

CANADA / JUDGMENT

Walls v. Ocampo

2020 BCSC 499

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2020 BCSC 499 Walls v. Ocampo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walls v. Ocampo,

2020 BCSC 499

Date: 20200401

Docket: M163801

Registry: Vancouver

Between:

Carrie Walls

Plaintiff

And

William Ocampo and Purolator Inc.

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Dates of Trial:

Vancouver, B.C.

March 2-6; 9,

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Vancouver, B.C.

April 1, 2020

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I. Introduction

- [1] This is an assessment of damages arising from injuries sustained by the plaintiff in a motor vehicle accident (the "MVA" or "the accident") that occurred December 16, 2014. The defendants admit liability for the accident.
- [2] Aside from general assessment issues, the major specific issues relate to: (1) the plaintiff's claim for an award for loss of future earning capacity; and (2) the defendants' contention that the plaintiff failed to mitigate her loss by failing to follow medical treatment advice.

II. Background

A. The Plaintiff

- [3] The plaintiff is 52 years of age. She was 47 years of age when the accident occurred. She is married, and has no children.
- [4] The plaintiff was born in Pontiac, Michigan in 1967. At two years of age she moved to Arizona, and at seven years of age she moved to Arkansas, where she graduated from high school in 1985. As a student she excelled at athletics. In grade 12, she was captain of the basketball and cheerleading teams. In 1986 she attended the University of Arkansas, but dropped out due to lack of funds. She worked for a time in construction with her father in Florida. He was a pipe fitter, and she worked as his helper. She returned to college, taking a paralegal program at Little Rock, Arkansas. She obtained a diploma as a paralegal in 1988, but has never worked as a paralegal.
- [5] While in college she worked as a waitress at a restaurant, then began working at a photography studio within a department store, Dillard's. The studio was operated by Photography Corporation of America ("PCA"). PCA promoted her to the position of "studio manager" at a location in Fort Smith, Arkansas. For a person of 19 or 20 years of age, she had considerable responsibility. She was in effect the sales manager and general manager of the outlet, with responsibility for functions such as floor sales, telemarketing, photography, and administrative duties.

- [6] In 1991, she married a U.S. Marine, who was assigned to a base in California. She quit her job with PCA and moved to California with her husband.
- [7] When in California, she obtained work with another photography company, Life 365 portraits ("Life 365"). With minor exceptions, she has worked for this company continuously since 1991.
- [8] The business of Life 365 is centred on baby photography. Using information obtained from hospitals, the company contacts new mothers, at various locations around the United States, and arranges for local photographers to attend at their residence to take baby photographs. Life 365 is responsible for scheduling the photographers efficiently by time and distance.
- [9] The plaintiff was hired as an office manager for Life 365 in California. She soon became a District manager for the company, covering areas within Southern California.
- [10] She and her first husband divorced in 1997, amicably. She chose to move to Houston, Texas, where she had friends. She resumed working for Life 365 there. The company tasked her with opening a call centre in Houston, which she organized, from the ground up, including locating a property, signing the lease, obtaining furnishings, and hiring and training staff.
- [11] In Houston the plaintiff continued working out regularly at a gym, as she had done in the past. She had been avid about training and fitness since high school. In 1998 she was attending the gym five days a week, for not less than 20 hours per week. She met her present husband, Mitch Walls, at a gym in Houston. Mr. Walls was working as a prison guard, but also did personal training as a sideline. He was equally passionate about fitness training. They enjoyed working out together at the gym, five or six days a week. They were married in January 2000.
- [12] Mr. Walls was born in Fernie, B.C. He moved with his family to Beaumont, Texas when he was in grade 3. He began bodybuilding and weight training at age 12. He opened a gym at Beaumont, Texas at age 18. When his stepmother died in 2002, his father moved from Texas to Las Vegas. Mr. Walls decided to return to Canada where most of his family resided. The plaintiff and Mr. Walls moved to Canada in 2002, initially residing in Kelowna. Their goal was to reside in the Lower Mainland and open a gym business.
- [13] They opened Pro Trainers gym ("Pro Trainers") at a location in Langley on 56th Avenue ("gym no. 1") in July 2003. They purchased a strata unit for the gym, and also a condominium apartment located above the gym.
- [14] Pro Trainers has had four locations, to the present.
- [15] When the plaintiff informed Life 365 that she was planning to move to the Lower Mainland of British Columbia, Life 365 offered to relocate the call centre from Houston, Texas to Bellingham, Washington, so that the plaintiff could continue to oversee the operation. The plaintiff accepted the offer. Once again, she started a call centre for Life 365, from the ground up. She resumed work for Life 365 in February 2003. Within a few months the

operation had approximately 30 employees. The work was the same as it was before, that is, managing the call centre, the leads, the routing schedules for the photographers, and associated administrative duties.

- [16] The plaintiff and Mr. Walls continued to work out together regularly.
- [17] In order to develop a personal reputation and profile to help with marketing the planned gym business, Mr. Walls sought to win a bodybuilding competition, which he succeeded in doing in June 2003, when he won a Master's (over 40) bodybuilding championship for the province of British Columbia. He also competed with some success nationally.
- [18] The plaintiff began commuting to Bellingham to work at Life 365 each weekday. It was a one-hour commute in each direction from their home in Langley, located in an apartment above the gym. The three-hour time difference with the U.S. east coast necessitated early starts. Her daily routine involved arising at 4:30 a.m., departing at 5 a.m., and arriving at work at 6 a.m., to open the office, and organize work for the callers, who began at 7 a.m. She worked a nine-hour day before leaving at around 4:30 p.m. to drive back to Langley, where she went directly to the gym. She worked in the gym for approximately two hours, until the gym closed at 7:00 or 7:30 p.m. She also worked in the gym on Saturday mornings. The gym was open for a half day on Saturdays.
- [19] Mr. Walls works as a personal trainer to the gym's clients. The clients pay a fixed monthly fee. Mr. Walls provides a personalized training plan for each client. He assists the clients personally at the gym in going through their workout routines.
- [20] When the plaintiff would arrive at the gym in the late afternoon, Mr. Walls would typically be working with six to ten clients. The plaintiff would assist with training some of the clients.
- [21] She would also tidy the gym by putting away weights (such as the weight plates used for attachment to the equipment), re-racking dumbbells, and so on. The plates weighed from 2.5 pounds to 45 pounds, or even more. She also helped with the gym's paperwork.
- [22] Prior to the accident, she was primarily responsible for tidying and also cleaning the gym.
- [23] She and her husband continued to work out frequently together, not only at their own gym, but at other gyms such as various locations of Steve Nash Fitness World. She did cardio workouts three or four times per week, during the week. She did weight training on Saturday mornings, at Pro Trainers, and would do further weight training on Sundays, sometimes at another gym location such as Fitness World. In total, she worked out four to five times per week.
- [24] Her route basic routine remained the same from 2003 until the MVA occurred in December 2014.

- [25] Gym no. 1 was about 1,000 square feet in area. In 2008 the plaintiff and Mr. Walls expanded the business. They purchased a strata unit on Enterprise Way in Langley to house another gym ("gym no. 2"). The size of the gym increased to 2,500 square feet, on two floors. The plaintiff and Mr. Walls also purchase a three-bedroom townhouse. They sold the gym no. 1 strata unit and their condominium.
- [26] In April or May 2012 Pro Trainers gym moved to a third location ("gym no. 3"), located on Langley Bypass. It was leased. At 4,500 square feet, gym no. 3 was much larger than the previous location.
- [27] In moving the gym to the much larger facility, the plaintiff and Mr. Walls were hoping for a substantial increase in business. However that did not materialize. The rent was \$2,000 a month higher than their previous monthly expense. In order to keep the gym afloat, and to save expense, they sold their townhouse, and moved into the gym. They separated some space from the gym. They converted office space into a bedroom; they added a basic living area, and obtained some kitchen items. The plaintiff's Life 365 income kept them together financially. This has not changed.
- [28] In 2012 and 2013 the plaintiff added evening cross-fit classes to her work at the gym. Cross-fit classes involve a combination of cardio exercise, weights, and other activities using various items of specialized equipment, on a timed circuit. The plaintiff would lead the classes and demonstrate the activities, which were conducted outdoors in the parking lot.
- [29] In 2012 Life 365 began allowing the plaintiff to earn "bonus" income by making prospecting calls to potential customers on her own account. She earned a commission or bonus of \$5 for each completed photo shoot that she arranged. She generally did this work in the afternoon, from 1:00 to 4:00 p.m., after her general administrative work was completed.
- [30] The plaintiff was healthy prior to the accident. She had no significant health problems. Although she weighed 185 pounds, and as she explained had always been "big", she was muscular and fit. She had gained approximately 10 pounds in the two years prior to the accident, and was somewhat heavier than she wanted to be, but felt good about her appearance, and fitness. As Dr. Wang acknowledged, given her 5'6" height, she would have fallen into the obese category based upon her Body Mass Index ("BMI") of 30.
- [31] However Dr. Heran testified that a BMI of 30 is borderline for obesity. BMI is used as a guide, but is not always an accurate indicator. A BMI of 30 could be within normal parameters for certain population members who are well muscled. He stated that a well muscled individual who has a higher BMI by weight alone does not necessarily indicate that they have bad health if they have a low body fat index.

