

CANADA / JUDGMENT

Winick v. Goddard

2020 BCSC 4

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 4 Winick v. Goddard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Winick v. Goddard,

2020 BCSC 4

Date: 20200106

Docket: M173431

Registry: Vancouver

Between:

Jaffa Ann Winick

Plaintiff

And

Mark Goddard

Defendant

And

Insurance Corporation of British Columbia

Third Party

Date: 20200106

Docket: M173447

Registry: Vancouver

Between:

Jaffa Ann Winick

Plaintiff

And

Carlos Humber Hernandez Rodriguez

Defendant

And

Date: 20200106

Docket: M155728

Registry: Vancouver

Between:

Jaffa Ann Winick

Plaintiff

And

Lorne Robert Crampton

Defendant

Before: The Honourable Mr. Justice Branch

Reasons for Judgment

Counsel for the Plaintiff:

K. Simon

K. Pierce

Counsel for the Defendant:

J. Murray

A. Schleichkorn

Place and Dates of Trial:

Vancouver, B.C.

November 25-December 6, 2019

Place and Date of Judgment:

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I. INTRODUCTION

- [1] The plaintiff was involved in three rear-end motor vehicle accidents on October 22, 2013, October 22, 2015, and October 27, 2016 (the "Accidents").
- [2] Mr. Goddard, the driver in the second accident, did not appear at trial, but the Insurance Corporation of British Columbia defended this claim as a third party. Given that the third party and the represented defendants were all represented by the same counsel, I will refer to the defendants and third party collectively as the "defendant".
- [3] The defendant admits liability for each accident.
- [4] The plaintiff makes a claim for a chronic pain condition affecting her neck and back and causing headaches. She has also received a diagnosis of thoracic outlet syndrome. The key issue at trial was the extent to which the plaintiff could be expected to carry on with full-time teaching work with these conditions.

II. BACKGROUND

A. The Plaintiff's Background

- [5] The plaintiff was born on December 11, 1993. She is part of a large close-knit family. They spent a great deal of time together, including on road trips and ski holidays. She was an excellent skier, able to do double black diamond runs. The plaintiff was also heavily involved in swimming and water polo. She obtained her lifeguard certification and began to coach swimming as well.
- [6] Following her high school graduation in the spring of 2012, the plaintiff hoped to pursue a career in teaching or publishing. Keeping both options open, she started with an arts program at Douglas College in the fall of 2012, with the goal of transferring into a university program at a later date.
- [7] The plaintiff says she had no active pre-accident health issues at the time of her first accident on October 22, 2013 (the "First Accident"). She had sought treatment for problems with numbness and tingling in her hands before the First Accident in the fall of 2012. At that time, she also complained of some back, knee and hip pain. She was referred for evaluation by a rheumatologist, Dr. Koehler. Dr. Koehler was unable to provide a specific diagnosis, but felt that the condition may be "benign transient arthritis of young women". Dr. Koehler simply suggested that she carry on with symptomatic treatment. She received some physiotherapy. By July 2013, she reported that her joints were somewhat improved, with her hands only occasionally being swollen in the morning. Dr. Koehler concluded that she was "gradually improving, more likely in a spontaneous fashion than due to treatment".
- [8] At the time of the First Accident, the plaintiff was continuing to attend Douglas College, as well as working as a lifeguard and a swim coach.

B. The First Accident

- [9] On October 22, 2013, the plaintiff was a passenger in her car while driving northbound on 120th Street, Surrey. She was on her way to Douglas College for an examination. Her vehicle was in the process of stopping because of congestion at the intersection with King George Boulevard when it was rear ended by Lorne Crampton. There was no material damage to her vehicle.
- [10] The plaintiff says she was in shock immediately after the accident, but she was able to continue on to Douglas College to write her exam. She was dizzy as she exited the vehicle. She was able to complete the exam and return home. She then began to feel pain in her neck and back, although she did do her coaching shift that day. She sought medical treatment the next day.
- [11] The plaintiff has not returned to lifeguarding since the First Accident, as she is no longer able to pass the strength standards required. She did return to coaching. She was also able to continue with her schooling.

- [12] In January 2014, she returned to see Dr. Koehler. He noted that the plaintiff had been in an accident and that "she has had recurrent hand symptoms, as well as foot symptoms, since then, and has also had pain in the upper and lower back".
- [13] The plaintiff first met her future sister-in-law Melinda Morris at about this time, and Ms. Morris described her as having a great personality. The plaintiff was fun and easy to talk to. Ms. Morris noticed that the plaintiff would periodically have dry heaving problems, which are associated with the injuries to her neck muscles. She also noted the plaintiff having some physical limitations.
- [14] In January 2015, the plaintiff transferred to the Bachelor of Arts program at Simon Fraser University ("SFU"). In the spring of 2015, she obtained her associates degree from Douglas College (which had been delayed because she failed one biology course in her final term).

C. The Second Accident

- [15] On October 22, 2015, at approximately 7:00 a.m., the plaintiff was driving north on 120th Street, Surrey. She was in the process of stopping at the intersection with King George Boulevard when she was rear ended by Mark Goddard (the "Second Accident").
- [16] Her first reaction after the accident was that she could not believe this had happened to her again. There was no material damage to her vehicle. Her pains from the first accident were aggravated, and she sustained a new injury in her right wrist. This new injury largely resolved by the time of trial. Her mood began to darken after this second accident, at least towards her family.
- [17] A new friend, Maryssa Muelaner, suggested that the plaintiff was in relatively good spirits over the 2015-2016 school year. The plaintiff began dating her future husband, James Steer, in March 2016. He describes her as being quite happy and buoyant during this period, although they were not doing any strenuous physical activities together. In the months leading up to her next accident in October 2016, she still held out hope for some improvement.

D. The Third Accident

- [18] On October 27, 2016, at approximately 6:30 a.m. the plaintiff was driving southbound on 10th Avenue in Burnaby. She was in the process of stopping when she was rear-ended by Carlos Rodriguez's vehicle (the "Third Accident"). Again, there was no material damage to her vehicle.
- [19] Her first reaction was one of anger that this was happening to her yet again. As with the other accidents, all of her injuries were aggravated. Her evidence as to whether her pain and suffering settled at a higher level, or back to the same level, was somewhat inconsistent. What is clear, however, is that her family and friends noted a serious emotional downturn after the Third Accident. She is now quite irritable and short with people.

