

CANADA / JUDGMENT

Tsonis v. Mizuguchi

2020 BCSC 643

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 643 Tsonis v. Mizuguchi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tsonis v. Mizuguchi,

2020 BCSC 643

Date: 20200427

Docket: M154320

Registry: Vancouver

Between:

Anastasia Tsonis

Plaintiff

And

Daniel A. Mizuguchi

Defendant

Corrected Judgment: The text of this judgment was edited at paragraphs 51, 64, 70, 95, and 111 on April 30, 2020.

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for Plaintiff:

John M. Cameron

Kevin P. Hyde

Counsel for Defendant:

Darren Stewart

Daniel W. Barber

Brendan Dawes

Kathleen Renaud (A/S)

Place and Dates of Trial:

Vancouver, B.C.

September 3-6, 9, 2019;

November 5, 8, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 27, 2020

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I. introduction

[1] The plaintiff is a 41-year-old teacher. This claim arises from a June 27, 2013 motor vehicle accident. The defendant does not dispute liability.

II. facts

A. The plaintiff

[2] The plaintiff grew up in a hard-working household. Her family ran several Greek restaurants. She began working in one of those restaurants at an early age. She has always held several jobs throughout high school and university.

[3] In October 2009 she married Anastasios Tsonis. He trained as a chartered accountant and is now the vice-president of a biomedical company.

[4] Their first son was born in September 2011. Their second son was born six months after the accident, in January 2014.

[5] Both sets of grandparents are very supportive of the Tsonis family. Both before and after the accident, they have split the responsibility of taking care of the two boys while the plaintiff and her husband worked full-time.

B. The plaintiff's teaching career

- [6] In 2004 the plaintiff obtained a degree in education from the University of British Columbia. After initial positions as a teacher on call, she was hired by the New Westminster School District as a special education resource. By January 2006, the position was increased to full time. She worked in that role until June 2007.
- [7] In January 2006, while still working full-time, she returned to Simon Fraser University to study special education. She obtained that designation in August 2007.
- [8] Her special education position was eliminated due to cutbacks. She was given a position as a Grade 8 teacher, with a dedicated class, for the 2009/2010 school year. She testified that this was her ideal situation, and her planned mode of teaching for the rest of her career.

C. Maternity leave

- [9] When the plaintiff's first son was born in September 2011, she took a year off as maternity leave. She then returned to full-time teaching in September 2012.
- [10] The plaintiff and her husband both testified that their plan with respect to their second son was identical: the plaintiff would take a year off, and then return to full-time teaching, with the grandparents providing daily care for the two children.

D. Pre-accident health

- [11] The plaintiff's pre-accident health was unremarkable. No issues of pre-existing conditions affect the present case.
- [12] Before the accident, she was active and busy. She had no issues actively caring for and playing with her son. There were no limitations on her physical activities. She went to the gym, rode a bicycle, went on hikes, and walked her dog. She was able to do a full range of domestic activities.

E. The accident: June 27, 2013

- [13] At the time of the accident, the plaintiff was driving from her home to teach the last class of that school year. At approximately 8 AM, she stopped her car and signalled to turn left onto Dolphin Street from Mariner Way in Coquitlam.
- [14] Although liability is admitted, the defendant was not reckless; the accident was of the sort that most drivers experience at some point in their lives. At trial, the defendant presented as responsible and remorseful.

- [15] The defendant was driving at 40-50 kilometres an hour behind the plaintiff. He said that he saw the plaintiff's car and braked when he was three or four car lengths behind her, but that he could not stop in time due to the wet road. His car hit the back of the plaintiff's car. The front of his car went partly under the plaintiff's back bumper. Its hood buckled. The damage to the plaintiff's car was minimal.
- [16] Upon impact, the plaintiff hit the back of her head on the car seat. There were no outward signs of injury. The plaintiff felt immediate pain. She compared the shock of the accident to an electric current going through her body. She felt a burning pain in her back. Her lower back felt pulled and strained.
- [17] The plaintiff's first concerns were her child and child-to-be: she was pregnant with her second child at the time of the accident, and her son was in the back seat. He was upset but uninjured.
- [18] The defendant called 911, but no one came. The plaintiff called her husband, who arrived quickly.
- [19] The plaintiff was able to drive her car away from the accident scene. After a brief stop at her parents' home, she went to see her family doctor, Dr Totouchian. Dr Totouchian testified at trial and provided an expert medical report. Her clinical records from the day of the accident note that the plaintiff reported pain in her back. Her physical exam noted a mild spasm in the paracervical muscles and upper back.
- [20] Three days after the collision, she described a general "bad feeling all over", including mid- and lower back pain and shoulder pain.
- [21] The plaintiff also reported to both her family doctor and the massage therapist that her neck was sore. This injury resolved itself largely by December 2013 and entirely by October 2014; the plaintiff does not claim for that injury.

F. The progression of the plaintiff's injuries: 2013-2014

- [22] The Tsionises had a holiday to Greece scheduled for August 2013, which they had booked before the pregnancy was known and before the accident. That holiday was uncomfortable for the plaintiff: sitting on the airplane was painful, and they were not able to do their usual active exploratory vacation. The plaintiff reported general pain and frustration throughout that summer.
- [23] The extent of the injuries became more clear when she returned to teach full-time in September 2013. Standing all day, moving around, and attending to students generated a constant burning pain between her shoulder blades and mid-back. It exacerbated the pain in her lower back. As the day progressed, the pain would evolve from dull to stabbing. The intensity of the pain would also increase as the school week progressed.

- [24] In the years following the accident, the plaintiff's pain was, at times, evident to her co-workers. On difficult days, she would walk with a limp and exhibit pain. She was no longer able to participate in recreational activities relating to her job, such as the Terry Fox run, volunteering for crosswalk regulation, and more physically demanding activities such as participation in school camping and canoeing trips.
- [25] In the first few months of the 2013-2014 school year, the plaintiff took many days off work due to pain. She depleted her allocation of 15 sick days, mostly due to the accident.
- [26] In January 2014, just before the birth of her second son, she took a nine-day medical leave, as recommended by Dr Totouchian. After the arrival of her son, she started her one-year maternity leave.
- [27] In contrast to her active maternity leave with her first son, her post-accident maternity leave was frustrating. A child bumping her would cause pain. She was less able to pick up or actively play with either child. After the accident, she is defensive with her sons, telling them to stay away from her at times, and protecting her body lest they bump her and aggravate her back. She no longer plays on the floor with her children. She feels guilty about both of these limitations.

G. Return to teaching: 2014-2018

- [28] The plaintiff had planned to return to full-time work after her maternity leave. Due to her injuries, however, she requested to return as a priority teacher on call. She explained that this role would allow more flexibility to attend treatment and take days off work when her injuries required. It would also be less disruptive for the students.
- [29] The New Westminster School District accepted her change request. The plaintiff returned to work in January 2015 as a priority teacher on call. The plaintiff claimed that the pain from her injuries required her to turn down many opportunities to teach.
- [30] In September 2015, the plaintiff returned to her regular full-time position as a Grade 8 teacher. She worked through her pain, as she did not wish to disrupt the lives of her students with a series of substitute teachers, or lose control of the classroom. Nonetheless, during the 2015-2016 school year, she had 15 absences. She testified that the majority of these absences were due to her accident injuries.
- [31] For the 2016-2017 school year, she reduced her hours to a 0.8 position, allowing her to take leave from work every Thursday. She based this on her discussions with Dr Totouchian, who recommended one or two recovery days in the middle of the week. She testified that the day off allowed her body to persevere through the week. She still ended most days in some degree of pain.