- [32] For financial reasons, in 2017 (therefore post-accident) Pro-Trainers moved again, to a fourth location, where it remains. Gym no. 4 is also located on Langley Bypass, immediately across the parking lot from gym no. 3. Gym no. 4 is smaller, with about 2,000 square feet of gym space and some upstairs office space of about 300-400 square feet. The space is less expensive than gym no. 3.
- [33] The plaintiff and Mr. Walls continue to reside in a small part of the gym facility. The plaintiff works for Life 365 from their residential space.
- [34] The plaintiff testified that she is no longer capable of cleaning the gym. The minimal cleaning that occurs is done by Mr. Walls, sometimes helped by clients.
- [35] The gym has no employees other than the plaintiff and Mr. Walls. No financial statements or records were provided for the gym business. The evidence of the plaintiff is that the gym's revenue only covers its expenses. As the plaintiff's evidence is that she and Mr. Walls rely on the plaintiff's income from Life 365, I infer that the gym pays little or nothing to Mr. Walls.
- [36] On October 1, 2015, the plaintiff's mother moved from Arkansas to Bellingham, Washington, in order to be nearer to the plaintiff. She continues to reside there. She testified that she would like to move to Langley, B.C. to live with her daughter and Mr. Walls. There is no evidence as to whether this is actually feasible from an immigration perspective.
- [37] During 2015 the plaintiff stopped making as many telemarketing calls as she had previously. She explained that she had less time and energy to make calls. In 2014 the "bonus" payments she received totalled US \$10,476. In 2015 the bonus payments she received were reduced to US \$6,631. Her claim for past wage loss is limited to the loss of bonus income between 2014 and 2015, as Life 365 subsequently eliminated the plaintiff's opportunity to participate in the bonus program. The parties have agreed on this amount at \$4,480 CAD.
- [38] Life 365 was purchased by new owners effective October 15, 2018. The new owners closed the Bellingham office effective December 1, 2018. The plaintiff and other employees formerly working at the Bellingham office were directed to work from home from that point. Since then, the plaintiff has done the same or similar work, but from a workstation in her home in Langley.
- [39] She visits her mother in Bellingham regularly. Her mother does her laundry during the visits. The plaintiff can work from her mother's residence, using a workstation she has set up there. She states that the drive remains difficult.
- [40] She continues to do paperwork for the gym, such as filing. She interacts with the gym's clients minimally, as compared with pre-accident.
- [41] In late February 2019 Mr. Walls had to take time away from the gym due to a serious medical condition requiring surgery. He was unable to work for several weeks. The plaintiff had to step in to keep the gym open, while still doing her Life 365 work. Some of the gym clients helped out. By May 2019 Mr. Walls was able to fully resume operating the gym.

B. The MVA

- [42] The MVA occurred on Tuesday, December 16, 2014 at approximately 5 a.m. The plaintiff was driving to work at Life 365 in Bellingham. She stopped at the intersection of Highway 10 (which is the Langley Bypass, in this area). She was stopped at the traffic light at 200th Street, headed westbound. When her light turned green she proceeded into the intersection. Her vehicle was struck by a semitrailer truck driven by the defendant, Mr. Ocampo. Mr. Ocampo was proceeding eastbound on Highway 10, and was attempting to make a left-hand turn to proceed northbound on 200th Street.
- [43] Mr. Ocampo testified that he proceeded into the intersection on an advance green arrow traffic signal. This of course is inconsistent with the plaintiff's testimony that she proceeded into the intersection on a green light. As liability has formally been admitted on behalf of the defendants, I need not resolve this conflict in the evidence.
- [44] The collision was clearly a forceful one. The plaintiff was driving a 2012 Kia Rondo. Post-accident photographs show extensive damage to the front of the vehicle, particularly the left front corner. The vehicle was a write off. The semitrailer also sustained significant damage.
- [45] The plaintiff had no warning of the collision. She was wearing her seatbelt and shoulder strap. She recalled being jerked hard to the right, and feeling pain in her left side neck and chest area, from the seatbelt. She felt like she was in shock, and was frightened and overwhelmed. She exited her vehicle and spoke with Mr. Ocampo. Their versions of the conversation differ somewhat. The details are not material. Police and ambulance attended. The plaintiff was examined at the scene by ambulance attendants. She declined going to the hospital. She was focused on trying to get to work. She called Mr. Walls, and her mother. The MVA was five blocks from the gym, so she walked to the gym. She called another employee at the Life 365 call centre to advise that she would be unable to get to work that day. She had not missed work in many years.
- [46] She called an insurance company and arranged for a rental car during the day. The next day, December 17, she worked a partial day only. She went to see a doctor. She also left work early on December 18, and again on December 19, for a second doctor's visit. Other than that, she has not missed time from her work at Life 365.

C. The Plaintiff's Injuries and Treatment

- [47] On the evening of the day the accident occurred, the plaintiff felt pain in her neck, and in her shoulder, and noticed bruising on the left side of her chest, and on the right side of her chest underneath the rib cage, which she thought were caused by the seatbelt.
- [48] Upon arising the next day, she had a stiff neck and a sore back. Her worst symptom was the stiff neck. She went to work for a few hours at Life 365. She elected to leave work early and go to a Langley walk-in clinic, Willoughby Medical. She had no family doctor at the time. She saw Dr. Anil Soni. Dr. Soni has treated her as a family physician since the MVA. She has

seen Dr. Soni or another doctor at the same clinic on 11 occasions between December 17, 2014 and May 8, 2016. There is no medical/legal opinion report from Dr. Soni, and he did not testify. The defence does not seek an adverse inference. Dr. Soni's clinical records were available for review by the experts in this case.

- [49] When the plaintiff saw Dr. Soni on December 17, 2014, she complained of neck and back pain. The plaintiff testified that Dr. Soni suggested pain relief medication, Tylenol 3, and prescribed physiotherapy and massage therapy.
- [50] Her condition worsened over the next couple of days. She saw another doctor at the Willoughby clinic on December 19, 2014. Her neck and back pain had increased. She also felt dizziness, and numbness down her arms. The plaintiff was sent for x-rays of her neck. The medical opinions all state that nothing remarkable was noted. An MRI of her cervical spine on May 30, 2015 showed degenerative disc disease. A CT scan of her lumbar spine on November 30, 2015 showed degenerative discs and facet joint arthropathy.
- [51] The plaintiff attended physiotherapy on four occasions, from December 23, 2014 to January 20, 2015, and one session of massage therapy February 3, 2015. Her main complaints were of neck and low back pain, particularly on the right side. She also continued to have dizzy spells, and left shoulder pain.
- [52] The physiotherapist demonstrated stretching and light exercise procedures, involving, for example, use of rubber bands. She discontinued physiotherapy after the fourth session, January 20, 2015.
- [53] The plaintiff continued to work daily at Life 365, doing the best she could. She found driving difficult due to low back pain, shoulder and neck pain. She had pain at night which interfered with her sleep, and she would awaken, thinking back to the accident.
- [54] During January when she returned home from work she would immediately lie down, avoiding the gym's clients. She engaged in no recreational activity. She tried some light cardio workouts but found them very difficult. She limited her workout to using a recumbent bicycle. She also did stretching, range of motion and rubber band exercises as recommended by the physiotherapist, three or four times per week.
- [55] She attempted massage therapy February 3, 2015. The massage therapy seemed to worsen her pain, so she did not continue with it.
- [56] The plaintiff testified that her condition worsened during 2015. Her pain did not seem to be improving, she was gaining weight, and felt poor, from an emotional and mood point of view. She found it difficult to manage her pain while at work. The commute remained difficult.
- [57] She continued to lie down on the couch and sleep when she returned home, rather than joining in at the gym with her husband as she had done previously,

- [58] She tried to resume weight training, with very light weights only, supervised by Mr. Walls. She bench pressed 20 pounds, versus as much as 200 pounds previously. This caused a lot of pain, and she did not continue. She continued doing the stretching and rubber band exercises recommended by the physiotherapist.
- [59] Dr. Soni referred her for the MRI of her neck which was conducted May 30, 2015.
- [60] Dr. Soni referred her to a neurosurgeon, Dr. Mutat, who she saw October 13, 2015. Dr. Mutat sent her for a CT scan of the lumbar spine. He prescribed medications, Gabapentin and Mobicox, which the plaintiff began using. They provided some relief, but the plaintiff felt that they had side effects that she did not like. The CT scan of her lumbar spine was conducted November 30, 2015. She saw Dr. Mutat again on December 17, 2015, and was discharged back into Dr. Soni's care. Among other recommendations, Dr. Mutat advised the plaintiff to start an aquasize exercise program, and join a weight loss program such as Weight Watchers.
- [61] There is no medical legal report from Dr. Mutat. His two consult reports to Dr. Soni are in evidence for limited purposes pursuant to a Document Agreement.
- [62] The plaintiff returned to see Dr. Soni on May 4, 2016. She complained that she was not improving, was depressed, and was gaining weight. Dr. Soni referred her to see a physiatrist, Dr. Sherry Wang.
- [63] The plaintiff saw Dr. Wang for the first time December 29, 2016, and on four subsequent occasions, ending February 13, 2018. Dr. Wang provided a report and testified at the trial. I will review her evidence, below.
- [64] When the plaintiff saw Dr. Wang, she continued to complain of neck and shoulder pain, low back pain, and hand numbness.
- [65] Dr. Wang prescribed venlafaxine an antidepressant, to help with the plaintiff's mood, and pain medications to help her get back to working out in the gym with her husband. The plaintiff continued taking gabapentin and mobicox. In October 2017 Dr. Wang added diclofenac, another pain medication.
- [66] During 2016 and 2017 the plaintiff continued with stretching and brief cardio workouts. She tried using weights once per week but found it painful.
- [67] When the plaintiff saw Dr. Wang for the final time February 13, 2018, Dr. Wang suggested active rehabilitation with a kinesiologist. The plaintiff underwent seven sessions with a kinesiologist during March and April 2018.
- [68] The plaintiff testified that the kinesiologist's recommendations were very similar to what she had already been doing, namely, stretching, use of rubber bands, and some weights.