E. Post Accidents

- [20] The plaintiff was able to complete her Arts degree in the Spring of 2017. However, her grades were not strong enough to enter into SFU's Professional Development Program for teaching. In the fall of 2017 these standards were lowered to a level at which she did qualify. However, she had missed the Fall entry window, and hence was only able to start the program in the Fall of 2018. During the gap, she was able to obtain full time work as a law office receptionist, as well as certain other sales and reception jobs.
- [21] The plaintiff was married in March 2018. Her mother testified that given the plaintiff's pain and low energy, the plaintiff delegated much of the wedding planning to her.
- [22] Over the months leading up to trial, the plaintiff has been participating in the last practicum period of her teaching program. She performed well, receiving good evaluations. She received her teaching certification during the course of the trial.
- [23] She has continued to work as a swim coach through this period, although she says she is no longer able to swim herself. She says that her plan is to continue to coach through the first few years of her teaching career. It is particularly important to her now, as it keeps her in touch with her former self. She did attempt swimming, but was embarrassed by the fact that she almost could not make it to the end of the pool. She has not tried to swim again since this incident.
- [24] She no longer skis or hikes regularly, although no health practitioner has told her not to attempt these activities. In the past year, she stopped exercising regularly and stopped seeking any physiotherapy.
- [25] The plaintiff says that her pain has not changed significantly for some time. She has become quite hopeless about her situation. Socially, she is less engaged and prefers to stay at home rather than spending time with her family or friends. That said, she was able to take two foreign holidays in 2018, although she did not engage in much physical activity upon arrival.
- [26] She has not received a formal diagnosis of depression or any other psychiatric or psychological disorder, nor has she been prescribed medication.
- [27] At home, she performs far less housework than she was able to do before the Accidents. This has created tension in her marriage. She is less interested or able to be touched by her husband because of her condition. She no longer likes to drive and is critical of her husband's driving when they drive together. They stopped living under the same roof for a period. They have sought counselling.
- [28] In terms of the future, the plaintiff does not believe that she has the capacity for full time teaching work. Her recent work experience caused her concerns, as she has now seen how much energy is required in order to be a good teacher. Her mentor for her practicum, Mandeep Khrod testified that she noticed that the plaintiff was in pain. On one occasion, she advised the plaintiff to go home early. The plaintiff says she came home "wrecked" at the end

of the day, although I note that her husband testified that, after a dinner break, she would often work until 8:00 p.m. or so.

- [29] Her current plan is to only work as a "teacher on call" ("TOC") as this will give her greater flexibility. She is targeting a 75% load as a TOC.
- [30] Ms. Khrod advised the court that she would not request the plaintiff as TOC for more than two days in a row, given the pain she saw the plaintiff battling.
- [31] The plaintiff only plans to work with secondary level students, having had a camping experience with younger children that indicated to her that she would not have the physical capacity to handle such a teaching environment. She is not approaching this new phase of her life with the enthusiasm she expected to have.
- [32] There was evidence presented that teachers receive 12 paid sick days a year, as well as approximately three unpaid discretionary days. There are holidays at Christmas, Spring Break, and over the summer. They receive 40-45 minutes for lunch in the middle of the day. A teacher will generally have a preparatory block every second day, or each day every second term. There may be an ability to seek an ergonomic assessment of the classroom (but not for the stations used for the preparatory block, or for any home office). There is more often technology available now that allows teachers to avoid having to reach up to write on a chalkboard. Ms. Khrod advised that if a teacher needed to stretch during the course of a morning or afternoon, this would need to be done in the class, as the teacher must remain in the classroom.
- [33] The current job market is good for teachers. There are many postings available that fit even the plaintiff's restrictions, let alone the additional postings that would be available if the restrictions were removed.
- [34] The plaintiff hopes to have a family someday, but both she and her family are worried about her capacity to take on the additional physical demands that pregnancy and childcare may require.

III. HISTORICAL Earnings

- [35] The plaintiff's employment earnings over the relevant period were as follows:

2012

\$13,831

Coaching, Lifeguarding

2013

\$14,604

Coaching, Lifeguarding

2014

\$4,686

Coaching

2015

\$10,983

Coaching, Retail

2016

\$4,153

Coaching, Receptionist

2017

\$27,729

Coaching, Receptionist, Tutoring

2018

\$17,542

Coaching, Receptionist

IV. EXPERTS AND TREATING PHYSICIANS

[36] The Court heard evidence from several experts and treating physicians.

A. Expert and Treating Medical Practitioners Called by the Plaintiff

1. Dr. Bright

[37] Dr. Bright has been the plaintiff's family doctor since 2007, and treated her throughout the period of the Accidents. Dr. Bright diagnosed the plaintiff with the following injuries and conditions:

Ms. Winick has had extensive soft tissue injuries cervical, thoracic and lumbar spine areas as a result of the accidents, with related cervicogenic type headaches

Ms. Winick's pain is chronic in nature. It has been numerous years and her pain has not resolved. It is very unlikely that she will be entirely pain free at any point in time in the near future, and her long-term prognosis is very guarded.

She will also benefit from extensive counselling for support in learning how to deal with chronic pain.

2. Dr. Chow

- [38] Dr. Chow is an expert in physical medicine and rehabilitation. He assessed the plaintiff on May 8, 2017 and again on July 11, 2019.
- [39] Dr. Chow diagnosed the plaintiff with chronic headaches, neck pain, and back pain. He also diagnosed chronic left upper extremity paresthesia, a right wrist strain, psychological issues and late whiplash syndrome. He suggested that further testing be performed in order to confirm thoracic outlet syndrome ("TOS").
- [40] In 2019, he determined that there had been a worsening of her neck and back conditions, but noted that her right wrist pain was better. He also diagnosed non-specific TOS, a form that did not require the testing recommended in 2017, but which he was able to confirm on physical examination alone.