- [32] The plaintiff's injuries required her to take additional days off: 25 days in 2016 and 43 days in 2017. By January 2018, her sick day bank was almost completely drained as a result of days missed due to her injuries. As such, any further absences would be unpaid. She applied to the British Columbia Teachers Federation ("BCTF") short-term indemnity program ("SIP"). The program paid partial reimbursement for some of the missed days beyond her sick bank.
- [33] In spring 2018, the plaintiff decided to move school districts from New Westminster to Coquitlam. She stated that the move allowed for greater flexibility to take days off for rest and treatment of her injuries. She was also able to keep her seniority despite the move, and would have been eligible to transfer 60 days of her sick day bank had it not been drained.
- [34] She started the 2018-2019 school year in a teacher on call position. By October 2018, she was once again working full time, partially as a dedicated classroom teacher, and partially working with students with special needs. Again, sitting or standing for prolonged periods intensified the burning sensation in her mid-back and changed the pain in her lower back from a dull to a stabbing pain. She missed a total of 26.8 days of work in the 2018-2019 school year.
- [35] She applied for a new position at a Coquitlam elementary school for the 2019-2020 school year. She began her new position on the first day of this trial. The new position is a 0.8 position, with Thursdays off.

III. credibility and reliability

A. Law

- [36] In *Karim v. Li*, 2015 BCSC 498, Abrioux J (as he then was) usefully gathered the guiding authorities for assessing credibility:
- [88] As Madam Justice Dillon noted in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para.186, *aff'd* 2012 BCCA 296:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C. C.A.) [*Faryna*]; *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 128). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[89] In addition, the following principles should be taken into account by the trier of fact:

- no one can expect compensation in the absence of convincing evidence that complaints of pain are true reflections of a continuing injury: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.);
- every injured person has a different understanding of his or her own complaints and injuries and it falls to judges to translate injuries to damages: *Price* at 397;
- where there is little or no objective evidence of continuing injury and where complaints of pain persist for long periods extending beyond the expected resolution, the court should be exceedingly careful to assess assertions in light of the surrounding circumstances including the medical evidence: *Price* at 399; *Tai v. De Busscher*, 2007 BCCA 371 at para. 41;
- it is the doctor's function to take the patient's complaints at face value and offer an opinion based on them and it is for the court to assess credibility. If there is a medical or other reason for the doctor to suspect the plaintiff's complaints are not genuine, are inconsistent with the clinical picture or are inconsistent with the known course of such an injury, the court must be told of that. But it is not the doctor's job to conduct an investigation beyond the confines of the examining room: *Edmondson v. Payer*, 2011 BCSC 118 at para. 77, *aff'd* 2012 BCCA 114; and
- in the absence of objective signs of injury, the court's reliance on the medical profession must proceed from the facts it finds, and must seek congruence between those facts and the advice offered by the medical witnesses as to the possible medical consequences and the potential duration of the injuries: *Fan (Guardian ad litem of) v. Chana*, 2009 BCSC 1127 at para. 73, *aff'd* 2011 BCCA 516.

B. The plaintiff's credibility

[37] The defendant did not seriously challenge the plaintiff's credibility. This was an appropriate position, based upon the plaintiff's testimony; I found the plaintiff to be a convincing witness. In the witness stand, she did not exaggerate her complaints of pain: this was also noted by the medical experts called by each side.[1]

[38] The defendant made two somewhat desultory attacks on the plaintiff's credibility.

[39] The first was in the form of several brief surveillance videos taken in February 2019. The first video was taken at the plaintiff's gym and showed her making a half-hearted effort at stationary biking and weightlifting. The second showed the plaintiff during and after a grocery shopping trip, including carrying a box of groceries. I did not find these videos to be particularly convincing or undermining of the plaintiff's complaints of pain. With respect to the gym surveillance, a restrained effort is consistent with pain complaints; insofar as she was weightlifting, I accept the evidence of the plaintiff's trainers that the weights were light. With respect to the shopping surveillance, I accept the plaintiff's testimony that the box of groceries contained lightweight items. The plaintiff does not claim to be completely

immobilized by her injuries; rather, she complains that the pain grows and interferes with every aspect of her life. The surveillance videos are not inconsistent with her account of her injuries.

- [40] Second, the defendant implied that the plaintiff was in part motivated to bring this claim based upon the successful personal injury claim brought by her high school and college friend and CrossFit work-out companion, Jennifer Raptis.
- [41] Ms Raptis's accident occurred on December 2, 2009. It went to trial in October 2016. In a decision issued August 31, 2017 (*Raptis v. Chalabiani*, 2017 BCSC 1548), this Court awarded Ms Raptis \$584,560. Apart from the friendship of Ms Raptis and Ms Tsonis, there were several other striking coincidences between the cases. Both plaintiffs are teachers, born in 1979. Both plaintiffs were pregnant at the time of the motor vehicle accidents. Both suffered injuries in their back and sacroiliac joint, the pain from which hindered their employment, as well as their ability to play with their children and do housework. Both had to reduce their teaching hours as a result of their accidents.
- [42] I agree with the submissions of the plaintiff that the Raptis case and coincidences are of no moment. I also agree that if the defendant wished to seriously pursue this argument, the allegation of secondary-gain motivation ought to have been put directly to the plaintiff in cross-examination: see generally *Dinnissen v. Lee*, 2019 BCSC 1729 at paras 163 -170. Instead, this allegation was only pursued after the plaintiff had left the stand, and was put to her husband. In any case, the plaintiff filed this claim on June 15, 2015. She would not have known at that time that her friend would receive over half a million dollars two years later.

IV. MEDICAL EVIDENCE

A. Introduction

- [43] The parties submitted medical reports from the following physicians, whose testimony will be discussed in this section:

Plaintiff

Defendant

Physiatrist

Dr Waseem

August 19, 2016

Dr Wong

May 21, 2019

Family Doctor

Dr Totouchian

May 12, 2019

Physician/Physical Therapist

Dr Chawla

August 30, 2019

[44] The plaintiff also called Snjezana Kalic, a registered massage therapist who treated the plaintiff between June 2013 and February 2016, and Andrea Shore, a chiropractor who has treated the plaintiff since January 2016.

B. The development of the plaintiff's conditions

[45] The testimony and clinical notes of the plaintiff's family physician, Dr Totouchian, were consistent with the plaintiff's history of her symptoms. Those notes, from November 2013 through May 2019, confirm ongoing burning pain, coupled with examination of objective spasms in the upper and lower back, as well as a dull, numb pain in her lower back radiating to her left buttock. The plaintiff regularly reported palpatory tenderness in both her thoracic and lumbar spine. By July 2015, she was also reporting a jabbing pain in her left sacroiliac joint.