- [69] The plaintiff described her condition in 2018 as being much the same as before; namely, neck pain, lower back pain, shoulder pain. She said she simply had to "fight through it, day to day".
- [70] The plaintiff has not had accident-related medical treatment since seeing Dr. Wang on February 13, 2018, and her last session of active rehabilitation on April 16, 2018.
- [71] Although the plaintiff testified that the venlafaxine was helpful in relation to her mood, she stopped taking it sometime in mid-2018, without medical advice. She believed that the medication was causing unpleasant side-effects. Initially she testified that a doctor had said she could discontinue using venlafaxine, but the evidence is that she did not receive such medical advice.
- [72] The plaintiff testified that she continues to have neck, shoulder and low back pain. Her shoulder pain is associated with her neck pain. It is in both shoulders. Her back pain is mostly in the lower back. While at work, she gets up, stands, walks a little bit, and stretches to relieve the pain. She interrupts her work five to seven times per day, for three to five minutes on each occasion. She continues to have problems sleeping. She describes her neck pain as "very stiff and painful". She continues to take over-the-counter medications such as Aleve and Tylenol. She stretches frequently.
- [73] The plaintiff does not do very much, recreationally, other than watching television or movies.
- [74] Her cardio exercise is limited to three or four times per week, 10 to 15 minutes, maximum. She does limited weights. She states that she continues to do the exercises demonstrated to her by the kinesiologist. Her cardio exercise is limited to using a recumbent bicycle.
- [75] Currently, she does light weight training once a week, and light cardio workouts consisting of just 10 minutes on an recumbent stationary bicycle three or four times per week. She can walk, but avoids "going too long or too fast" as she put it. Pre-accident for her cardio exercise she used a stair stepper, stationary bicycle, and treadmill, for 45 minutes to an hour. Now she only uses the recumbent bicycle.
- [76] The plaintiff testified that prior to the accident, she weighed 185 pounds, but was "solid muscle" and was very toned. She now weighs 235 pounds. She feels that she cannot be the person that she was. She was previously energetic, fit, and happy. Now she is sad and embarrassed about her appearance and physical condition. She says she feels like a failure. Her relationship with her husband has suffered. The relationship was centred around their joint love for fitness and physical conditioning, and the gym operations. The plaintiff feels she is no longer a true partner in the gym. She feels that she is no longer fulfilling her promise to her husband. She feels there is no hope of resuming the relationship they had before.

III. Medical and Occupational Therapist Evidence

A. Dr. Sherry Wang, Psychiatrist

[77] On referral from her family doctor, Dr. Wang saw the plaintiff for consultation purposes. She saw her on three occasions in 2016 and 2017. She saw the plaintiff again January 26, 2018 and February 13, 2018, after she was asked to prepare a medical-legal report. Her report is dated February 14, 2018 (thus, just over two years prior to the trial). She testified at the trial.

[78] Dr. Wang's report notes the following symptoms:

- (1) neck pain;
- (2) shoulder pain;
- (3) numbness in hands;
- (4) lower back pain;
- (5) weight gain and poor tolerance to exercises;
- (6) sleep disturbance; and
- (7) depressed mood.

[79] Dr. Wang provided the following primary diagnoses:

- (1) mechanical neck pain/traumatic neck strain;
- (2) traumatic shoulder soft tissue strain; and
- (3) mechanical low back pain/traumatic back strain.

[80] At trial she explained that "mechanical neck or low back pain" is not a strictly defined medical term. It means musculoskeletal pain.

[81] As secondary diagnoses, that is, indirectly related to the MVA, Dr. Wang diagnosed: (1) physical deconditioning; (2) insomnia; and (3) mood difficulties.

[82] Dr. Wang also referred to her symptoms as being widespread myofascial soft tissue pain, and chronic pain syndrome, or chronic pain disorder.

[83] In Dr. Wang's opinion, the plaintiff has carpal tunnel syndrome, resulting in the plaintiff's hand numbness. Although the plaintiff believed her hand numbness was related to her accident injuries, in Dr. Wang's view the carpal tunnel syndrome is probably unrelated to the MVA. At trial, the plaintiff does not assert that the carpal tunnel syndrome was caused by the MVA.

[84] Dr. Wang's prognosis, in summary, is:

- a) The plaintiff has reached maximal medical improvement with respect to her chronic pains and associated dysfunctions. She is unlikely to achieve further tissue healing, because tissue healing is usually complete within three months. However the pain may persist. She added: "pain management skills usually include activity modification, cognitive pain coping strategies and functional adaptation";
 - b) She may experience intermittent flares of her pains depending on her level of activities. She will likely need ongoing supportive care from her family physician and therapists in managing [symptom flares];
 - c) It is possible that the plaintiff would improve her physical deconditioning through a well-designed exercise program; and
 - d) In the long-term, there was a possibility of future deterioration of her neck and low back pain owing to a combination of factors: natural aging, accumulative injuries, and incomplete recovery from this injury. She is at high risk of developing post-traumatic neck and low back degeneration.
- [85] Functionally, Dr. Wang states that the plaintiff is expected to be independent in relation to activities of daily living (such as bathing, toileting, dressing, etc.) She can manage what Dr. Wang described as "instrumental activities of daily living" (meal preparation, laundry, home maintenance) with some restrictions and limitations.
- [86] In relation to her occupation, Dr. Wang states that: "... her ability to reliably and consistently perform the above-mentioned duties (gym, and office/desk work) is limited owing to pain and dysfunction, and this is likely an ongoing issue in the foreseeable future."
- [87] Dr. Wang recommended that the plaintiff take two or three months off from work in order to focus on an active rehabilitation program, guided by a qualified kinesiologist. She stated it would be beneficial for the plaintiff to have cognitive behavioural therapy ("CBT") or psychiatry/psychological counselling to further address coexisting psychological pain concerns.

B. Dr. Paul Winston, Psychiatrist

- [88] The plaintiff saw Dr. Paul Winston, psychiatrist, at the request of the defendants on November 6, 2019. Dr. Winston prepared a report of the same date, and testified at the trial.
- [89] In relation to patient history, Dr. Winston noted that "Ms. Walls is a tangential historian who struggled to remain on topic and frequently did not answer the question that was requested of her. She had a great difficulty describing her symptoms." Dr. Winston's report refers to complaints of neck pain, lower back pain, numbness in her hands, dizziness and headaches, and sleeping difficulties.

- [90] Dr. Winston described her clinical examination as: " grossly unremarkable with good range of motion in the neck and shoulders, good power in the upper and lower extremities, normal range of motion of the low back. She was not feeling any particular discomfort at the time of examination."
- [91] Dr. Winston provided no specific diagnosis. He says her complaints are subjective.
- [92] He states that her diagnosis is: " likely soft tissue injuries [against] the background of significant osteoarthritis both in the cervical spine and low back." He notes the psychological component to her symptoms, as noted by Dr. Wang.
- [93] Throughout his report and testimony, he emphasized that Ms. Walls did not receive much in the way of treatment, and was uninterested in standard therapies.
- [94] He disagreed with Dr. Wang's characterization that the plaintiff had undergone "extensive rehabilitation therapies" as stated in Dr. Wang's report.
- [95] Dr. Winston states, "I cannot see that there is an organic basis for Ms. Walls' symptoms." In his opinion, she is not impaired or restricted in terms of employment or activities of daily living, or in any other area.
- [96] In terms of treatment recommendations, Dr. Winston stated that although Ms. Walls is not interested in participating in a rehabilitation program, nonetheless, "I would always recommend a good exercise cardiovascular program and a strengthening program for any patient who reports pain, deconditioning and weight gain".