3. Dr. Salvian

- [41] Dr. Salvian is a vascular surgeon who conducted assessments on April 27, 2016 and July 3, 2019. He has a particular specialty in the diagnosis and management of TOS. His opinion is that the plaintiff developed TOS after the 2013 Accident, and that this condition was exacerbated by the next two accidents. The plaintiff had a predisposition to such a condition upon trauma because of the fact that she has a "cervical rib" which crowds the nerves in the relevant area.
- [42] In terms of treatment for the TOS, Dr. Salvian opined.

Ms. Winick may benefit from left cervical and first rib resection. However, this surgery is not without risk, nor should it be viewed as a panacea. In other words, even with successful surgery it is unlikely that she would be able to do heavy repetitive activities with the left arm.

4. Dr. Badii

- [43] Dr. Badii is a rheumatologist who conducted two assessments of the plaintiff on September 11, 2015 and July 9, 2019. He opines that the plaintiff likely sustained whiplash-associated soft tissue injuries in her neck and back as a result of the 2013 Accident, with additional injuries and aggravation of her pre-existing symptoms in the 2015 and 2016 Accidents. He believes that the injuries have become chronic, and the plaintiff has developed chronic myofascial pain syndrome, as well as symptoms of TOS. In terms of prognosis, he feels the plaintiff has plateaued. Dr. Badii noted the plaintiff was hypermobile before the accident, meaning she had flexible joints. This can make an individual more susceptible to developing a pain condition after trauma.

5. Dominic Shew

- [44] After completing an evaluation in 2019, Mr. Shew, an occupational therapist, concluded that the plaintiff has suffered a decline in speed and function with respect to: horizontal and vertical reaching involving the left upper extremity; bending/stooping, and crouching (repetitive and prolonged); sustained head/neck positions; and prolonged "casual" and "work-intensive" sitting. He concluded that she did not meet the full strength and durability

requirements to manage occupations such as a lifeguard on a part- or full-time competitive basis. In relation to her ability to teach, he concluded as follows:

In summation, if Ms. Winick completes her education and obtains a position as a Teacher, she is likely safe and employable, as she demonstrated the capacity to perform aspects of the demands. However, due to her restrictions, she will need the opportunity to take breaks to rest, stretch, and/or change positions, as well as suitable ergonomics to best manage her symptoms while attempting to remain functional.

The need for accommodations likely renders her less competitively employable compared to individuals that do not possess her physical and functional limitations.

[45] Mr. Shew also provided cost of care recommendations, based on the medical information discussed above. He recommended the following:

- a) Kinesiology: Eight sessions costed at \$504-\$630 plus mileage;
- b) Fitness Membership: Costed at between \$473 to \$653 annually to age 84;
- c) Mental Health Services: An initial battery of sessions for the plaintiff costed at \$1890 to \$3200, and couples counselling at \$125 per session for an unspecified number of sessions.
- d) Vocational and Ergonomic Assessment: Costed at up to \$248 for each of home and work. The potential for further additional equipment was noted but not fully costed.
- e) Physiotherapy/Massage Therapy/Acupuncture: Costed at between \$720 to \$1440 annually indefinitely, based on one session per month;
- f) Potential post-operative physiotherapy should there be surgical intervention: Costed between \$960 and \$1280.
- g) Multidisciplinary chronic pain management program: Costed at \$13,600, if this option was pursued privately rather than waiting for the publicly paid wait list to clear.
- h) Vocational rehabilitation: He noted that a report along the lines recommended by Dr. Chow would cost in the range of \$1200-\$1800, and that there might be some additional cost for retraining.
- i) Medication: The cost of her current medications was provided, along with the information that any Botox would not be covered.

[46] In relation to housekeeping, Mr. Chew found that the plaintiff had the physical capacity to manage all her basic activities of daily living and to engage in her chosen light to moderate day-to-day household activities as long as she breaks up her activities appropriately to manage her symptoms. He found that higher-level physical demands such as cleaning overhead or down low, or repetitive handling of moderate loads, could cause an aggravation in her symptoms. He opined that two to three hours of household assistance every two weeks for such tasks would be reasonable, yielding an estimated annual cost of \$1,651 to

\$2,476.

6. Adryon Hutton

[47] Ms. Hutton is a registered massage therapist who treated the plaintiff from 2016 to 2018. She reviewed her notes for the court, and confirmed that the plaintiff was always open to any reasonable treatment suggestions.

7. Melinda Morris

[48] Ms. Morris is a registered massage therapist who has treated the plaintiff since December 2018. She is also the plaintiff's sister-in-law. She reviewed her course of treatment, as well as confirming the plaintiff's mood changes.

8. Jasub Jarquin

[49] Mr. Jarquin is a physiotherapist who treated the plaintiff from 2014 to 2018. In particular he confirmed the following points:

- a) the frequency of his treatments decreased steadily over time;
- b) the workplace incident in February 2015 did not result in a material change to his treatment approach;
- c) he and the plaintiff tried to work her back into swimming, but it caused pain.

9. Hassan Lakham

[50] Mr. Lakham is an economist who prepared reports providing certain present value multipliers. For income earning capacity purposes, the economic multiplier, incorporating contingencies and reflecting an annual loss of \$1000 is \$20,828. For cost of care purposes, the lifetime multiplier for an ongoing \$1000 annual expense is \$34,351.

[51] Although Mr. Lakham was challenged on the participation rates used, he explained that:

- a) his adjustment to account for earlier exits from the labour force ensured that the data recognized that the plaintiff is or would have been ready to enter the labour force at this time, such that excluding persons who in fact had already had to exit the labour force was reasonable;
- b) although presented with some data suggesting that the average teacher retires at age 60 rather than the inferred age 61 in his report, other adjustments which could be made for teachers, such as the removal of the part-time discount which is not applicable in a unionized environment, could more than offset any suggested change.

B. Experts Proffered by the Defendant

[52] The defendant presented evidence from two experts.

