts of the case.

- [160] In addition, punitive damages are considered only after the remainder of the damage award has been determined because if the other components are sufficient to meet the objectives of punitive damages, there is no need for a further award: *Morrow* at para. 300; *Rycroft* at para. 164.
- [161] In my view, there are intangible elements to Ms. Singh's suffering as a result of the assault that have not been adequately compensated by the non-pecuniary damages award. Ms. Singh was pushed to the floor by a virtual stranger out of the blue, in the presence of her friends and acquaintances. This was embarrassing. She was humiliated in front of her community. She lost friendships as a result. Much of her social network was destroyed. These circumstances warrant additional compensation to augment the non-pecuniary damages already awarded. I award Ms. Singh \$10,000 in aggravated damages.
- [162] Dr. Reddy's conduct was clearly wrong and it warrants sanction. There is a need to denounce and deter such self-indulgent, uncivilized, and dangerous conduct. However, I have already awarded Ms. Singh damages exceeding \$350,000. In my view, an award of that magnitude, which is not likely to be covered by any insurance policy, sufficiently achieves the objectives of retribution, deterrence and denunciation. Accordingly, I decline to make a punitive damages award.

Health Care Costs Recovery Act

- [163] Pursuant to s. 16 of the Health Care Costs Recovery Act, the Minister of Health has provided a certificate dated July 2, 2019, claiming the return of \$8,575.23 for the cost of healthcare services provided to Ms. Singh. The defence concedes liability for that amount.

Conclusion

- [164] In summary, the damages awarded to Ms. Singh are:

Non-pecuniary damages

\$108,000.00

Past loss of income earning capacity (gross)

\$130,172.00

Future loss of income earning capacity

\$96,260.00

Loss of housekeeping capacity

Cost of future care

\$10,000.00

\$1,000.00

Special damages

Aggravated damages

\$2,455.01

\$10,000.00

[165] In addition, pursuant to the Health Care Costs Recovery Act, the province of British Columbia is entitled to \$8,575.23.

[166] I have not expressed the total of the damages awarded because the past loss of income earning capacity award has been quantified on a pre-tax basis. I leave the calculation of the tax consequences and the issue of pre-judgment interest for the parties to resolve. If counsel are unable to reach agreement on these matters, they may make arrangements, through Supreme Court Scheduling, to speak to them.

[167] That leaves the issue of costs.

[168] After I granted judgment in Ms. Singh's favour following the liability portion of the trial, Ms. Singh applied for special costs of that portion. Her application was heard on July 5, 2018. I dismissed it as premature because she had not yet obtained any remedy, but granted her leave to reapply. Her written submissions on the damages assessment state that she seeks special costs for the liability portion of the trial and costs at Scale B for the damages assessment portion. No additional submissions were made on her behalf in support of her claim for special costs.

[169] I have reconsidered the costs submissions advanced on behalf of Ms. Singh and Dr. Reddy on July 5, 2018. In summary, Ms. Singh submitted that special costs of the liability portion of the trial are warranted because she says:

- (a) Dr. Reddy gave untrue, misleading and/or fabricated evidence about her involvement in the assault, which forced Ms. Singh to the difficult task of proving liability, which in turn caused her significant time and expense;
- (b) In defending the claim, Dr. Reddy made prejudicial claims about Ms. Singh's conduct, which were damaging to Ms. Singh's reputation;
- (c) Mr. Rangaiya attempted to dissuade Mr. Jagroop from testifying at the liability portion of the trial in support of Ms. Singh's case; and
- (d) Dr. Reddy unreasonably delayed in responding to Ms. Singh's demand for production of certain medical records, was not forthright in her testimony at the liability portion of the trial about her efforts to obtain those records, and swore an intentionally false or misleading affidavit concerning those efforts in opposition to Ms. Singh's efforts to obtain interlocutory relief in that regard.

- [170] While party and party costs are intended to partially indemnify the successful litigants, deter frivolous actions and defences, encourage both parties to make reasonable offers to settle and discourage improper or unnecessary steps in the litigation, special costs, in addition to their compensatory function, also serve a punitive or deterrent purpose, and are reserved for cases involving scandalous, outrageous or reprehensible conduct: *Nazmdeh v. Spraggs*, 2010 BCCA 131 at 41.
- [171] The standard of reprehensible conduct warranting an award of special costs encompasses not only scandalous or outrageous conduct, but also milder forms of misconduct deserving of the court's reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (CA) at para. 17. Having said that, the Court must exercise restraint in awarding special costs; the party seeking special costs must demonstrate exceptional circumstances; and, while the concept of "reprehensibility" captures different types of misconduct, not all misconduct is encompassed by that term: *Westsea Construction Ltd. v. 0759533 BC Ltd.*, 2013 BCSC 1352 at para. 73.
- [172] In my view, Dr. Reddy's testimony denying any involvement in the assault and about Ms. Singh's conduct cannot be characterized as reprehensible in the sense required to justify an award of special costs. My conclusion on the liability portion of the trial was based on my credibility findings, and I did not find Dr. Reddy credible. However, as I emphasized in my reasons for judgment on the liability portion, the standard of proof is a balance of probabilities. My credibility findings do not amount to a finding that Dr. Reddy lied under oath about her involvement in the assault or about Ms. Singh's conduct. Rather, I merely preferred the testimony of Ms. Singh. As specifically observed by the Court of Appeal in *Garcia* at para. 23, taking a position that is ultimately found to have little merit is not in itself a reason for awarding special costs; something more is required, such as improper conduct, before the conduct becomes sufficiently reprehensible to warrant an award of special costs.
- [173] Similarly, while I accepted Mr. Jagroop's testimony to the effect that Mr. Rangaiya attempted to dissuade Mr. Jagroop from testifying, I made no finding linking Dr. Reddy to Mr. Rangaiya's conduct. While it was apparent that Mr. Rangaiya remained close to Dr. Reddy's husband, that is an insufficient basis upon which to conclude that Dr. Reddy caused Mr. Rangaiya to act as he did.
- [174] However, my conclusions about Dr. Reddy's testimony and conduct in relation to the medical records demanded by Ms. Singh are sufficient to ground a finding that Dr. Reddy behaved in a manner that was reprehensible and to justify an award of special costs against Dr. Reddy for the ultimately unsuccessful steps taken by Ms. Singh to obtain the records in question. This would include correspondence concerning her demand for the records, any interlocutory applications related to the records, and any associated steps.

[175] I found that Dr. Reddy was not forthright about her efforts to locate the medical records in question and, by clear implication, she made deliberately inaccurate statements in an affidavit about those efforts. The records were sought by Ms. Singh in an effort to prove her theory that on the evening of the dance, Dr. Reddy was suffering from depression and had combined anti-depressant medication with alcohol. I was not prepared to draw any particular negative inference against Dr. Reddy as a result of her failure to produce the records and I made no findings about her condition on the evening in question.

Accordingly, the absence of the records was, ultimately, of no consequence to the outcome of the liability portion of the trial. Nevertheless, Dr. Reddy's misconduct was serious and displayed indifference to the integrity of the administration of justice. It is essential to the fairness of civil trials that parties comply with their document production obligations. Dr. Reddy had been ordered to produce the records. Her misconduct caused Ms. Singh to incur unnecessary expense.

[176] For these reasons, Ms. Singh shall have special costs of all steps taken in the litigation in relation to her efforts to obtain Dr. Reddy's medical records, and costs at Scale B in relation to the balance of the proceeding.

"Warren J."

The Honourable Madam Justice Warren

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