C. Dr. Navraj S. Heran, Neurosurgeon

- [97] The plaintiff saw a neurosurgeon, Dr. Navraj S. Heran, at the request of her counsel for purposes of an independent medical/legal examination, on February 4, 2017. Dr. Heran prepared a report of the same date, and testified at the trial. Dr. Heran provided the following diagnoses, all as a consequence of the MVA:
1. Soft tissue injuries involving the neck and upper torso;
 2. Soft tissue injuries involving the left shoulder consistent with seat belt injury;
 3. Soft tissue injuries involving the low back;
 4. Probable aggravation of underlying mechanical neck and low back pain, mid-cervical spine C4-5 and C5-6, and lumbar L4-5; and
 5. Sensory dysfunction in the upper extremities, not yet diagnosed; this could be consistent with secondary thoracic outlet syndrome--neurogenic type, or possibly from carpal tunnel syndrome.

- [98] With respect to the fifth item, (the reference to sensory dysfunction in the upper extremities, etc.), at trial, Dr. Heran confirmed that when he wrote his report in 2017 he did not have enough information to confirm a diagnosis, although he suggested possible thoracic outlet syndrome, or carpal tunnel syndrome. As the plaintiff does not make a claim for either condition as having been caused by the motor vehicle accident, there is no need for me to consider this item any further.
- [99] Dr. Heran noted that post injury psychological factors of stress, anxiety and depressive elements were influencing her symptoms.
- [100] He provided a qualified prognosis. He stated: "significant improvements will be established following the management of her mood state. Only once this is done then will a true assessment of her functional limitations be established."
- [101] Dr. Heran said that, at the present time (that is, when he wrote his report, in February 2017, more than three years prior to trial) her limitations appeared to be reasonable and "are consistent with anything involving repetitive activities, prolonged sitting, standing and any medium level activities or above. This applies to domestic, recreational and vocational pursuits". In other words, as I interpret this evidence at the time, the limitations she was experiencing were not out of line with her medical condition.
- [102] He added, "Overall, from a functional perspective, I anticipate that she will improve once treatment measures have been optimized." He reiterated that treatment "optimization" included psychological treatment. He noted that the plaintiff was taking the psychotropic medication, Venlafaxine, as prescribed by Dr. Wang, which he appears to assume she would continue to use.

D. Dr. Mitchell Spivak, Psychiatry

- [103] Dr. Spivak examined the plaintiff October 28, 2017. He provided a report and testified at the trial.
- [104] His patient history and examination which, as a psychiatrist, consisted of the interview, is best summarized by the following comment in his report: "Most themes returned to how the loss of the gym in her life and her ability to work out has impacted her and has left her feeling unhappy."
- [105] Dr. Spivak diagnosed "adjustment disorder with depressed mood". He also noted some modest vehicular phobia, in that driving provoked anxiety.
- [106] Dr. Spivak explained at trial that an adjustment disorder is a psychiatric diagnosis that is provided when someone has a form of emotional disruption, brought on by a stressor, which is viewed as being excessive or causing some level of impairment, but does not meet the criteria for other psychiatric diagnoses such as an anxiety disorder or major depression. In Ms. Walls' circumstances, the "major stressor" is the impact of her pain, and how that has affected her life; both the direct effect of the pain, and also, and most

importantly, not being able to be in the gym the way she was before, which was an integral part of her happiness and her identity.

- [107] Dr. Spivak added that " her quality of life has suffered dramatically. The impact of not being able to exercise when it has been a fundamental part of her life dating back to her childhood has been dramatic for her. She has experienced an inability to emotionally adapt to what for her has been a significant change in her lifestyle and self identity."
- [108] Dr. Spivak said that her prognosis is guarded. He states, "until she is able to be more adaptive regarding her physical limitations and how to work around them, she may continue to struggle with depressive symptoms chronically."
- [109] Dr. Spivak recommended that she see a mental health professional. He suggested she should see a psychologist trained in CBT. 10 to 20 sessions of psychotherapy, to begin with, could be beneficial, and she could benefit from further psychotherapy sessions.
- [110] However, Dr. Spivak noted that she is " generally disinclined towards mental health treatment." And "her general reluctance around mental health treatment may also represent an impediment to her seeing a more successful resolution at some point in the future".
- [111] Her chronic pain will leave her vulnerable towards depression and mental health issues.
- [112] At trial, Dr. Spivak was not optimistic about the likelihood of success with psychotherapy such as CBT, due to her reluctance to utilize or participate in such treatment.

E. Dr. Eugene Okorie, Psychiatry

- [113] Dr. Okorie saw the plaintiff November 16, 2019, for an independent medical examination, at the request of the defendants. He provided a report and also testified at the trial.
- [114] Dr. Okorie's diagnosis is similar to that of Dr. Spivak. Dr. Okorie states:
- However, Ms. Walls has developed pain associated dysphoria (distressed, sadness, anxiety and worry) that are markedly out of proportion to her injuries qualifying her for adjustment disorder with mixed anxiety and depression, according to criteria specified in the Diagnostic and Statistical Manual of Mental Disorders fifth edition (DSM-5).
- [115] She also meets criteria for mild specific driving anxiety according to DSM-5.
- [116] In Dr. Okorie's view, she "erratically engaged" with physical rehabilitation therapies, with limited benefits. She has not had any psychological treatment for her accident related injuries. Her emotional disorders have been maintained by inadequate psychological treatment together with ongoing pain and physical limitation.

- [117] Dr. Okorie states that, given the mild nature of her emotional disorders, she does not need treatment with psychotropic medication. He recommends 12 to 16 sessions of CBT focused on stress management, coping skills training, mindfulness/meditation and trauma desensitization". He recommends education to teach her appropriate exercises that would help her pain, and suggests a weight loss program to enhance her self image and reduce the load and consequently the pains in her spine.
- [118] In Dr. Okorie's view, the prognosis for her adjustment disorder and driving anxiety are good. In his view, effective treatment would lead to remission of her emotional syndromes, meaning that her symptoms would improve and that they would no longer be clinically relevant.
- [119] Unlike Dr. Spivak, Dr. Okorie was of the view that she need not continue with psychotropic medication such as Venlafaxine.

F. Jennifer Lane, Occupational Therapy

- [120] Ms. Lane provided a cost of future care assessment report, and testified at the trial. She conducted her assessment December 6, 2018.
- [121] For purposes of her report, Ms. Lane conducted some limited functional testing. The plaintiff demonstrated range of motion within functional limits, but reported pain and demonstrated guarding behaviours during the testing. The report is largely based upon the plaintiff's self-report.

IV. Diagnosis and Prognosis

A. Diagnosis

- [122] I accept that the plaintiff suffers from the symptoms she described to Dr. Wang, and at trial, and which are summarized above, in relation to the evidence of Dr. Wang. I also accept the primary and secondary diagnoses as set out by Dr. Wang in her report and her evidence at trial, also as summarized above.
- [123] Specifically then, the plaintiff suffered traumatic neck, shoulder, and low back strains in the accident which have resulted in what can be called mechanical or musculoskeletal pain. These conditions can also be referred to, as Dr. Wang noted, as widespread myofascial soft tissue pain. Due to the chronicity of her problems, and her related psychological condition, she has a chronic pain syndrome or chronic pain disorder.
- [124] I accept Dr. Wang's secondary diagnoses as well; that is, of physical deconditioning, insomnia, and mood difficulties.
- [125] As noted, the plaintiff does not allege that her carpal tunnel syndrome, and her hand numbness condition are related to the accident injuries.
- [126] The diagnosis of Dr. Heran is generally very consistent with that of Dr. Wang.

- [127] Dr. Winston stated that her diagnosis is "likely soft tissue injuries" but ultimately declined to make any diagnosis. He doubted whether there was an organic basis for her symptoms. In general, it can be said that Dr. Winston questioned whether there was any ongoing injury at all. He seemed to rely quite heavily on what he perceived as the plaintiff's disinterest in standard therapies. He reasoned that if she was truly injured, she would have sought and followed through with treatment as recommended. However this is a questionable line of reasoning, and leads me to give Dr. Winston's opinion less weight, although I do not discount it entirely. I accept that Dr. Winston found minimal physical signs of continuing injury. This is explainable, however. Her continuing injury has a substantial psychological component. This is well supported by the opinions of all of the other doctors, and in particular, both psychiatrists.
- [128] In particular, I accept the opinion of Dr. Heran that "significant improvements will be established following the management of her mood state. Only once this is done then will a true assessment of her functional limitations be established." What emerges clearly from this is that, as long as three years ago, Dr. Heran was of the view that psychological treatment was key, and held promise of improvement in her condition.
- [129] I accept the diagnosis of the psychiatrists, Dr. Spivak and Dr. Okorie, that the plaintiff suffers from an adjustment disorder. Dr. Spivak described it as an "adjustment or disorder with depressed mood". Dr. Okorie diagnosed, very similarly, "adjustment disorder with mixed anxiety and depression". He also noted a mild driving anxiety.
- [130] I accept that her adjustment disorder and her mild driving anxiety were caused by the accident.