[46] The plaintiff complained regularly of tension in her lower, middle, and upper back, which Ms Kalic herself felt during treatment from 2013 to 2016. Dr Shore recorded similar complaints and objective findings from 2016 to 2018: the plaintiff's complaints of pain were consistent with spasms, tension, and trigger points (knots) felt by Dr Shore.

C. Treatments

[47] The defendant argued that the plaintiff has been less than zealous in pursuing potential treatments for her symptoms. This argument has some merit, particularly with respect to the soft-tissue injuries complained of by the plaintiff. There is no clear path to treating soft-tissue injuries which, in the case of the plaintiff, should ordinarily have resolved within a few months: often a patient must attempt multiple forms of treatment before finding success. As set out below, there remain several other promising treatments that the plaintiff has not pursued or not fully pursued despite being recommended by the medical experts.

[48] The plaintiff admits that she often does not follow the medical advice of her doctors, as "they don't have the same perspective on natural health." Her family physician Dr Totouchian's first recommended treatment for her post-accident pain was anti-inflammatory medication: not only to relieve pain, but also to reduce inflammation and assist in healing. The plaintiff declined to take anti-inflammatory medications, as she was both pregnant and breastfeeding: a status that lasted from the time of the accident to early 2018. Since then, even when the pain has been most acute, she has only taken regular rather than extra-strength Tylenol.

[49] In her medico-legal report, Dr Totouchian noted some of the several treatment recommendations for the plaintiff's injuries, as well as the plaintiff's general response to such suggestions:

Future Treatment: It is my recommendation that Mrs. Tsonis to continue with chiropractic treatments once every two weeks. In my opinion, along those same lines she would also benefit from trigger point and Botox injections, however Mrs. Tsonis has a fear of needles and is not keen to proceed with this type of therapy. Mrs. Tsonis is also not keen on taking NSAIDS or analgesics for her pain. She reverts to herbal medications for her pain.

A referral for Prolotherapy was discussed. Mrs. Tsonis said she will take it into consideration since she [is] not keen on having injections.

[50] The plaintiff's primary means of treating the injuries have been massage therapy and chiropractic treatments. She reports that neither have healed her back pain, but have provided interim relief. She has also attempted acupuncture as well as naturopathic treatments.

[51] The medical witnesses were united in recommending active physical exercise, including stretching and core strengthening, to heal and relieve the pain. The plaintiff has pursued this strategy to some extent by her regular attendance at CrossFit classes since autumn 2014. Her CrossFit gym trainer modifies the exercises to suit the plaintiff's condition. The video surveillance evidence indicated that the plaintiff has exhibited mixed focus on CrossFit as a rehabilitation exercise. Her trainer admitted that her efforts were often "lackadaisical". The plaintiff and her husband (who attends CrossFit with her) admitted that her attendance at CrossFit was as much social as for any rehabilitative purpose.

D. Diagnosis

[52] The plaintiff's main expert evidence was provided by Dr Waseem, a physiatrist. Unfortunately, that evidence was based upon his somewhat dated examination of the plaintiff in July 2016.

[53] Dr Waseem concluded that the "history, documentation and examination findings are consistent with initially sustained soft tissue injuries predominately to the thoracic and lumbar spine as a result of the [accident]. This is resulted in residual myofascial pain of the thoracic spine and left sacroiliac joint dysfunction."

[54] Dr Waseem's conclusions were based upon both the plaintiff's self-reports, as well as objective factors corresponding to the plaintiff's pain complaints such as a trigger point (knot) within the right thoracic paravertebral muscles.

[55] Dr Totouchian similarly concluded that the plaintiff had chronic myofascial pain syndrome based on her soft tissue injuries to her upper and lower back. She based this diagnosis on the plaintiff's complaints, as well as trigger points and palpitation.[2]

[56] Dr Wong, called by the defendant, also diagnosed a left-sided posterior sacroiliac joint ligament sprain. He did not dispute the plaintiff's complaints of lower back and mid-back pain, but could not find any other abnormal physical findings to support those complaints.

[57] He noted that as the plaintiff was pregnant at the time of the accident, her ligaments may have been looser than normal, and thus more prone to injury and slower to heal.

E. Prognosis and recommendations

[58] Dr Wong was optimistic that the plaintiff would recover, based on his finding that the injury was located to her ligament sprain in the sacroiliac joint. He said that the condition can be treated with local physiotherapy, including ultrasound, electrical stimulation, or a steroid or cortisone injection into the sacroiliac joint ligament. He also recommended that the plaintiff be seen by kinesiologist for a six-week exercise program concentrating on stretching and strengthening her lower back and pelvis muscles to decrease the mechanical stress on the sacroiliac joint. He also suggested that the plaintiff take stronger anti-inflammatory medications to address lower back pain.

[59] Dr Waseem provided a more qualified prognosis in his 2016 report:

The prognosis is uncertain at this time. Her mid back pain appears to be responding well to her more recent course of chiropractic, and it remains to be seen whether this can provide a more permanent benefit to her.

[60] At the same time, Dr Waseem recognized that "[t]he left sacroiliac dysfunction may improve with additional intervention that has not been attempted yet." To that end, Dr Waseem recommended the use of a sacroiliac joint belt, image-guided cortisone injections, prolotherapy (injections to stimulate healing), continued core strengthening, strengthening of the left hip muscles, and continuing CrossFit.

[61] Dr Totouchian concluded that while the plaintiff's symptoms had somewhat improved since the accident, they had reached a plateau: the point of maximum medical improvement. As set out above, she would likely always have some degree of discomfort with her back "in the foreseeable future." As set out above, she recommended that the plaintiff continue with chiropractic treatments once every two weeks. She also recommended trigger point and Botox injections, as well as, potentially, prolotherapy.

F. Cortisone injections

[62] Dr Wong was particularly optimistic about the cortisone injection treatment: many patients are effectively healed after a single injection, although some patients require multiple treatments before it is effective.

- [63] Dr Waseem was more guarded. He recognized that cortisone injections were an appropriate treatment for chronic pain, but doubted that the chronic pain would "magically resolve with one injection I'm not of that viewpoint."
- [64] Dr Totouchian agreed that cortisone injections were an appropriate treatment for the plaintiff's complaints. She in fact had referred the plaintiff to a doctor specializing in cortisone injection treatments in April 2018. The plaintiff did not have her first injection until August 2019, just before the start of trial.
- [65] Dr Chawla, a physiatrist and pain medicine specialist, administered the cortisone injection and testified as to the procedure and its effect. On his recommendation, he provided a left sacroiliac joint interarticular cortisone injection under ultrasound guidance. The treatment would potentially provide pain reduction for between one and three months. The typical patient requires repeated injections, to a maximum of four times a year. If that procedure is successful, it may also suggest the potential success of another form of injection treatment: radiofrequency neurotomy/ablation of the left sacroiliac joint for longer-term pain reduction, averaging between six and nine months. As the plaintiff's symptoms had persisted for five and a half years, Dr Chawla noted that it was unlikely that she would ever enjoy a complete resolution of pain and full restoration of function. Accordingly, the predominant goal is pain management rather than a complete cure.
- [66] A month after her sacroiliac joint injection, the plaintiff reported some success: the intensity of her pain decreased, and she now felt the pain in a smaller area. The treatment was tolerated well, with no immediate complications. The plaintiff still reported a favouring of her left leg, and a resultant limp.
- [67] Dr Chawla confirmed that it was not unusual for most patients to see only modest improvement after one injection, and that some patients require repeat procedures or progression to radiofrequency neurotomy/ablation for further improvement.
- [68] Despite this initial success, Dr Chawla did not recommend further injections. Instead, he stated that, for now:
- [g]iven the comorbid mood disturbance and impact of pain on her daily functioning and mood, this would not be the ideal time to pursue further injection/interventional-based treatments, despite their potential benefit. I have encouraged her that at this time, she needs to participate in more cognitive and behavioural therapy from a desensitization perspective, which will likely assist in her symptom management in the long term.
- [69] With respect, based on Dr Chawla's own opinion, coupled with that of Dr Wong, that multiple injections are often necessary, it does not make sense to abandon further injections. The favourable results of the single injection suggests that there is a real prospect that further injections will prove effective.