1. Dr. Paramonoff

- [53] Dr. Paramonoff assessed the plaintiff on July 17, 2019. She is a physical medicine and rehabilitation specialist.
- [54] Dr. Paramonoff concluded that the plaintiff had hypermobility in her joints before the Accidents, and that this is likely now contributing to the prolonged soft tissue symptom presentation. This hypermobility may have resulted in certain symptoms 30 years or more into the future in any event. Dr. Paramonoff acknowledged that the plaintiff was not functionally limited by her pre-existing joint condition.
- [55] She found that the plaintiff sustained musculoligamentous injuries in her neck and back as a result of the First Accident, which were aggravated by the Second Accident. Although the plaintiff denied symptom aggravation as a result of the Third Accident with her, the medical records did reflect a temporary aggravation. She concluded that the plaintiff likely has positional compression at the left thoracic outlet. TOS was within the scope of her differential diagnosis, although she recommended further studies to consider the nerve compression issues.
- [56] In terms of the right wrist, Dr. Paramonoff agreed that the plaintiff likely sustained soft tissue injuries because of the Second Accident.
- [57] She also found that the plaintiff suffered from headaches that were likely contributed to by muscle tension as well as cervicogenic sources, secondary to the injuries identified above.
- [58] She accepted that the plaintiff was suffering mood problems that likely contributed to her pain experience, but deferred to any psychiatric or psychological opinion.
- [59] Dr. Paramonoff projected a prolonged course of recovery, but that there could be moderate improvement with an independent exercise program and the proper management of confounding factors such as her emotional condition.
- [60] In terms of the plaintiff's capacity to work, she felt there would be an ongoing need for adaptations including micro-breaks when required, breaking down tasks into smaller portions, and optimal ergonomics. In cross-examination, she characterized these micro-breaks as being less than five minutes. She also expected that the plaintiff would need to do some stretching over her lunch hour. She concluded that the plaintiff should be able to work full time as a teacher.
- [61] As for recreational activities, to the extent that her upper extremity symptoms are attributable to thoracic outlet compression, she will need to avoid activities that require repetitive and prolonged overhead movement of her left arm. She agreed that she would have to build back up to more vigorous sporting activities.

[62] Dr. Paramonoff agreed that it was reasonable for the plaintiff to have had some assistance with homemaking activities, but that she should be able to carry out regular homemaking activities over the long term with continued strengthening and activity adaptations, save for seasonal cleaning and heavier yard work, for which it would be reasonable to have some assistance for the next five years or so.

[63] She agreed that not working as a lifeguard was medically reasonable, as was missing some coaching time after the First Accident. She identified a risk of symptom aggravation with pregnancy and the infant care that may necessitate further physiotherapy or massage therapy.

[64] Dr. Paramonoff recommended:

- a) further assessment of the left shoulder to rule out underlying structural pathology including TOS/nerve compression;
- b) depending on the results of these evaluations, potential Botox injections or other intervention, could still result in moderate improvement;
- c) a regular independent exercise program;
- d) some ongoing medication;
- e) 18 sessions with a physiotherapist over the next year or two;
- f) one or two sessions with an occupational therapist; and
- g) a gradual build up to activities given that the plaintiff has not been active over the past few years.

[65] Dr. Paramonoff did not recommend reliance on passive treatments but agreed that six treatments a year for the next two years would be reasonable to manage any flare-ups.

[66] In cross-examination, Dr. Paramonoff admitted that she was forced to rely more on the records and the plaintiff's own statements about her abilities, as the plaintiff was physically drained from the occupational therapy evaluation with Mr. Chew, which had taken place the day before.

2. Dr. John Watterson

[67] Dr. Watterson performed an assessment of the plaintiff on January 19, 2017. He is a rheumatologist. He concluded that the plaintiff suffered musculotendinous strain injuries in the First Accident, which were exacerbated by the Second and Third Accidents. He found that the injuries have healed, but that she remains symptomatic. He stated that she appears to have features of vascular thoracic outlet syndrome but concluded that it "appears to have been a preexistent condition but may have been exacerbated by" the Accidents. He did not anticipate the plaintiff requiring further significant absenteeism from either teaching, coaching or sales as a result of the Accidents. He encouraged the plaintiff to continue with a

self-directed rehabilitation program. He said that massage therapy "may be an adjunct to allow her to continue with active rehabilitation". Dr. Watterson's report was filed without the necessity of cross-examination.

V. CAUSATION, including the effect of PRE-EXISTING and subsequent conditions and injuries

A. Generally

- [68] The plaintiff must prove on a balance of probabilities that her injuries would not have occurred "but for" the Accidents: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 14. The Accidents do not need to be the only cause of the plaintiff's injuries but they must be a causal factor beyond the "de minimis" range: *Athey* at para. 15. I find that causation is established. The defendant did not suggest otherwise.
- [69] The parties accepted that the injuries from the Accidents are indivisible, and did not seek a division of responsibility between the Accidents.

B. Pre-Existing Condition

- [70] The defendant is only liable for the injuries caused by the accident: *Athey* at para. 24. Defendants need not put the plaintiff in a better position than she was in prior to the accident: *Athey* at para. 35. Consistent with this principle, if "there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award": *Athey* at para. 35; see also *Moore v. Kyba*, 2012 BCCA 361 at para. 43.
- [71] This risk does not need to be proved on a balance of probabilities in order to support an adjustment to the damages figure. As the Court of Appeal stated in *T.W.N.A. v. Canada* (Ministry of Indian Affairs), 2003 BCCA 670:
- [28] ... a pre-existing condition, whether it is quiescent or active, is part of the plaintiff's original position.
- [48] ... Whether manifest or not, a weakness inherent in a plaintiff that might realistically cause or contribute to the loss claimed regardless of the tort is relevant to the assessment of damages. It is a contingency that should be accounted for in the award. Moreover, such a contingency does not have to be proven to a certainty. Rather, it should be given weight according to its relative likelihood.
- [72] The issue raised by the defendant in relation to the plaintiff's pre-accident condition arises from earlier complaints of pain in her hands in the fall of 2012 and the spring of 2013, which was accompanied with some low back pain. As noted, Dr. Koehler felt it was possibly "transient arthritis". However, there has been no indication that the plaintiff has developed arthritic processes since this incident. Given that the chief pre-accident complaint was numbness and tingling in her hands, the pain being complained of at this time is largely "different in kind than the injury from which [she] now suffers": *Grigor v. Johal*, 2008 BCSC

1823 at para. 47. The defendant concedes that the condition was not active at the time of the Accidents. Although Dr. Paramonoff suggests some potential for difficulties far into the future, I find that the pre-accident condition's potential fallout does not rise to the level of certainty necessary to justify an adjustment of the trial award.