B. Prognosis

- [131] There is a degree of ambiguity in the prognosis provided by Dr. Wang. She states that the plaintiff "has reached maximal medical improvement". However her other comments are not quite so definitive. She indicates that the likelihood of further significant improvement is "likely guarded". She adds that going forward, the plaintiff "may experience intermittent flares of her pains depending on her level of activities". She suggests that her physical deconditioning could be improved, and pain management skills could improve, through activity modification, functional adaptation, and cognitive pain coping strategies.
- [132] Therefore, as I interpret her evidence, her prognosis is generally quite negative, but improvements could occur through improvement in her physical condition, psychological treatment, functional adaptation, and pain management abilities.
- [133] Dr. Heran placed even more emphasis on management of her mood state, and suggested the possibility that psychological treatment could result in significant improvements in her condition. His report states "marked improvements" but in his oral testimony, he clarified that it might have been more accurate for him to have said that "significant improvements will be established following the management of her mood state". Overall, from a

functional perspective, Dr. Heran anticipated that once treatment measures have been optimized, her functional ability would improve.

- [134] Dr. Spivak was pessimistic about her chances of improving her psychiatric condition, largely because she was "generally disinclined towards mental health treatment". He therefore states that "her prognosis is guarded". She may continue to struggle with depressive symptoms chronically.
- [135] Dr. Okorie was somewhat more optimistic about her psychological or psychiatric condition. In his view, she has had inadequate treatment both from a physical and psychological point of view. He described her emotional disorders as "mild". He suggested CBT, and a weight loss program. In his view, effective treatment or adaptation to her pains, following treatment recommendations, and completion of the litigation would achieve remission of her emotional disorder.
- [136] On the basis of all of the medical evidence, I accept that the prognosis is generally negative. That is, it is likely that the plaintiff will continue to suffer from physical pain in her neck, shoulders and low back that somewhat limits her day-to-day activities, including vocational, domestic, and recreational activities.
- [137] However, as I will explain in further detail below, I accept that the plaintiff has not had optimal medical treatment either physically or psychologically. I accept that appropriate treatment could still result in significant improvements in the plaintiff's condition, although the passage of time since Dr. Heran provided his opinion may have reduced the chances of that somewhat. In assessing her loss, I place somewhat less weight on Dr. Spivak's pessimism surrounding the likelihood that psychological treatment will be of benefit for her. The plaintiff's reluctance to engage in psychological treatment is a matter substantially within her control.
- [138] The opinion of Dr. Wang that the plaintiff has reached maximal medical improvement for her chronic pains and associated dysfunctions is based, in part, on her view that the plaintiff had made slow and incomplete progress over the course of two years since the motor vehicle accident "despite extensive rehabilitation therapies". However the plaintiff had not engaged in extensive rehabilitation therapies. When she saw Dr. Wang, she had engaged in only four physiotherapy sessions, all shortly after the accident, in December 2014 and January 2015. She had a single massage therapy visit February 3, 2015. As Dr. Wang confirmed, the usual full course of physiotherapy is 12 sessions, and it is preferable if the physiotherapy treatments take place within six months of injury.
- [139] Dr. Wang explained that in referring to "extensive rehabilitation therapies" she was taking into account the exercise the plaintiff said she was doing on her own, guided by her husband, a personal trainer. Mr. Walls has no formal qualifications. I am not satisfied that the plaintiff's self-directed therapies would have been as effective as a full course of physiotherapy, together with other therapies that the plaintiff could have pursued.

- [140] Even though more than three years had passed since the MVA, in 2018 Dr. Wang recommended that the plaintiff take two or three months from work to focus on an active rehabilitation program, guided by a qualified kinesiologist. At trial, she noted that a full course of active rehabilitation would be 12 sessions or possibly more. This treatment is best undertaken within a year of the injury. Following her examination by Dr. Wang, and Dr. Wang's report, the plaintiff did not take time off from work, but she did engage in seven sessions of active rehabilitation in March and April 2018. Again she maintains that she continued similar treatment on her own, and with her husband's guidance.
- [141] Clearly, the plaintiff's substantially self-directed rehabilitation treatment has not been effective.
- [142] Since the plaintiff had not engaged in extensive rehabilitation therapies, either physical or psychological, prior to Dr. Wang's report, in my view Dr. Wang's prognosis that the plaintiff has "has reached maximal medical improvement" is overly negative. I accept that this is a possibility, however.

V. Failure to Mitigate

A. Legal Principles

- [143] I discussed the legal principles applicable to a defence argument of failure to mitigate in *Forghani-Esfahani v. Lester*, 2019 BCSC 332, at paras. 57 to 69.
- [144] In this case, the defendants contend that the plaintiff failed to mitigate her loss in that she did not pursue medical and rehabilitation treatment as recommended by medical practitioners. Therefore the defendants must establish:
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] In order to meet the second part of the Chiu test for failure to mitigate, the defendants must, first, establish a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assessed damages accordingly: *Forghani-Esfahani*, para. 69.
- [146] In determining the reasonableness of a refusal to undergo recommended medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62 (SCC), at para. 31.
- [147] The court must consider the plaintiff's personal characteristics and circumstances in the analysis, including financial circumstances, using a subjective-objective test. To be relevant, these characteristics must rise to a level that reasonably explains the failure to

mitigate; when a plaintiff has the subjective capacity to make reasonable decisions, the test for failure to mitigate is an objective one. The question is whether the plaintiff made contextually reasonable and sincere efforts to limit the loss: *Lynch v. Ueland*, 2018 BCSC 2144, at para. 51.

[148] It is appropriate to consider the issue of mitigation separately in respect of each head of damage: *Zawadzki v. Calimoso* 2011 BCSC 45, at para. 164.

B. Analysis

[149] The defendants argue that the plaintiff has failed to mitigate her damages by failing to receive the following treatments:

- a) adequate physiotherapy, as recommended by her general practitioner;
- b) a course of Aquasize as recommended by Dr. Mutat;
- c) psychological counselling, as recommended by Dr. Wang and Dr. Spivak; and
- d) continued use of Venlafaxine as recommended by Dr. Wang.

[150] The defendants argue that a 30% deduction for failure to mitigate is warranted.

[151] I accept that a deduction for failure to mitigate is warranted in this case.

[152] The plaintiff's injuries have a substantial psychological component. The plaintiff has unreasonably resisted accepting recommended psychological treatment.

[153] Dr. Wang advised Dr. Soni that she noted "a significant component of psychological factors" when she first saw the plaintiff on December 29, 2016. Dr. Wang prescribed Venlafaxine, which the plaintiff began using.

[154] The plaintiff discussed obtaining psychological treatment with Dr. Wang on January 26, 2018. At that time Dr. Wang advised Dr. Soni that the plaintiff appears to have significant psychosocial distress and psychological concerns, and that it would be important to address these issues in the context of chronic pain management. Dr. Wang noted the diagnosis of "chronic myofascial pain syndrome". Dr. Wang added, "She is going to discuss more with her family physician regarding this. I think she would benefit from a psychological or psychiatry consultation, although, she is not keen for this." Dr. Wang also noted that she had started the plaintiff on Venlafaxine (a year before) and that the plaintiff had tolerated it well.

[155] At trial, Dr. Wang confirmed that she discussed obtaining psychological or psychiatric treatment with the plaintiff. The plaintiff acknowledged that Dr. Wang told her that this could be beneficial to her. Even now, more than two years after Dr. Wang made this recommendation, the medical opinion evidence is clear that the plaintiff could benefit from psychological or psychiatric counselling, including in particular, CBT. The plaintiff has not undertaken any such treatment.

- [156] At trial, the plaintiff testified that she did not seek counselling because of financial constraints, and scheduling difficulties, in view of her demanding work schedule. These excuses are not satisfactory. She acknowledged that she did not inquire with ICBC about funding for psychological treatment. There is no evidence as to the cost that would have been incurred. The plaintiff simply never explored the matter. She did not testify as to any efforts she made to arrange for counselling or treatment within her work schedule. There is no evidence that she requested time off from work to obtain recommended medical treatment.
- [157] Dr. Spivak noted that the plaintiff is "generally disinclined towards mental health treatment". He saw her on October 28, 2017. This comment aligns with the comment of Dr. Wang that the plaintiff was "not keen for this."
- [158] I conclude that the plaintiff did not explore psychological treatment primarily because she was simply disinclined to pursue it.
- [159] Another indication of the plaintiff's reluctance to accept psychological treatment is that she stopped taking Venlafaxine in mid-2018, although it was providing some modest benefit to her. Her decision to stop taking the medication was not guided by any medical practitioner.
- [160] In his report (October 28, 2017) Dr. Spivak stated that the Venlafaxine was a reasonable medication for her, and he would not recommend a change in her medication. At trial, he downplayed the effect of the plaintiff's decision to stop taking the medication. He testified that he could not say that she was obtaining a substantial benefit from the medication, anyway.
- [161] Therefore, whether her discontinuance of Venlafaxine constitutes a failure to mitigate may be questionable, standing alone, but in my view the plaintiff's decision to stop the medication without appropriate medical advice or guidance is indicative of her unreasonable resistance to obtaining appropriate medical treatment for her psychological condition.
- [162] The plaintiff acknowledged that when she saw Dr. Heran February 4, 2017, he discussed possible improvement of her condition with mood management. She acknowledged that Dr. Spivak, psychiatrist, discussed treatment with psychological counselling with her in October 2017, and that it could benefit her.
- [163] The plaintiff testified that she did not think she was ready for that. She felt she was making improvements on her own without psychological treatment. She felt at that time that psychological treatment was something that could be explored in future. She continued to focus on her own self-directed exercise in the gym. This was quite clearly not working. This was not a reasonable decision in all of the circumstances.