[70] In any case, Dr Chawla, like the other medical doctors, identified several other treatments offering realistic avenues for relief and recovery. He recommended that the plaintiff pursue a multidisciplinary pain management approach, including physical therapy, exercise, and cognitive-based treatment approaches.

V. causation

A. Law

- [71] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. If the defendant's negligence is one cause of an injury, or if it exacerbates or aggravates an existing condition, then the defendant is liable for causing the resulting injury: *Athey v. Leonati*, [1996] 3 SCR 458 at para 47. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*.
- [72] The primary test for causation asks: "but for the defendant's negligence, would the plaintiff have suffered the injury?" This test recognizes that compensation for negligent conduct should only be made where there exists a substantial connection between the injury and the defendant's conduct: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras 21-23.
- [73] Causation need not be determined by scientific precision: *Athey* at paras 13-17. The "but for" causation test must be applied in a robust, common sense manner. The inference of "but for" causation usually flows without difficulty from proof of negligence: *Clements v. Clements*, 2012 SCC 32 at paras 9-10.
- [74] Tortfeasors must take their victims as they find them, and are liable even if the plaintiff's injuries are more severe than they would be for the average person: *Athey* at para. 34.
- [75] In determining causation, caution is required before drawing any inference that because one event follows another in time, the first event is the cause of the second: *White v. Stonestreet*, 2006 BCSC 801 at paras 70-74.

B. Discussion and decision

- [76] The plaintiff has established causation. The defendant does not seriously dispute causation. Each of Drs Wong, Waseem, and Totounchian opined that the injuries complained of are likely causally linked to the accident. The present is not the kind of case where the injuries are divisible, or could be attributable to other stressors unconnected to the accident. The plaintiff's injuries and symptoms started immediately after the accident, and have been consistent since then.

VI. damages

A. Introduction

- [77] The plaintiff seeks the following damages:

Non-Pecuniary Damages

\$115,000

Past Loss of Earning Capacity

\$49,297

Future Loss of Earning Capacity

\$350,000

Cost of Future Care

\$50,000

Special Damages

\$19,041

Total

\$583,338

B. Non-pecuniary damages

1. Law

[78] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras 188-189.

[79] In *Stapley v. Hejslet*, 2006 BCCA 34 at para 46, the Court of Appeal set out a non-exhaustive list of factors guiding the assessment of non-pecuniary damages:

- a. age of the plaintiff;
- b. nature of the injury;
- c. severity and duration of pain;
- d. disability;
- e. emotional suffering; and
- f. loss or impairment of life;
- g. impairment of family, marital and social relationships;
- h. impairment of physical and mental abilities;
- i. loss of lifestyle; and

j. the plaintiff's stoicism.

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

2. Discussion and decision

[81] The plaintiff suggests a non-pecuniary award of \$115,000. This amount includes an increase over the range of comparable cases representing her loss of housekeeping and childcare capacity: she relies considerably upon her parents and in-laws for assistance in that regard. Following *Liu v. Bains*, 2016 BCCA 374 at para 26, the plaintiff does not seek a separate award of loss of housekeeping capacity.

[82] The defendant concedes that "the effect of this injury has had on the plaintiff's life will be commensurate with a significant award." The defendant argues that despite the plaintiff's subjective complaints, she appears to be "functioning quite well." The defendant points to her attendance at CrossFit twice a week, and the surveillance video showing her grocery shopping with no disruption. The defendant notes that the plaintiff is able to still work for the most part. The defendant's comparator cases set out a range of non-pecuniary damages of \$44,000 to \$80,000.

[83] At the core of this disparity between the positions of the parties is the nature and extent of the plaintiff's injury. The defendant argues that the plaintiff's primary injury is limited to her sacroiliac joint. The plaintiff argues that the Court should focus on the effects of the injury on the plaintiff's functionality, rather than the prescribed condition. Specifically, they argue that the myofascial pain in her middle and lower back, combined with the sacroiliac joint injury, significantly constrain daily activities and cause her ongoing pain. In this regard, the plaintiff cites *Bricker v. Danyk*, 2015 BCSC 2404 at para 123:

the issue for the court is not so much the label or diagnosis attached to a particular condition, but rather the extent to which the condition has affected a plaintiff in his or her social, recreational and employment pursuits.

[84] I agree. I also agree that the pain in her upper and lower back and sacroiliac joint is real and debilitating. Its constant presence has had a significant impact on her professional and personal life. For a dedicated teacher and a caring mother, the pain has a double effect as the plaintiff feels that she is letting down her pupils and her children.

[85] Primary among the Stapley factors, the accident has significantly affected her home and personal life. Before the accident, the plaintiff enjoyed being an active mother. She would frequently be down on her hands and knees playing with her infant firstborn son. She would carry her firstborn in a chest strap while she was working at home and walking outside. She was active in taking her firstborn out on adventures. After the accident, she is guarded around her children. The pain sometimes makes her short-tempered. She is less able to take

her children out to activities.