C. Subsequent Accident

[73] The plaintiff had a slip at work in February 2015. Although she mentioned it to her physiotherapist, her complaints before and after this incident were largely similar. Again, I find that it did not reach the level of certainty required to drive an adjustment of the trial award.

VI. CREDIBILITY AND RELIABILITY

[74] I found the plaintiff to be generally forthright. The defendant did not seek to challenge her credibility. However, they raised some concerns with her reliability in terms of her reporting of her symptoms. In particular, there was a tendency to somewhat overweight the Accidents' impact on her capacity. For example, she has virtually stopped all recreational activities even though no medical practitioner has told her this is necessary. She is only doing 5% of the housework at home when the medical evidence does not support this degree of restriction. She has made her own decision to only pursue part-time employment when other evidence suggests that she could work full time with certain accommodations.

[75] An excerpt from the report of the plaintiff's occupational therapist is reflective of the nature of the concern:

However, as per her subjective estimations of her residual capacity (i.e. Perceived Capacity), she underestimated her capacity for carrying and overestimated her capacity for sitting. Additionally, as per her responses in the MTAP questionnaire, she mildly underestimated her functional strength. Furthermore, as per her responses in the DPQ, she likely underestimated her capacity for standing and walking.

It is my opinion that although there was some variability, when taking [sic] as a whole, she was more reliable than unreliable...

[76] I share the defendant's concern as to reliability. While I find the plaintiff is generally credible, I find I must review her recounting of the Accidents' impact with some heightened scrutiny. I do not fault the plaintiff in any way for this. It is completely understandable that she has become quite focused on her pain presentation given that her accidents kept coming and coming. Indeed the emotional problems she has suffered are a factor in enhancing my award of non-pecuniary damages.

VII. DAMAGES

A. Non-Pecuniary Damages

1. Generally

[77] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. The compensation awarded should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured in part against awards made in comparable cases: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 51. That said, other cases are helpful but serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189.

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

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

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

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

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

2. Key Factors

[79] I find the following factors particularly germane to the determination of a proper non-pecuniary award in this case:

1. The plaintiff sustained soft tissue injuries to her neck and back in the First Accident that were aggravated by the Second and Third Accidents. She also suffered from increased headaches that followed a similar course. Her back pain sometimes radiates into her hip and legs. She continues to suffer from these difficulties six years after the First Accident.
2. The plaintiff sustained wrist problems as a result of the Second Accident, but these problems have largely resolved.

3. The plaintiff suffers from thoracic outlet syndrome in one arm, which is likely to continue to cause symptoms into the future.
 4. The plaintiff's mood has been adversely affected by the Accidents. She is tense when driving. Her irritability has caused increased tension in her marriage and with her friends and family. However, she has not been formally diagnosed with a psychiatric or psychological condition, nor has she been prescribed medication for same.
 5. The plaintiff was able to continue her studies along with employment as a receptionist and swim coach. She has not been able to return to lifeguarding given the more intense demands of that position. She is confident enough in her ongoing condition to seek work at a 75% level (which issue is discussed further in the subsequent income loss sections).
 6. The plaintiff was very physically active before the Accidents, and these recreational activities have fallen away since the Accidents. This has had a material impact on the plaintiff's psyche. The plaintiff has stopped pushing herself to get back into these activities. It is unlikely that she will be able to lifeguard or do long distance swim lap work again. However, I find that it is reasonable to assume that she will be able to return to hiking, and to skiing more intermediate runs. That said, I accept that she obtained a great deal of her identity from her high level sporting capacity, so there will be a continued impact from these limitations.
 7. The plaintiff's household work has largely dropped off since the Accidents. However, I find that she is no longer pushing herself back into these tasks to the extent she should be able to once she has managed the psychological and emotional factors. I find that there is a reasonable prospect that she will be able to return to most household work in the future, with appropriate breaks and accommodations, save for heavier, overhead tasks. However, given that the plaintiff has made a separate request for a housekeeping award, the Court must be cautious not to duplicate this element in her non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77, at paras. 30-31, 33.
 8. The plaintiff's condition has largely plateaued, but at a level that I find should allow her to continue to work with some accommodations, keep a home with some help, and engage in recreational activities with certain restrictions. There are certain investigations and treatments, like Botox, that have some prospect for improving her symptoms. She has also stopped exercising regularly, but I find that more frequent activity also has a reasonable prospect of providing her with some level of increased functioning. There is also some potential for surgical improvement, although it is not expected to provide full relief.
- [80] In sum, her chronic pain condition is now likely to be permanent, but there is a reasonable prospect for some increased functioning and scope for a return to a more moderate level of activity.

3. Plaintiff's Authorities

[81] The plaintiff presented several authorities to the Court for its assistance, of which, I found the following the most helpful:

- *MacLeod v. Whittemore*, 2018 BCSC 1082 - A 28 year old dental assistant sustained injuries to her neck, left shoulder and mid back. She developed myofascial pain syndrome with myofascial trigger points in the scalene muscle are, and TOS. Witnesses testified that the plaintiff appeared to be in psychological pain. The plaintiff was having much difficulty caring for a new child. Experts retained for both plaintiff and defence agreed that the plaintiff would benefit from counselling to address her chronic pain. The court noted that the plaintiff suffered from anxiety, sleeplessness, sadness and irritability, noting "[t]his is the opposite of what the plaintiff was like prior to the accident." (para 87). The court awarded \$135,000 in general damages.