- [164] At trial, the plaintiff stated that as she feels she is no longer making any progress in recovering either from a physical or mental point of view, she is now prepared to consider psychological treatment, if that is what the medical professionals advise. It clearly is.
- [165] Psychiatric treatment does not have the stigma it once did: *Mullens v. Toor*, 2016 BCSC 1645 at paras. 116-117.
- [166] In my view, the defendants have established that there was a real and substantial possibility that had the plaintiff engaged in appropriate psychological treatment when she was advised to do so in 2017 and 2018, there could have been a material benefit. Appropriate ongoing psychological or psychiatric advice would have included advice about CBT or other forms of psychological or psychiatric treatment and medications. The plaintiff would likely have received appropriate advice about whether she ought to have continued using Venlafaxine, or perhaps some other pharmacological medication.
- [167] I also conclude that the plaintiff unreasonably failed to participate in physical rehabilitation treatments.
- [168] The plaintiff acknowledged that Dr. N. Chitsaz (a doctor at Dr. Soni's clinic) recommended continuation of physiotherapy on January 30, 2015. The plaintiff did not continue with physiotherapy, preferring instead to exercise on her own. This was not effective, as ought to have been clear to the plaintiff very quickly.
- [169] Dr. Mutat advised the plaintiff to start an Aquasize exercise program and join a Weight Watchers program when he saw her on October 13 and December 17, 2015. She did not pursue this advice. She explained that she would feel uncomfortable with Aquasize due to her weight gain, and she started a new diet, on her own.
- [170] Since the plaintiff has gained 50 pounds since the accident, and physical deconditioning is now a significant part of her problem, it is apparent that her self-directed measures have not been successful.
- [171] I accept that the defendants have established that there was a real and substantial possibility that if the plaintiff had followed physical treatment advice, including exercise advice, her condition could have been improved.

C. Assessment - Failure to Mitigate

- [172] What reduction in what part of the award should be made?
- [173] The strongest ground of failure to mitigate relates to failure to obtain psychological treatment. However, the opinion evidence regarding the extent to which such treatment could have benefited the plaintiff is not strong. That is, the medical opinion evidence does not go so far as to say that there was an actual probability of benefit, as opposed to a possibility.

- [174] The degree of potential benefit is also questionable. Psychological treatment could have helped the plaintiff's overall condition, and could have helped her better manage her pain. The medical opinion evidence does not suggest that psychological treatment could have provided an outright cure for her physical symptoms.
- [175] With respect to physical therapies, the plaintiff engaged in some physical therapies, and she engaged in some exercise on her own as well. She did not completely fail to obtain and follow medical and rehabilitation advice. This tempers the reduction therefore.
- [176] Conceptually, a 30% reduction as the defendants propose is equivalent to a 30% probability that 100% of the loss was avoidable. This is clearly too high on the evidence in this case.
- [177] As I will explain, there remains a chance that the treatment the plaintiff has not undertaken could still be of benefit. Insofar as the award relates to future losses, this is a factor that works to reduce the damages award, to the benefit of the defendants. Duplication of deductions should be avoided. This is another factor pushing the appropriate reduction downwards.
- [178] On the other hand, I am satisfied that early and appropriate treatment had at least a fair chance of making a substantial difference, and on that basis I think 10% would be too low.
- [179] In all of the circumstances of the case, a 20% reduction of her damages for non-pecuniary loss on the basis of failure to mitigate is appropriate. As I will explain, in my view no other deduction is warranted in this case.

VI. Assessment of Damages

A. Legal Principles - Loss of Earnings or Earnings Capacity

- [180] I repeat my summary of the legal principles for assessing loss of earning capacity as set out in *Roemer v. Shafi*, 2020 BCSC 1 [Roemer], at paras. 81 to 82, as follows:
- [81] I adopt the summary of the applicable legal principles I set out in *Sendher v. Wong*, 2014 BCSC 140 [Sendher], at paras. 158-163 (pre-trial loss) and 171-177 (future loss):
- [158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.
- [159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.
- [160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:

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

[161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, *aff'd* 2011 BCCA 45 (CanLII).

[162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

[163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.

...

[171] The Court's essential task 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*, at para. 32. 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*, at para. 185.

[Emphasis added.]

[172] The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353; *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260; *Pett v. Pett*, 2009 BCCA 232 (CanLII).

[173] The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII), at para. 18.

[174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from *Pallos* and the "capital asset approach" in *Brown*. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 12.

- [175] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: Pallos; Gilbert, [[2011] B.C.J. No. 1931] at para. 233.
- [176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: Brown; Gilbert, at para. 233.
- [177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 (CanLII), at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII) at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. ...

[Emphasis added.]

- [82] In *Bhatti (Litigation Guardian of) v. Ethier*, 2018 BCSC 1779 [Bhatti], I added:
- [54] The use of economic and statistical evidence does not turn the assessment into a calculation, but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49, citing *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [55] As I will explain, in this case the capital asset approach is applicable. The following comments of Savage J.A. in *Villing v. Husseni*, 2016 BCCA 422 are relevant:

18 Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[Emphasis added.]

19 In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:

- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
- (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

20 The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

B. Loss of Earning Capacity

[181] As noted, the parties have agreed on the appropriate award for past loss of earning capacity, at the sum of \$4,480 CAD. This is based upon the plaintiff's lost opportunity to earn bonus income in 2015. This amount should not be reduced for failure to mitigate, as it is an agreed amount. Also, the loss was early on, so there was less chance that the plaintiff's mitigation efforts would have made a difference.

[182] The plaintiff claims for loss of future earning capacity under the capital asset approach.

[183] The plaintiff argues that her position with Life 365 is vulnerable, because the company's financial position is weak, and her position could be in jeopardy. She argues that there is therefore a real risk that she will need to seek alternative employment in the future, despite her very long record with this employer. She argues that she is no longer the cheerful, energetic, vibrant and efficient worker that she was previously. She argues that if she is

forced to seek other employment, she will not be as marketable as she was prior to the accident. I would characterize this as her primary submission.

- [184] She argues that if a new job, or changes to her current job were to require her to achieve production targets or quotas, she would have difficulty meeting the job requirements. She referred to a recent conversation with her employer who indicated that the nature of her employment could change, and she may be required to do some work as a telemarketing agent, calling prospects to sell photographic services. There is very little detail about these possible changes, as the matter came up only briefly in the plaintiff's cross-examination, and there are no documents.
- [185] The plaintiff suggests that there is a chance that she could become medically unable to work, entirely. She notes the prognosis of Dr. Wang that there is a possibility of future deterioration of her neck and low back pain, and of Dr. Spivak, that she is vulnerable to depression and mental health issues, due to her chronic pain. I characterize these as secondary submissions.
- [186] The plaintiff argues that under the capital asset approach, an appropriate award for loss of future earning capacity would be \$250,000. No particular method for arriving at that sum is suggested.
- [187] The defendants contend that the plaintiff has not established the basis for any claim for loss of future earning capacity. In the alternative, they argue that an award of \$30,000 is appropriate, based upon a proportion of the plaintiff's annual income, said to be equivalent to six months of income. (Her income is approximately \$60,000 USD, so on this basis, the award would have to be more than \$30,000 Canadian.)
- [188] On the evidence as a whole, I am not persuaded that the plaintiff has established a real and substantial possibility of a set of circumstances, not mere speculation, that will lead to a loss of income in future.
- [189] The evidence that the plaintiff's employment with Life 365 is in jeopardy due to the financial circumstances of the company is weak. She has been with the company more or less continuously for more than 28 years, since 1991. Clearly, she is a very valued employee. She is also a key member of the organization, in that she is the only person responsible for the company's telemarketing operations, a critical component of its business. There is no actual direct evidence that the company's business is in jeopardy. The plaintiff asks that I infer this from certain facts, such as dismissal of other senior employees and changes to company's operations generally, including closing of the physical offices in Bellingham. These moves indicate cost-saving measures to be sure, but are not strong evidence that the company is likely to go out of business anytime soon. As a key employee, I would expect the company to retain her as an employee if at all possible, and in the absence of outright dissolution or bankruptcy.