- [86] Before the accident, the plaintiff led an active life. She regularly exercised, was active at her gym, and would climb the Grouse Grind and Coquitlam Crunch. She and her husband took active vacations sightseeing and doing various other activities. She now is more restrained with her activities outside of the house.
- [87] Before the accident, the plaintiff was a perfectionist housekeeper and took great pleasure in cooking meals. She now relies considerably upon her parents and in-laws for assistance in childcare, housekeeping and cleaning. As a measure of her domestic impairment, she is no longer able to carry the vacuum cleaner upstairs; she has difficulty bending, cleaning the floor, and picking up her children's toys. While she still regularly cooks, she finds the standing and twisting to be painful and tiring, and is less ambitious.
- [88] With an eye to the other relevant Stapley factors, the plaintiff is relatively young: 34 at the time of the accident and is presently 41 years old. At the same time, she has continued to work, exhibiting stoicism.
- [89] The analogous cases advanced by the plaintiff are closer to the present facts.
- [90] In *Teunissen v. Hulstra*, 2017 BCSC 1569, the 38-year old plaintiff, who suffered from long-term chronic soft-tissue back pain as a result of the accident, was awarded \$110,000. The plaintiff exhibited stoicism and determination in trying to work despite his chronic pain. That said, Mr Teunissen's disability was more acute than that of the plaintiff: at times, for example, he had to use an electric wheelchair.
- [91] In *Stoneson v. Testa Estate*, 2015 BCSC 1549, the plaintiff was diagnosed with soft tissue injuries primarily to her neck, shoulder and upper thoracic spine. The pain was likely to be permanent and affected most aspects of her life. At the same time, the plaintiff was older (57) and suffered from some pre-existing conditions. Non-pecuniary damages were \$100,000.
- [92] In *Wahid v. Caporusso*, 2016 BCSC 1743, the plaintiff was diagnosed with chronic pain syndrome as a result of the accident. Her age (32) and active pre-accident lifestyle resembled those of the present plaintiff. At the same time, her chronic pain was more widespread over her body, and included her neck and legs as well as her back. The Court noted that the plaintiff's condition and function could possibly improve in future with additional therapy. The Court awarded \$100,000 in non-pecuniary damages.
- [93] The defendant suggests that two cases are analogous and should guide the Court: *Madsen v. Bekker*, 2012 BCSC 112, and *Strilec v. Leila*, 2015 BCSC 1515. The plaintiff argues that those two cases are readily distinguishable. In *Madsen* (\$44,000 in non-pecuniary damages)[3], the plaintiff's neck and shoulder resolved within seven months of the collision, and the sacroiliac joint pain had significantly improved by the time of trial; the Court found that the plaintiff's pain had not disabled any of his activities in any way: para 159. In *Strilec* (\$80,000), the plaintiff was able to continue work at his physically demanding job with minimal time

off.

- [94] One important factor distinguishing the present case from *Teunissen and Stoneson* is the poor prognosis for recovery in those cases. As set out below, under "Contingencies", the medical experts from both sides have identified several treatment options that, if pursued seriously, could well heal the plaintiff's condition or at least significantly improve her ability to manage her pain. The prognosis for improvement based upon the multiple potential avenues for treatment suggested by the medical experts also make the plaintiff's prognosis for improvement more likely than that of the plaintiff in *Wahid*.
- [95] For this reason, instead of awarding non-pecuniary damages in the range of \$100,000-\$115,000, based on the closest comparator cases, non-pecuniary damages will be awarded in the reduced amount of \$65,000. Insofar as non-pecuniary damages address both past and future losses, I have not applied the 60 per cent contingency deduction that I have applied to the two heads of purely future loss (future cost of care and loss of future earning capacity), as set out below.

C. Loss of past earning capacity

1. Law

- [96] Insofar as is possible, the plaintiff should be put in the position she would have been in but for the injuries caused by the defendant's negligence. An award for future loss of earning capacity is meant to provide pecuniary compensation for a loss: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para 32.
- [97] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para 30; *M.B. v. British Columbia*, 2003 SCC 53 at para 49.
- [98] *Falati v. Smith*, 2010 BCSC 465 at para 41, aff'd 2011 BCCA 45, sets out the principles which inform the assessment of loss of earning capacity:
- (i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
 - (ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).

(iii) The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

2. Discussion and decision

[99] As set out above, the pain from the accident caused the plaintiff to drain her allotted sick days. The parties agree that from the date of the accident to trial, she had lost 87 days attributable to the accident. As she ran out of sick days, she relied upon 21.8 days of relief from the BCTF SIP for partial reimbursement of her lost earnings.

[100] The plaintiff, as well as a representative of the New Westminster School District, provided evidence with respect to the lost sick days, and the SIP fund. Based on that evidence, I accept that the "sick bank" was not conceptually limited to illness or injury, but was permissibly used for other pressing reasons, including family issues and events. Teachers consider this broad "sick bank" as a valuable part of their compensation package. Before the accident, the plaintiff had never come close to depleting her sick day bank, other than in one year when she had two surgeries. The School District expects teachers to reimburse the sick bank from any compensation later received, such as from a court award, although there is no contractual or other formal requirement to do so.

[101] This court has long recognized the loss of sick bank credits as a compensable loss: *Bjarnson v. Parks*, 2009 BCSC 48 at paras 56-60, and the cases surveyed therein.

[102] I accept the plaintiff's adjusted methodology for compensation related to sick days sick days: 87 days at rates from \$402 to \$445 per day = \$37,679.35.

[103] I also accept the plaintiff's methodology for compensation related to the SIP fund: a payback amount of \$4,892.36, with the differential loss to the plaintiff, as SIP is 50 percent tax-free, for a total of \$7,338.58.

[104] In short, the award for past loss of earnings is \$45,017.93.

[105] With respect to what the plaintiff does with this portion of the award, I follow the lead of Kent J in *Sahota v. Slupskyy*, 2019 BCSC 2215:

[133] In any event, the bottom line in the present case is that the plaintiff is entitled to claim as loss of income the amounts paid to her by the VSB pursuant to accumulated sick bank credits for absences from work caused by her MVA injuries. Any award in this regard will presumably be paid by the plaintiff to the VSB to restore the accumulated sick bank credits in question but it is not the role of the Court in this case to supervise or enforce any such obligation.

D. Loss of future earning capacity

1. Law

- [106] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not on an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiv* (1985), 26 BCLR (3d); *Pett v. Pett*, 2009 BCCA 232.
- [107] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para 18.
- [108] Insofar as possible, the plaintiff should be put in the position he or she would have been in, but for the injuries caused by the defendant's negligence: *Lines*, supra, at para 185. The essential task of the Court is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory*, supra, at para 32.
- [109] *Savage J* (as he then was) summarised the principles for assessing loss of future earning capacity in *Parker v. Lemmon*, 2012 BCSC 27 at para 42:
- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
 - (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
 - (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
 - (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;
 - (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
 - (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
 - (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
 - (8) An earnings approach will be more useful when the loss is more easily measurable;
 - (9) The capital asset approach will be more useful when the loss is not easily measurable.
- [110] It is helpful to consider the matter in the form of an average estimated annual loss or range of annual losses. As stated by our Court of Appeal (sitting in their capacity as the Yukon Court of Appeal) in *Knapp v. O'Neill*, 2017 YKCA 10:

- [18] The judge is to consider the quantum of the award in light of the range of possibilities indicated by economic analysis. Mathematical aids and economic analysis facilitate a "bracketing" exercise that indicates the high and low extremities of possible awards in a given case, as was recently considered by this Court in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 70-73 (majority per D. Smith J.A.) and paras. 56-58 (Goepel J.A., dissenting).
- [19] Courts, where they can, should endeavor to use factual and mathematical anchors as a foundation to quantify loss of future earning capacity, including economist reports and a plaintiff's pre accident employment history, training, and capabilities: *Jurczak v. Mauro* at paras. 35- 37; *Lampkin v. Walls*, 2016 BCSC 1003 at paras. 181-184, 192-210; *Carey v. Richert* at paras. 14-19; *Summers v. Boneham* (1994), 45 B.C.A.C. 306. In addition, a plaintiff's personality, work ethic, and attitude should all be considered where possible; it may constitute an error to ignore such factors: *Spencer v. Rosati* (1985), 50 O.R. (2d) 661 at paras 11-13 (CA).