- *Tench v. Van Bugnum*, 2019 BCSC 1877: The plaintiff was 29 years old at the time of trial. She had been in two motor vehicle accidents in the four years leading up to trial. She was taking certain university courses at the time of the first accident while also working a job 30 hours a week. She was off seven months after the first accident. At the time of trial, she was in the teaching program at SFU, while teaching ESL part time. She was still suffering from pain in her shoulders and neck, numbness and tingling in her hands, intermittent headaches, mid and low back pain, as well as feelings of depression and anxiety. She was diagnosed with chronic myofascial pain syndrome and TOS in both arms. She was found to be "very credible". She was only able to perform limited work in the home and her partner had taken on most of this work. She struggled with the teaching and the academic program. The court concluded that the TOS prevented her from focussing, concentrating reading and typing for sustained periods. The accidents were found to have played a role in her not pursuing a Ph.D. Her employer and partner both identified that her energy seemed low. She had stopped socializing. Given her psychological and emotional symptoms, she had been prescribed antidepressants. Her prognosis was described as poor. The court found that she was unable to work full-time. She was worried about how she could care for children, and whether she would be able to teach full time. Botox treatment provided temporary relief. The court awarded \$120,000 in general damages.

[82] The plaintiff suggested that the appropriate award for non-pecuniary damages was \$140,000.

4. Defendant's Authorities

[83] The defendant's most helpful authorities were as follows:

- *Zell v. Carvajal*, 2019 BCSC 1979: The 28 year old plaintiff landscaper was involved in three motor vehicle accidents over a three year period. He suffered from chronic neck and back pain, headaches, disrupted sleep, TOS affecting both arms, and carpal tunnel syndrome. He was limited in his ability to engage in overhead work, or to perform "below the waist" work. He was no longer able to engage in the outdoor activities he enjoyed before the accident. He no longer liked to be touched. He was receiving counselling for his psychological mood problems. The court found that if the plaintiff suffered Somatic Symptom Disorder, it was mild. There was no concern about the plaintiff's credibility or reliability. The court found that there was some prospect of improvement. The court awarded \$105,000.

· *Sharma v. MacDonald*, 2017 BCSC 2121: The 26 year old plaintiff suffered numbness and tingling in one arm as a result of TOS, as well as pain in her neck and back. She was near the end of her undergraduate studies at the time of the accident, as well as working part time, and later went on to obtain her nursing degree. She was suffering stress reactions when in the vehicle. She was able to continue to play basketball, with some pain. By trial she started building back up her social relationships. If she worked 3 or 4 days in a row, her back and neck pain would worsen. She would have to rest afterwards. She had low mood. By the time of the trial she had returned to a number of her activities and was able to work. The court expressed no concerns about her credibility. Finding she was suffering from TOS, but all of her symptoms were steadily improving, the court awarded her \$100,000 in non-pecuniary damages.

· *Gillam v. Wiebe*, 2013 BCSC 565: The 36 year old plaintiff production worker suffered from neck and shoulder pain, TOS, headaches, deterioration in her mood, sleep deprivation and significant weight gain. The TOS only affected her right arm and hand. She was able to return to work after a few days, although she did have some difficulties while at work thereafter. She could no longer do heavy work, and had to avoid other activities that could potentially aggravate her neck and shoulder. Her ability to care for her special needs daughter was restricted. Her headaches were starting to lessen by the time of trial, but were still frequent. Her mood was poor, but she was found to be a bit better by the time of trial. The court found her to be reliable. The court awarded \$90,000 (or approximately \$100,000 in today dollars)

[84] The defendant suggested an appropriate range for non-pecuniary damages of between \$80,000 and \$105,000,

5. Determination

[85] Applying all the individual factors above, and with guidance from the case law, I find that the appropriate amount for non-pecuniary damages is \$110,000. Although *Tench* is the most factually similar case, there are material differences that justify a lower award here. In *Tench*:

- a) The plaintiff's TOS was in both arms.
- b) The interference with her abilities were more severe than I have found to be the case here. For example, Ms. *Tench* was less able to tolerate even her occupational therapy evaluation. The court noted as follows at para. 143:

When giving evidence, however, Ms. Black commented that during testing, Ms. *Tench* needed breaks to manage her symptoms and she could not complete certain tasks, some of which were required in her current work.

- c) The plaintiff's psychological and emotional problems appear to have been more severe and required treatment through prescription medication.

[86] These distinctions move the present case closer to the fact pattern in *Sharma*. However, the plaintiff has not seen the pre-trial improvement in mood found in that case.

- [87] Hence, looking to the particular facts in this case, I find that a non-pecuniary award set between the amounts awarded in Sharma and Tench is reasonable.

B. Past Loss of Earning Capacity

- [88] Justice Goepel canvassed the proper assessment of past wage loss in *Grewal v. Naumann*, 2017 BCCA 158. While he dissented in the outcome, the majority agreed with the following summary of the relevant principles (see para. 66):
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21. Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for his injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [89] An assessment of the loss for both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.
- [90] Here, the parties agreed that the plaintiff's condition prevented her from continuing with her lifeguarding work. The parties also agree that the plaintiff would likely have stopped lifeguarding before the trial in any event.
- [91] The plaintiff suggested that an award of \$37,648.86 was appropriate under this head of damage, derived by calculating the amount the plaintiff would have earned as a lifeguard based on past performance, and deducting the amounts she was able to earn from her new, and less-strenuous positions. The defendant performed a similar analysis and arrived at a range that includes the plaintiff's figure, being \$32,882.39 to \$48,458.60. I agree that an award at the figure proposed by the plaintiff is reasonable.

C. Loss of Future Earning Capacity

[92] The legal principles relevant to determining future loss of earning capacity were neatly summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

[93] I find that the capital asset approach is the appropriate approach in this case given that:

- a) the plaintiff was able to continue to earn income after each Accident;
- b) the plaintiff was not fully established in her career at the time of the Accidents.

[94] The plaintiff did become "less valuable to [her]self as a person capable of earning income in a competitive labour market": *Perren v. Lalari*, 2010 BCCA 140 at para. 11 citing *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.).