- [190] I recognize that it can be difficult for an employee to adduce evidence relating to the employer's financial position. However, it can be done. This is a central factual submission of the plaintiff. I am required to assess the evidence as actually presented.
- [191] As noted, the plaintiff testified that there is a chance that the nature of her work could change, in that she could be required to make calls to customers herself. The evidence supporting this possibility is also weak. I infer that the company would still need the organizing and administrative work the plaintiff does, but she could be required to do some calling.
- [192] I am not satisfied that the plaintiff cannot make an adjustment to her duties if required. To her credit, she has always been very adaptable, and in my view she retains that quality. Since the bonus program ended she continued to successfully demonstrate customer calling techniques for training purposes. She believes she remains quite good at telemarketing.
- [193] The medical evidence supporting a loss of earning capacity on a long-term basis is also weak. Her work at Life 365 is, generally speaking, administrative desk work. The most specific evidence is that of Dr. Wang, whose report states: "although Mrs. Walls has kept working since this injury, her ability to reliably and consistently perform the above-mentioned duties is limited owing to pain and dysfunction, and this is likely an ongoing issue in the foreseeable future."
- [194] However, Dr. Wang agreed that the plaintiff is not disabled from performing desk type work. The fact is, the plaintiff has successfully managed all the requirements of her job, with some limitations, for an excess of five years since the MVA. She manages her work currently by taking stretching and mobilizing breaks as needed. This is not at all unusual with employees who perform desk and administrative type duties. The limitation that Dr. Wang refers to is not of such a nature that the plaintiff cannot perform her job functions.
- [195] Dr. Wang mentions the possibility of future deterioration of her neck and low back, and a higher risk of developing post-traumatic neck and low back degeneration. Dr. Spivak notes that she is chronically vulnerable towards depression and mental health issues. However, there is no medical opinion evidence supporting a real and substantial possibility that she will become completely disabled from the type of work she does.
- [196] In addition, there is a reasonable prospect that her condition could be improved if she were to follow medical advice and obtain appropriate psychological and rehabilitation treatment.
- [197] Therefore, the claim for an award for future loss of earning capacity is denied.
- [198] The pain the plaintiff endures while working is properly taken into account as a factor in the non-pecuniary award.

C. Non-Pecuniary Loss

- [199] I adopt my comments concerning the legal principles for assessment of non-pecuniary loss as set out in *Gillam v. Wiebe*, 2013 BCSC 565, at paras. 68-71. There, I referred to the leading decision of the BC Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46. There is no need for that familiar authority to be repeated here.
- [200] The plaintiff has suffered a physical injury and a psychological injury.
- [201] The physical injury results in ongoing chronic pain. Her ongoing chronic pain and other physical symptoms have mildly impaired her ability to perform desk and administrative work with Life 365. She works with pain and with some limitations. Her condition has all but eliminated her ability to physically assist her husband in the operation of the gym. She has conducted no cross-fit classes since the MVA. Although she was forced to do what she could when Mr. Walls was convalescing from surgery, in general she no longer participates in working directly with the gym's clients or putting away weights. She interacts minimally with the gym's clients. The clients miss her cheerful, talkative, outgoing nature. She used to be a good counterpoint to Mr. Walls, who is a man of few words type.
- [202] Her pain is mild to moderate in intensity. Her neck pain is the most problematic for her. At trial she tended to overstate the degree of her pain and disability somewhat.
- [203] Nevertheless, her physical and psychological condition has had a profound effect upon the plaintiff's lifestyle, and her enjoyment of life.
- [204] I accept the evidence of several witnesses that prior to the accident, the plaintiff was cheerful, happy, and energetic, and that she was unimpaired in her ability to work and to engage in recreational pursuits. The core of her enjoyment of life centred on her physical fitness activities, which she enjoyed together with her husband, and the clients at their gym. I accept that her enjoyment of life has dramatically diminished since the accident. I accept that, generally speaking, the prognosis is negative. In all likelihood, the lifestyle change that she has suffered is permanent.
- [205] She used to take pride in being strong and fit, and in her appearance. This is gone. She is now ashamed of her body image. She believes there is no hope that she and her husband could ever resume the type of relationship they had before, in terms of their joint passion for fitness, and participating together as partners in their gym business.
- [206] The plaintiff has been commendably stoic in relation to her work. Indeed, she may have allowed her dedication to her work at Life 365 to interfere with her rehabilitation.
- [207] Dr. Heran noted that he would have expected her to have lost more work than she did. However, he added that from a functional perspective, he anticipated that she would improve once treatment measures have been optimized. This related essentially to psychological treatment.

[208] The following comment from Dr. Spivak is apt:

Subsequent to the motor vehicle accident where she has developed chronic pain in her lower back and in her neck, she has lost a significant part of her lifestyle in that she has not been able to work out on a regular basis, nor has she been able to actively participate in what was a fundamental part of her relationship with her husband or her self identity by being at the gym on a daily basis. Removing this from her life, which has always been an integral part of her emotional functioning has resulted in depressive symptoms.

[209] Dr. Spivak added:

Her level of impairment is in the realm of mild to moderate. While it has not interfered with her ability to work, nor has it necessarily directly interfered with her ability to interact with others socially, her quality of life has suffered significantly. The impact of not being able to exercise when it has been a fundamental part of her life dating back to her childhood has been dramatic for her.

[210] These comments are well supported in the evidence, and I accept them.

[211] Several witnesses testified to the effect of the accident injuries upon the plaintiff. Three clients of the gym testified: Bonney Rempel, Jane Gill and Avtar Sundher. All indicated that prior to the accident she was outgoing, cheerful, and very active physically. All testified to the dramatic change in her demeanour and personality since the accident. They also confirmed that she no longer was doing the work at the gym that she did previously, including cleaning and interacting with clients. The plaintiff's mother, Linda Bertsfield, testified about the change in her daughter's personality, as did an employee of Life 365, one of the telemarketing callers, Ms. Melinda Mendez. These were all very solid witnesses and I accept their evidence.

[212] The defence argues that other factors have also come into play, and had a negative role in the plaintiff's life. These include the financial pressures of the gym, and her husband's serious health issues. However the financial problems with the gym were manifest prior to the motor vehicle accident, and did not seem to affect the plaintiff's personality at that time. The plaintiff's husband's serious medical issue is an additional significant stressor of course, but is not the cause of the plaintiff's change in personality. He has recovered enough that he is back working at the gym regularly, but the plaintiff has not resumed her former role at the gym. Their relationship continues to be impacted.

[213] I accept the plaintiff's testimony that prior to the accident, she loved coming home to the gym, and that this was the "highlight of her day". She loved to work out, and loved to work out with her husband. They worked out together very frequently. Since the accident the plaintiff has only engaged in minimal exercise.

[214] The plaintiff was stocky and somewhat heavy prior to the accident, although she was fit. She was already struggling with her weight. That is certainly not uncommon in today's society. Her avid training helped her keep her weight in check. She has suffered from a substantial weight gain since the accident.

[215] The plaintiff also suffers from a mild driving anxiety. It is clearly not severe. She continued to drive one hour each way to work and back from the time of the MVA to December 2018, when her employer required her to begin working from home. In addition, in October 2015 she drove her mother from Arkansas to Bellingham, when her mother moved. The journey lasted five days and covered about 3,000 miles.

[216] The plaintiff submits that an appropriate award for non-pecuniary damages is \$125,000. The plaintiff cites the following authorities as guidance in this regard. In each case, the non-pecuniary award noted has been increased to account for inflation since the award was made:

Non-pecuniary award

Present value of Non-pecuniary award

1. Fillmore v. McKay, 2010 BCSC 1401

\$75,000

\$89,139.88

2. Chong v. Nguyen, 2017 BCSC 1564

\$110,000

\$116,200.77

3. Brundige v. Bolton, 2018 BCSC 1843

\$165,000

\$171,389.52

4. Dabu v. Schwab, 2016 BCSC 613

\$95,000

\$102,492.11

5. Raptis v. Cahalabiani, 2017 BCSC 1548

\$95,000

\$100,355.21

[217] The defendants contend that an appropriate award for non-pecuniary damages is between \$60,000 and \$75,000, before deduction.

[218] The defendants cite the following authorities, for guidance:

Non-pecuniary award

Present value of Non-pecuniary award

1. Jacobi v. Monteith, 2020 BCSC 218

\$50,000

2. Piper v. Hassan, 2012 BCSC 189

\$50,000

\$56,669

3. Earl v. Cindrich, 2020 BCSC 197

\$62,500

4. Fabian v. Song, 2018 BCSC 762

\$70,000

\$72,710

5. Roemer v. Shafi, 2020 BCSC 1

\$80,000

[219] The defence argues that Earl v. Cindrich is the most comparable case.

[220] The plaintiff contends that a separate award for loss of housekeeping capacity should be made, in the amount of \$20,000.

[221] In Roemer, I stated as follows:

[130] As I noted in Firman v. Asadi, 2019 BCSC 270, at para. 235, the court has discretion whether to address a claim for loss of housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In Riley v. Ritsco, 2018 BCCA 366, at para. 100, Groberman J.A. added:

[101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non pecuniary damages.

[102] I acknowledge what was said in Kroeker about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular

aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[131] Likewise, in *Kim v. Lin*, 2018 BCCA 77, Bauman C.J.B.C. held as follows:

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

[222] This is not a case in which a separate distinct pecuniary award should be made for loss of housekeeping capacity. At the time of the accident the plaintiff was already residing with her husband in a portion of the gym. Her domestic duties were limited due to the nature of their lifestyle at the time. I accept that her capacity to do domestic work such as cooking, cleaning, and laundry has been limited, but this has had only a limited effect domestically, due to the plaintiff's circumstances.