2. Discussion and decision

- [111] The plaintiff argues that the "earnings approach" is appropriate, as the plaintiff is established in her profession, and has a clear job history and a future plan. The plaintiff urges the following analytical approach:
- a) the Plaintiff is currently 41 years old, with approximately 25 years remaining in her teaching career. Her earnings at full-time, based on the evidence entered at trial, is approximately \$90,000. At 0.8 (that is, only being able to teach four days of the five-day school week) the loss approximates \$18,000 per annum;
 - b) based on the present value tables provided in the Civil Jury Instructions, the present value of that annual loss must be calculated over the relevant period of years, in order to conform with requirement that present value multipliers allow for the discount rates to be applied pursuant to the Law and Equity Act, RSBC, 1996, c. 253, s. 56.[4] The present value of \$18,000 over 25 years as a starting point yields a multiplier of 20.7196 and a net result of \$372,952.80 present value;
 - c) as the assessment of future loss of capacity is a judgment, and not just a calculation, the Court should consider those positive and negative contingences that it sees fit such as the possibility for her condition to improve, the possibility of having to retire earlier than hoped, the fact that the annual amount may underestimate the true annual loss due to annual raises, the impact of less annual earnings on pension long-term, and anything else the Court considers relevant. Finally, the award should be fair and balanced to both sides;
- [112] The plaintiff submits that a loss of future earning capacity award of \$350,000 meets those criteria and is fair and balanced on all the facts of this case.

[113] The defendant argues that the plaintiff has failed to prove any loss of future earnings capacity. Alternatively, the defendant argues that if damages are to be awarded for future income loss, it should be based upon the capital asset approach, and that \$24,000 would be an appropriate amount in this regard. The defendant advances two primary arguments to this end.

[114] First, the defendant argues that the plaintiff has provided no medical opinion and limited medical evidence establishing that she is only able to work four days a week, with one recovery day. The defendant also points to the lack of a functional capacity evaluation in support of her claim of needing a rest day. While such evidence is useful, however, it is not required. As stated by Southin JA in *Miscisco v. Small*, 2001 BCCA 576 at para 2:

Ms. Stevens for the appellant suggests that there is a principle of law that medical evidence is necessary to establish an impairment of earning capacity. With respect, that is not the law. The question is whether on the whole of the evidence the verdict of the learned judge is supportable. On the evidence here including that of the plaintiff which he accepted it was open to him to make a finding of impairment, as he did here, and to assess it at \$40,000. That being so, I would dismiss the appeal.

[115] The evidence provided by both the plaintiff and the medical experts indicate that the plaintiff has proven a real and substantial possibility that her earning capacity has been impaired by her injuries attributable to the defendant's negligence. The job demands of an active teacher plausibly escalate the pain in the plaintiff's back both in any given day as well as over the progression of a week, such that she would have to work a reduced week, with commensurate lost earnings. In any case, Dr Totouchian did recommended a reduced work week, albeit in a 2015 recommendation. Dr Waseem also states in his report:

Reduced tolerances with sitting and standing causes functional deficiencies in the workplace, leading to a partial disability with reduced work hours and having to work with pain.

The injuries have diminished to a mild degree her ability to perform employment tasks and caregiving. It is uncertain if this reduced capacity will continue indefinitely, as her condition may improve with additional interventions outlined in response to question #10 below.

[116] Second, the defendant advances a mitigation argument. He argues that the plaintiff has lost and will lose no income as a result of her injuries. She could readily take a day off each week if desired and needed, and replace any lost income through a part-time teaching position in the summer.

[117] Neither party could find authority as to whether an injured teacher is expected to mitigate her loss by working in the summer. The plaintiff pointed to several cases where the argument was not advanced and in any case, the court did not expect the plaintiff teacher to mitigate her losses by working in the summer: see for example, *Cebula v. Smith*, 2013 BCSC 1939; *Pham-Fraser v. Smith*, 2010 BCSC 322, and *Soligo v. Turner*, 2001 BCSC 205.

[118] The closest case located by the defendant was *Schnare v. Roberts*, 2009 BCSC 397. That case does not directly consider whether an injured teacher must teach summer school in order to make up for a mid-week rest day necessitated by the injuries. Ultimately, however, *Schnare* turns on the factual finding that the plaintiff had failed to establish that she could only work a four-day teaching week. The Court awarded a reduced amount, based upon the loss of a capital asset approach.

[119] Both sides return to first principles with respect to mitigation of future earning capacity.

[120] Supporting the defendant's position is *Parypa v. Wickware*, 1999 BCCA 88:

[67] These cases demonstrate that the trier of fact, in determining the extent of future loss of earning capacity, must take into account all substantial possibilities and give them weight according to how likely they are to occur, in light of all the evidence. However, in calculating such likelihoods, the plaintiff is not entitled to compensation based solely on the type of work she was performing at the time of the accident. There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work, then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work. If the plaintiff claims she is not able to mitigate by pursuing other lines of work or by retraining, she must prove this on a balance of probabilities. The requirement for mitigation is addressed by this court in *Palmer [v. Goodall]* [1996] BCJ No. 235], at 59:

A plaintiff is not entitled at the cost of the defendant to say, "The only sort of work I like is such and such. I cannot do that. Therefore, you must give me sufficient capital to replace the income I cannot earn on that sort of job".

What the respondent proved in this case was that he had lost his capacity to follow the sort of occupation he was pursuing at the time of the accident. But that did not prove, on a balance of probabilities that he could not earn by pursuing some other sort of occupation, as much as before.

[121] The plaintiff noted that she is only obliged to take the steps that a reasonable and prudent person would take to mitigate her losses: *Red Deer College v. Michaels*, [1976] 2 SCR 324. It does not lie in the mouth of the tortfeasor to finely second-guess the plaintiff's good-faith attempts to mitigate. In the oft-cited words of Lord MacMillan in *Banco de Portugal v. Waterlow and Sons Ltd.*, [1932] AC 452 at 506:

Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the

adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken.

[122] Our Court of Appeal recently considered the test for mitigation in a personal injury context in *Gill v. Lai*, 2019 BCCA 103. In declining to interfere with the trial judge's assessment of whether the plaintiff had exhibited reasonable efforts to mitigate her loss, the Court stated:

[22] I would not accede to the appellants' argument the judgment of this Court in *Friesen* precludes consideration of the plaintiff's personal circumstances in the analysis. In my view, the subjective/objective analysis requires the court to ask what a reasonable person would do in the plaintiff's circumstances. In *Tangye v. Calmonton Investments Ltd.*, 1988 ABCA 206, a commercial case subsequently applied in personal injury damage assessment in *Paniccia Estate v. Toal*, 2012 ABCA 397, Côté J.A. identified that test in the following terms at para. 24:

[T]he law does not exact perfection or hindsight by the creditor (landlord). His test is relatively lax: whether a reasonable but conservative person in his shoes, knowing only the facts then known, might have made the same choice .

[26] In my view, under the subjective/objective test for the reasonableness of mitigation efforts, the trial judge was entitled to look to the respondent's personal circumstances to determine whether the course of action she took was reasonable. The subjective component of that test does allow a court to look beyond just whether the individual understood, appreciated, and was capable of following the advice given, and to look to their personal circumstances and ability to follow that advice. Further, the objective component of the test entitles the judge to look to what a reasonable person in that plaintiff's circumstances would do. As stated above, where a trier of fact applies the correct test, this Court must defer to their determination on this question of fact.