[95] Based on a variety of models, the plaintiff suggests that an award in the range of \$453,247 to \$676,342 would be appropriate under this head. On top of this analysis, the plaintiff suggests that:

- a) an additional \$37,615.25 is appropriate to compensate for her inability to perform future lifeguarding work;
- b) a positive contingency should be applied to address the fact that her employment was delayed by a year as a result of the injury, and
- c) a positive contingency should be applied to address the loss of pension value that will occur if the plaintiff can only work as a TOC, as TOC's do not accrue pensionable earnings.

[96] All factors considered, the plaintiff proposes that a figure of \$500,000.

[97] The defendant suggests that the plaintiff has not established a material prospect that she will need to engage in part time work. However, if such a finding were made, the defendant suggests that an award in the range of \$16,000 to \$128,000 would be appropriate, using the more rough and ready "Pallos Approach" of awarding one or two years income: *Rozendaal v. Landingin*, 2013 BCSC 24; *Daleh v Schroeder*, 2019 BCSC 1179 at para. 146.

[98] I rely on the following findings and analysis to assess a proper figure for future loss of earning capacity.

[99] Although I accept that teaching elementary school children may no longer be feasible for the plaintiff given the heavier bending, stooping and lifting demands, the evidence suggests that the plaintiff will suffer minimal earnings impairment by restricting herself to secondary school positions. Pursuit of a secondary teaching profession will provide a deep and broad array of potential positions.

[100] The plaintiff has made her own decision to pursue only a part-time TOC position. Based on Mr. Chew's evidence, I accept that there may have to be accommodations provided to her in order for her to perform full time work. However, the accommodations required are not particularly dramatic. I find that there is a reasonable prospect that such accommodations would be provided within a full time position. The plaintiff also has access to 12 sick days over ten work months to address any flares in her condition. As the plaintiff has not yet tested the availability and suitability of the necessary accommodations, it is not at all clear to me that she could not secure suitable and appropriate full time work. That said, I accept that there is a material risk that she will not have the capacity to perform full time work, or that the necessary accommodations to facilitate full time work will not be provided. But it is just that - a risk.

[101] There is some evidence of the extent of this risk through the plaintiff's self-assessment following her practicum and, more objectively, Ms. Khrod's evidence that she would not request that plaintiff perform more than two days' work in a row as a TOC for Ms. Khrod. This evidence must, however, be weighed against the evidence of Dr. Paramonoff, who suggests that the necessary accommodations should be manageable within her current workday with "microbreaks". This in turn is supported to some extent by the evidence of Dr. Badii, who stated:

In my opinion, Ms. Winick should be able to work full time as a teacher in the future, but likely with some accommodations (eg avoiding prolonged sitting/standing, or heavy lifting on a repeated basis).

[102] The plaintiff suggests that the two examples were not an exhaustive list. I find that had Dr. Badii felt that there were more notable accommodations required, he would likely have listed them. I find that, based on the evidence presented as to the management of today's modern classrooms, the plaintiff should be able to avoid prolonged sitting or heavy lifting as a secondary school teacher.

[103] The witness who presumably would have been the most likely to speak directly to this issue is the occupational therapist, Mr. Chew. Unfortunately, his report does leave some room for interpretation. Again, his evidence was as follows:

In summation, if Ms. Winick completes her education and obtains a position as a Teacher, she is likely safe and employable, as she demonstrated the capacity to perform aspects of the demands. However, due to her restrictions, she will need the opportunity to take breaks to rest, stretch, and/or change positions, as well as suitable ergonomics to best manage her symptoms while attempting to remain functional.

[104] The plaintiff suggests that Mr. Chew's use of the word "breaks", when combined with the lay evidence, should be interpreted as breaks longer than her present work environment would allow. I cannot accept this suggestion. I conclude that if an occupational therapist had intended to say that only part time work was reasonable, he would have said so clearly.

[105] The plaintiff notes that Mr. Chew's assessment was made before the plaintiff attempted her practicum. The plaintiff suggests that even if Mr. Chew did not recommend part-time work, the plaintiff's own assessment should now be accepted as the best evidence. However, I have already noted my caution regarding the plaintiff's self-assessment of her capabilities. The defendant notes that applying caution in relying on a plaintiff's self-assessment has some support in the case law. Specifically, in *Kim v. Morier*, 2014 BCCA 63, the Court of Appeal unanimously reversed the award granted at trial for the loss of earning capacity on grounds that the plaintiff had not shown a "real possibility" of diminished ability to compete in the marketplace. *Newbury J.A.*, for the Court, held:

[8] In my view, the trial judge here did err in equating the loss of capital asset here with the plaintiff's own perception. As the cases demonstrate, that is not enough. The plaintiff must show that it is a realistic possibility she will be less able to compete in the marketplace - with economic consequences, not merely psychological ones. In my view as well, the trial judge's statement made after the award was pronounced, that Ms. Kim "may" be less capable of maintaining her disciplined approach to work also fell short. As we suggested to counsel this morning, the word "may" is essentially speculative and does not equate to a finding of a real possibility.

[Emphasis added.]

- [106] In the face of the competing evidence, I find that the appropriate approach is to acknowledge that there is a material risk that she will not be able to work full time. The competing evidence is simply reflective of the unknown extent of that risk.
- [107] The last factor I must consider in deriving an appropriate award is the potential impact of the future care assistance awarded below. This assistance provided may well result in the plaintiff developing symptom of relief, better coping strategies, and improvement in her emotional health, all of which could increase the likelihood of her being able to work full time.
- [108] Considering all of the evidence and the most likely future course of her capabilities, I conclude that the real risk that she will need to reduce her workload to her targeted 75% level is 50%. I also conclude that an appropriate award under this head of damage is \$225,000. To the extent that it is helpful to cross-check this figure against a mathematical anchor, incorporating a 50% risk that she will only be able to work at the 75% level through to retirement yields a present value estimate of \$199,428 based on the data provided.
- [109] In terms of the positive contingencies sought by the plaintiff:
- a) I do not accept that the plaintiff would have continued to do lifeguarding work after becoming a full time teacher, or that a compensable loss has incurred in this respect. As the witnesses indicated, full time teaching is exhausting, particularly in the early years of one's career. I find it unlikely that the plaintiff, even if healthy, would have had the time and energy to lifeguard above and beyond the swim coaching which she is still able to do.
 - b) I do not accept that there was a "lost year" in the plaintiff's income earning lifespan. There was insufficient evidence to support that:
 - i. the one failed biology course at Douglas College can reasonably be attributed to the Accidents; or
 - ii. that this one failed course was the "tipping" point that brought down her average to a point that she was prevented from immediately applying to the teaching program upon her graduation with an Arts degree.
 - c) I accept that there should be a positive contingency to reflect the potential loss of pensionable earnings if she is only able to work as a part time TOC. No expert evidence was provided in this respect. I find that the spread between the mathematical anchor discussed and my final award adequately reflects this contingency.