[223] The plaintiff's capacity to help in the gym, including cleaning of the gym, has been substantially adversely affected. She no longer helps clean the gym, and does very little tidying of the gym, including putting away of weights, and so on. There has been no pecuniary loss in this respect. No services have been purchased. In my view, these losses have essentially resulted in non-pecuniary loss to the plaintiff. There are no "special circumstances". However, these losses should be taken into account in relation to assessment of the plaintiff's non-pecuniary loss.

[224] I am making an award for cleaning services as a cost of care. Duplication must be avoided. This is an additional factor militating against a separate pecuniary award for loss of housekeeping capacity: *Firman v. Asadi*, 2019 BCSC 270, at para. 236.

[225] The most striking feature of this case is the very substantial impact on the plaintiff's lifestyle and enjoyment of life of the loss of her ability to work out and train, which was central to her lifestyle, and enjoyment of life, and to her relationship with her husband. This has been a profound loss, and it is expected to continue.

[226] The most comparable authority cited is *Chong v. Nguyen*, 2017 BCSC 1564. In that case, the 27-year-old plaintiff similarly took great pleasure in going to the gym and working out but was rendered unable to do so by her accident injuries. The court found that the

predominant cause of the impairments in her lifestyle was her psychiatric condition because it " [aggravated] her perception of her ongoing physical symptoms" (para. 73). The plaintiff was awarded \$110,000 (\$116,200 in 2020). I think a similar award is appropriate in this case, adjusted to reflect the difference in age and the fact that in Chong the plaintiff was unable to pursue her chosen career without significant accommodation.

- [227] The cases cited by the defence do not involve a comparable lifestyle change. For example, in *Piper v. Hassan*, 2012 BCSC 189, the plaintiff's pre-existing injuries were found to have been exacerbated by the accident, but the Court held that his depression had "settled to its pre-accident level by the time of his examination " (para. 135).
- [228] The defence submits that *Earl v. Cindrich*, 2020 BCSC 197 is the most comparable case. There, the plaintiff was 56 years of age when the accident occurred. On the findings of Riley J., her physical condition was much better than that of Ms. Walls, and she did not suffer from a psychological condition. She experienced occasional flare-ups of her symptoms and discomfort. She was not prevented from engaging in her pre-accident activities. Riley J. took into account limitations on her ability to do housework in assessing her non-pecuniary loss at \$65,000. I conclude that the non-pecuniary damages suffered by Ms. Walls are much more significant than that of the plaintiff in *Earl*.
- [229] Having regard to the authorities referred to, in my view the appropriate non-pecuniary award is \$100,000.
- [230] In accordance with my earlier comments, the award is reduced by 20% for failure to mitigate loss. Therefore, the net award for non-pecuniary damages is \$80,000.

D. Cost of Future Care

- [231] A concise summary of the legal principles for an award for cost of future care can be found in *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68 to 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).
- [232] Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389, at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9, at para. 21.
- [233] In *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351, the court reduced the care costs award of counselling by 20% to account for the contingency that the plaintiff may not attend counselling: para. 54.
- [234] Based largely upon the cost of care report of Ms. Lane, the plaintiff claims for future care costs, as follows:

Item

Annual Cost

Age

Multiplier (2.0%)

Amount

Aleve

\$109.50

80 (28 yrs)

21.2813

\$2,330.30

Tylenol

\$32.76 (average)

80 (28 yrs)

21.2813

\$697.18

Housekeeping

\$2,463.75

80 (28 yrs)

21.2813

\$52,431.80

Seasonal cleaning

TOTAL:

\$540.00

75 (23 yrs)

18.2922

\$9,877.79

\$65,337.07

[235] In addition, the plaintiff seeks the costs of CBT.

[236] The defendants submit that the plaintiff is entitled to some future care cost for Tylenol in the amount of \$300. They contend that the plaintiff is not entitled to an award for housekeeping or seasonal cleaning. They argue that the plaintiff's living space requires little upkeep, and that Ms. Lane's recommendation is mainly for maintenance and cleaning of Pro-Trainers gym. They argue that the maintenance and cleaning of the gym is being done by Mr. Walls and clients of the gym. They argue that what the plaintiff struggles with is picking up heavy plates (weight plates) "which is not something housekeeping services are meant for".

[237] The defendants submit that the plaintiff is not entitled to a care award for psychological counselling (such as CBT). Psychological counselling was recommended to the plaintiff more than two years ago, but she never attended, and probably will not attend in future, even if the award is made. In the alternative, the defendants submit that if the plaintiff is entitled to an award for psychological counselling, then 10 to 20 sessions are appropriate. A 20% deduction should be made to account for the contingency that the plaintiff would not attend counselling anyway. Therefore the defendants submit, in the alternative, that the total counselling award would be \$3,200.

- [238] The plaintiff does not claim for a number of items that are recommended by Ms. Lane: Botox treatment (recommended by Dr. Heran); the cost of medications (Gabapentin and Venlafaxine); occupational therapy services, and services of a kinesiologist for active rehabilitation at a swimming pool, and otherwise.
- [239] The plaintiff uses the over-the-counter pain medications (Aleve and Tylenol). These were recommended in the report of Dr. Wang. The costs are modest, and reasonable. The defence argues that the plaintiff is not entitled to the cost of Aleve, because its function duplicates the function of Tylenol. That point is not supported by the medical evidence. The claim is allowed, in full. I round up the amount from \$3,027.48 to \$3,030.
- [240] Ms. Lane recommends a psychological assessment, followed by 10 to 20 sessions with a psychologist. Her estimated cost, at \$200 per hour, is \$2,200-\$4,200.
- [241] Although the plaintiff has been unreasonably resistant to obtaining such treatment in the past, at trial she stated that she remained open to it. I have determined that she ought to have taken the treatment in the past, and should still do so now, in relation to my assessment of her damages. Clearly the expense has a medical justification. In my view it is reasonable to incur the cost. In my view the expense may reasonably be expected to be expended in future, although a contingency reduction is appropriate.
- [242] Given the lengthy period of time since the accident, and the chronicity of the plaintiff's symptoms, I would expect that the amount of treatment would be at the upper end of the range suggested by Ms. Lane. Therefore, the claim is allowed, at the sum of \$4,200, less 20%, to account for the possibility that the plaintiff will not incur the expense, therefore \$3,360 is allowed for this item.
- [243] I do not accept that the seasonal cleaning claim has been established as being reasonably necessary. There is no particular rationalization in Ms. Lane's report for "seasonal cleaning" as such. The plaintiff and her husband have no exterior or outdoor living space. In the past, in the Lower Mainland, they resided in apartments and a townhouse. Although there was some evidence that Mr. Wall's 88-year-old father and the plaintiff's mother may want to move to Canada to reside with the plaintiff and Mr. Walls, I infer that it is much more likely that if the plaintiff and Mr. Walls were to give up the gym (which is not making money) they would move into a residence that would not require exterior or yard maintenance.
- [244] I accept that the plaintiff, prior to the accident, did practically all of the household and gym cleaning and tidying. That was the plaintiff's evidence, which is well supported by the evidence of the gym's clients. I discount Mr. Walls' evidence that he does some cleaning and tidying. I infer that this must be very minimal, and I put his evidence down to husbandly defensiveness.

- [245] The recommendation of Ms. Lane is for 50% of the cleaning tasks, therefore there is already a substantial reduction in the recommendation, to account for work done by others, or work that will not be done. The recommendation is for 73 hours per year, which is the equivalent of only 12 minutes per day.
- [246] I see no reason to discount the award on the basis that much of the cleaning is related to the gym. This was one of the plaintiff's roles with the gym, which is a joint enterprise. The gym is more of a labour of love than a business. The plaintiff's residence and the gym are in the same facility. If the plaintiff and her husband do not operate the gym, they will require a residence, and the plaintiff will remain responsible for cleaning.
- [247] However contingency reductions in the award are appropriate. There is a strong possibility that the award will not be used for cleaning services. There is a possibility that the plaintiff's condition will improve. Moreover, the housekeeping services claim extends to age 80. Many people require assistance with housekeeping services well prior to that age. The plaintiff's pre-existing spinal conditions suggest that she could have required assistance in any event.
- [248] In my view \$30,000 is a reasonable assessment for costs of future cleaning services.
- [249] In the circumstances of this case, there should be no reduction for failure to mitigate these awards, as, generally speaking, the plaintiff ought to have incurred greater costs in the past, which the defendants would have been responsible for paying. The defendants have already had the benefit of these savings. This is most obviously the case in relation to the psychological treatment expense.
- [250] In summary, costs of future care are allowed as follows:
1. Pain medications (Aleve, Tylenol) - \$3,030;
 2. Housekeeping - \$30,000;
 3. Psychological treatment - \$3,360;
- Total:
- \$36,390
- E. Special Damages
- [251] The parties have agreed to special damages of \$1,372.56.

VII. Costs

[252] The plaintiff is entitled to costs, subject to any relevant offer to settle. If necessary, the parties may make arrangements to speak to costs, either by way of written or oral submissions, provided arrangements are made within 60 days of issuance of these reasons. The 60-day period of time is extended for any delay occasioned by the Covid-19 emergency suspension of regular court operations that came into effect March 19, 2020, shortly after the conclusion of the trial.

"Verhoeven J."

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