[123] While a plaintiff is expected to take reasonable steps to mitigate her losses, the defendant cannot insist that she rearrange her life in such a significant way as to work during the summer. One of the main perquisites of the teaching profession is the lack of classroom responsibility in July and August. To insist that she give up that aspect of her profession goes beyond what the reasonableness standard requires. Accordingly, I make no deduction for the plaintiff's failure to seek out summer teaching work.

[124] The Court was not provided with useful evidence with respect to positive and negative contingencies that might affect the plaintiff's future career. With a view to the evidence that was provided, I accept the plaintiff's proposed quantum for loss of future earning capacity of \$350,000. This award will be subject to a 60 percent deduction based on the realistic prospect that her pain will be cured or significantly diminished or managed in future, as discussed below under "Contingencies."

E. Special damages

- [125] The plaintiff claims \$19,041 in special damages.
- [126] The defendant concedes that the plaintiff is entitled to some special damages, but argues that \$5,000 is the appropriate amount. While claims for special damages are subject only to the standard of reasonableness, "plaintiffs are not given carte blanche to undertake any and all therapies which they believe will make them feel good": Redl v. Sellin, 2013 BCSC 581 at para 55. Further, evidence of the medical justification for the expense is a factor in determining reasonableness.
- [127] The defendant focuses on two heads of special damages.
- [128] First, the defendant argues that the plaintiff's claim for the costs of the CrossFit gym membership (\$8,758.75) is unreasonable. The evidence provided by the plaintiff, her husband, and her trainers, as well as the surveillance video, indicate that (1) there are less expensive alternatives for stretching and exercise; (2) her attendance is as much social as rehabilitative; and (3) her efforts are somewhat "lackadaisical." The plaintiff attended a gym before the accident, and would likely be attending in any case. I agree that is not reasonable to reimburse the full amount of the gym membership, and award 50 percent of the amount sought (thus reducing the overall amount claimed by \$4,379.38)
- [129] Second, the defendant objects to reimbursement for their costs of numerous chiropractic treatments from the chiropractor Dr Shore.
- [130] I will allow the plaintiff to recover for the amounts paid to Dr Shore: those treatments were medically recommended and were reasonable in the circumstances. Both Dr Waseem and Dr Totouchian recommend ongoing chiropractic treatment. Although Dr Wong opined that such treatment would be ineffective in resolving the plaintiff's condition permanently, he did not dispute that it could provide relief. Further, while Dr Shore is a chiropractor, her treatment modalities overlap with those provided by physiotherapists and other health professionals. These treatments include active treatments including rehabilitation and corrective exercises. They also include massage therapy, interferential electric currents, laser treatments, and transcutaneous electrical nerve stimulation. These treatments go beyond passive chiropractic treatment, and approximate the treatments recommended by the medical witnesses cited by the defendant. Further, while they may not have healed her injuries, these treatments did assist the plaintiff in pain management.

F. Cost of future care

1. Law

- [131] The purpose of an award for cost of future care is to restore, as best as possible with a monetary award, the injured person to the position he or she would have been in had the accident not occurred. The award is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: Gignac v. Insurance Corporation of British Columbia, 2012 BCCA 351 at paras 29-30.

[132] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care; (1) there must be a medical justification for claims for cost of future care; and (2) the claims must be reasonable: *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 at 84 (SC); *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras 62-63.

[133] While a physician need not testify to the medical necessity of every item of care that is claimed, there must be some evidentiary link drawn between the physician's assessment of the plaintiff's condition and recommended treatment and the care recommended by a qualified health care professional: *Gregory*, supra, at para 39.

[134] In *Prempeh v. Boisvert*, 2012 BCSC 304 at para 108, Dardi J summarized the law:

The assessment of damages for cost of future care necessarily entails the prediction of future events: *Courdin v. Meyers*, 2005 BCCA 91 at para. 34; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, [2002] 1 S.C.R. 205 at para. 21. The courts have long recognized that such an assessment is not a precise accounting exercise and that adjustments may be made for "the contingency that the future may differ from what the evidence at trial indicates": *Krangle* at para. 21; *X. v. Y.* at para. 267. The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the consideration of the specific care needs of the plaintiff and the expenditures that reasonably may be expected to be required - taking into account the prospect of any improvement in the plaintiff's condition or conversely the prospect that additional care will be required: *O'Connell v. Young*, 2012 BCCA 57 at paras 67-68; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[135] The resulting award is to reflect the reasonable or normal expectations of what the injured person will require while being fair to both the claimant and the defendant: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras 21-22.

[136] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle* at para 21.

2. Discussion and decision

[137] The plaintiff claims \$50,000 in costs of future care. She argues that this amount is required in order to allow her to continue with the therapy she has been engaged in since the accident, and also to maintain her fitness as recommended by the medical experts.

[138] The plaintiff proposes that the future care costs be based on the cost of the treatments that she has actually spent to date, as a measure and indication of her ongoing costs of care. She has spent \$19,041 on care and health maintenance since the accident: approximately \$3,000 per year.

[139] The plaintiff points to the recommendations for various future treatments made by the medical experts. For example, Dr Waseem recommends:

[The plaintiff] requires supportive therapy consisting of chiropractic soft tissue treatment modalities to target myofascial pain of thoracic spine.

Additional interventions for the left sacroiliac joint pathology would include use of a sacroiliac joint belt when engaged in more physically demanding tasks, image guided cortisone injection, prolotherapy, and continued core strengthening, strengthening of the left hip muscles, and partaking in cross fit as per her current routine.

[140] The defendant accepts that the plaintiff may have a "modest claim" for the cost of future care, and suggests \$5,000 as an appropriate award. Once again, the defendant objects to payment for CrossFit and treatment by Dr Shore.

[141] I reach the same conclusions with respect to the future costs of CrossFit and treatment by Dr Shore as I did under Special Damages, above. Specifically, I award a lessened amount with respect to CrossFit gym membership. Insofar as Dr Shore is not solely providing chiropractic treatment, and the treatment is providing some relief in any case, an award for that ongoing care is also warranted. It also serves as a proxy for the cost of future treatments along the lines suggested by the medical experts, including cortisone injections, prolotherapy, and physiotherapy.

[142] Accordingly, I award future care costs of \$44,000, which will be reduced by 60 percent, as set out below, representing the real possibility that the plaintiff will be wholly or partially healed in the future.

VII. MITIGATION

A. Introduction

[143] In addition to the mitigation argument discussed above with respect to loss of future earning capacity, the defendant claims that the plaintiff has failed to mitigate her damages in failing to pursue two medical treatments recommended by her treating physician as well as the experts called at trial: physiotherapy and cortisone injections. The defendant suggests a reduction of up to 25 percent for failure to mitigate in this regard.

[144] The parties agree that the defendant bears the onus of proving that the plaintiff could have avoided all or a portion of her loss. Specifically, the defendant must prove two things to establish that the plaintiff has not pursued a course of medical treatment recommended to her by doctors: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para 57.