D. Costs of Future Care and Housekeeping

- [110] In *Peters v. Ortner*, 2013 BCSC 1861, Justice Harris outlined the general principles to consider when assessing a plaintiff's cost of future care:

- [141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
- [142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.
- [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [111] 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.
- [112] The plaintiff proposed a future care award of \$150,000, plus an additional award of \$75,000 for diminished housekeeping capacity, for a total of \$225,000. The present value of the cost of the full battery of Mr. Chew's recommendations was calculated as being between \$137,088 and \$186,830. In deriving \$150,000, the plaintiff indicated that she had applied a discount for the following accepted negative contingencies:
- a) the plaintiff may opt to be put on the waitlist for a government funded pain clinic;
 - b) the plaintiff may not require a vocational assessment;
 - c) the plaintiff may choose not to undergo surgery; and
 - d) the plaintiff may not take all of the medication recommended.
- [113] The defendant suggested that an award between \$9443 and \$14,390 would be appropriate.

- [114] The main points of departure between the parties are as follows.
- [115] First, the plaintiff proposes a general award for loss of housekeeping capacity, as well as a specific future care award to fund additional housekeeping based on Mr. Chew's recommendations (valued between \$53,344 and \$77,001). I find that there is duplication: Tench, paras. 229-230. It is more appropriate to rely on Mr. Chew's analysis of what housekeeping assistance will be necessary based, as it was, on the plaintiff's actual condition and his expert opinion.
- [116] The defendant does not propose any award for housekeeping. This is also unreasonable given that the defendant generally accepted that reaching up or stooping down will cause problems for the plaintiff into the future. I find that there is real and substantial possibility that she will not be able to perform all of her necessary household services. I find that Mr. Chew's approach to determining the costs of performing work that she can no longer perform is reasonably conservative and properly incorporated the plaintiff's husband's role in providing assistance.
- [117] Second, the defendant generally stops running the care costs beyond the next two years. The defendant suggests that, after this time, the plaintiff should simply be able to manage her own conditioning program. I find this to be unrealistic. The defendant accepts that the plaintiff will have chronic pain for the rest of her life. There is a real possibility that the condition may worsen in the future. Sending the plaintiff off to deal with these problems on her own without support is neither fair nor reasonable.
- [118] Third, I find that, if the plaintiff is going to do everything reasonably possible to maximize her ability to perform full time work (which I have already assumed, to the defendant's benefit in my analysis of employment capacity above), then Mr. Chew's recommendations, as costed by the plaintiff, should generally be pursued, subject to the following:
- a) The plaintiff would likely have incurred a cost for a gym membership in any event given how active she was prior to the accident. This was an expensive item, with the plaintiff costing the present value at \$20,515;
 - b) The twelve passive treatment sessions for the rest of her life is excessive. In my view, halving this amount would be more reasonable, particularly given that there was some acknowledged double counting during the period of any multidisciplinary chronic pain management program. This supports a further \$10,000 to \$21,000 reduction;
 - c) The plaintiff's proposed contingency of \$10,000 for future adaptive aids, assistance and treatment is unnecessary. I find that Mr. Chew's recommendations were comprehensive and are just as likely to be high as low;

- d) While acknowledging certain negative contingencies, the actual discount applied by the plaintiff to account for the accepted items was very light, only \$12,000 off the estimated midpoint for the full \$162,000 package. I find that a 10% reduction for these factors, or an additional \$4000, would be reasonable;
 - e) The plaintiff's proposed twelve sessions of couples counselling is excessive. Four sessions should be sufficient to address solely the couples approach to the plaintiff's pain issues, lowering the plaintiff's figure by a further \$1000.
 - f) There was some mixed evidence whether an ergonomic assessment at her workplace would be provided free of charge. If the union or the school board provides the service, this would save a further \$248.
- [119] I find that a reasonable assessment of the collective cost of future care and housekeeping is \$120,000. As a cross-check against the case law, I note that the award for these same damages in *Tench*, applying eerily similar facts, was \$100,000. There is some variation in the case law as to whether diminished homemaking capacity should be assessed separately from cost of care: *Suthakar v. Humble*, 2016 BCSC 155. Were it necessary to segregate the amounts, I would apply \$40,000 to the loss of homemaking capacity and the remaining \$80,000 to the cost of future care.

E. Special Damages

- [120] The parties advised that they had agreed on special damages (although I note that their closing submissions provided slightly different figures).

VIII. SUMMARY

- [121] In summary, damages are awarded as follows:

General Damages

\$110,000.00

Past Loss of Earnings

\$37,648.86

Future Loss of Opportunity

\$225,000.00

Future Cost of Care and Housekeeping

\$120,000.00

Special Damages

As agreed.

TOTAL:

\$492,648.86 plus special damages

IX. TAX GROSS-UP, STATUTORY DEDUCTIONS, INTEREST, AND COSTS

[122] I leave it to the parties to consider the results of this judgment and address any special damages, tax gross-up, statutory deductions, and interest implications accordingly. If they are unable to agree on these matters, they are at liberty to make further submissions, with the plaintiff providing written submissions to the Court within 30 days of this judgment, and the defendant responding 30 days thereafter.

[123] Unless the parties wish to make submissions concerning costs, the plaintiff will be entitled to her costs at Scale B.

[124] I wish to commend counsel on the efficient manner in which this trial was conducted.

"Branch J."

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