[145] As stated in *Gregory*, supra, where the Court of Appeal reversed the trial judge's mitigation deduction based on the plaintiff's failure to seek recommended cortisone injections:

- [56] I would describe the mitigation test as a subjective/objective test. That is whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is "the extent, if any to which the plaintiff's damages would have been reduced" by that treatment. The Turner case, on which the trial judge relies, uses slightly different language than this Court's judgment in Chiu: "there is some likelihood that he or she would have received substantial benefit from it..."
- [57] In this case the trial judge found as a fact that the cortisone shots were "not necessarily curative, they reduce the inflammation... Sometimes the relief is only temporary but sometimes the injections bring long term benefits". She did not find that the treatment would have reduced the symptoms. In addition there is the fact that the plaintiff reasonably believed the diagnosis was a tear and that the injections would have no healing effect on a tear.
- [58] Regardless of whether the trial judge erred in finding on the evidence that it was objectively reasonable for the plaintiff to undergo the injections, I conclude that she erred in her application of the correct test, as articulated in Chiu. The physicians testified only that it was a reasonable treatment to try, and it might afford some relief. In my view such an opinion does not meet the threshold for reducing an award as described in Chiu.

[emphasis in original.]

B. Discussion and decision

- [146] As set out above, the plaintiff has failed to pursue several treatment options recommended by her treating physician, as well as the expert witnesses. This overall pattern comes very close to satisfying the heavy burden of proof imposed on the defendant in establishing a failure to mitigate. That said, I conclude that the defendant has fallen short of establishing that the plaintiff was not reasonable with respect to the two specific treatments raised by the defendant under this argument.
- [147] First, I am satisfied that the plaintiff has appropriately received treatment akin to physiotherapy from Dr Shore, for the reasons set out above under "Special Damages."
- [148] Second, the plaintiff did not wish to try the cortisone injection while she was breast-feeding (until around 2018) even though she admits that no physician had indicated any complications or risks associated with that treatment to the mother, or the child. Further, while Dr Totouchian raised the topic of cortisone injections in 2018, it was only after hearing Dr Wong's great confidence in the treatment at her independent medical examination in May 2019 that she decided to give it a try. The cortisone injection was delayed due to the schedules of both the plaintiff and the referring doctor. That said, the law does not impose the standard of perfection in its analysis of mitigation. I am satisfied that there was no undue delay between the plaintiff first learning of the great promise of cortisone treatments, and her first treatment. Further, the defendant has fallen short of the

high standard required by the test for mitigation, and is unable to show the extent to which the cortisone treatments would have reduced the plaintiff's symptoms. Based on the single cortisone injection applied, the plaintiff's condition improved but was not wholly resolved.

- [149] That said, the initial, albeit limited, success of the cortisone treatment, and the prospect that further cortisone injections or other treatments will likely improve or heal some or all of the plaintiff's complaints, act as a significant positive contingency in reducing damages, as discussed in the next section.

VIII. CONTINGENCIES

- [150] In *Athey*, supra, Major J provided guidance on adjustments for contingencies. He contrasted past events, which must be proven on a balance of probabilities and are thereafter treated as certainties (at para 28), with hypothetical and future events:
- [27] Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J.C. Hutton Proprietary Ltd.* (1990), 160 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1997), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
- [151] The extent, if any, to which awards should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para 253.
- [152] The qualified success of the sacroiliac joint injection prompts a contingent reduction in the damages on the basis that further treatments or similar treatments may heal the plaintiff's injuries or reduce the pain to a more manageable amount.
- [153] The plaintiff's conditions may also be improved or healed entirely through some or the several other treatments recommended by the medical witnesses called by both sides: core-strengthening, stretching exercises, exercises overseen by a kinesiologist, cognitive behavioural therapy, radiofrequency neurotomy/ablation, ultrasound treatment, electrical stimulation, prolotherapy, use of a sacroiliac joint belt, and more consistent use of anti-inflammatory medications.

[154] As noted above, Dr Wong was highly optimistic that the plaintiff's conditions would be entirely resolved if she pursued the cortisone injections, coupled with a kinesiology program. Cortisone injections were also recommended by Dr Totouchian and Dr Chawla. Dr Waseem was less certain, although he provided a list of other therapeutic options that he believed would assist in the plaintiff's recovery or pain management.

[155] I find that the recommended treatments, particularly cortisone injections, coupled with the recommended kinesiology and targeted exercises, offer a very real possibility that the plaintiff's complaints will be largely resolved or at least significantly manageable at some point in the future. Further, and in any case, the plaintiff can likely substantially abate the pain through slightly stronger over-the-counter anti-inflammatory medication and through more regular resort to that medication. Accordingly, damages for loss of future earning capacity and cost of future care will be reduced by 60 percent.

[156] In this, I reach a conclusion and remedy similar to that in *Utle v. Schmeichel* (1997) 155 Sask R 108 (QB) at para 40:

The plaintiff has established on the balance of probabilities that she will suffer a future loss of income as a result of her current loss of earning capacity. She has not satisfied me on the balance of probabilities that her medical condition is permanent. In the circumstances I consider it reasonable to calculate the future losses as if they were permanent and reduce the same by a 50 percent contingency. This contingency includes all of the negative and positive contingencies that would normally be taken into account with respect to this head of damage.

[157] Insofar as non-pecuniary damages partly address the plaintiff's future, I have also reduced that head of damages, as set out above.

IX. conclusion

[158] The plaintiff is awarded the following damages:

Non-pecuniary damages

\$65,000

Loss of past earning capacity

\$45,017.93

Loss of future earning capacity

\$140,000*

Special damages

\$14,661.62

Cost of future care

\$17,600*

Total

\$282,279.55

* after 60% contingency deduction

[159] Subject to further submissions on facts presently not before the Court, the plaintiff is entitled to her costs.

"Crerar J"

- [1] A few points of testimony provided by the plaintiff and her husband were questionable, somewhat undermining their credibility. They alleged, for example, that they had to cut back on home expenses as a result of the injuries. During this period, however, the overall household income increased.
- [2] Dr Totouchian's report made several erroneous references to ongoing neck injuries in addition to the back injuries. The defendant argued that her report and testimony should be afforded little weight. The plaintiff and Dr Totouchian said that these references were just the result of typographical errors and sloppy editing. While those errors are unfortunate, and lessen the weight to be afforded her report, I accept that those references to neck pain were immaterial errors. Dr Totouchian is in the best position to report on the plaintiff's development since the accident, and in any case, her conclusions are consistent with most of the other medical evidence.
- [3] These figures adjusted for inflation.
- [4] No expert actuarial evidence was called. The plaintiff's proposed approach was recently blessed by Branch J in *MacGregor v. Bergen* 2019 BCSC 315: "Neither party provided expert testimony as to the appropriate present value multipliers. However, I find that I have an obligation to account for the present value of the future losses pursuant to s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253. Multipliers are calculated using the designated 1.5% for the present value of future income loss and 2% for any other future losses. I find that I am entitled to make use of the multipliers provided at Appendix E of the Civil Jury Instructions for this purpose. I note that the court has relied on the Civil Jury Instructions for this purpose in other cases where expert evidence was not made available "

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