

CANADA / JUDGMENT

Xu v. Balaski

2020 BCSC 940

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 940 Xu v. Balaski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Xu v. Balaski,

2020 BCSC 940

Date: 20200624

Docket: M177531

Registry: New Westminster

Between:

Jing Xu

Plaintiff

And

Gail Katherine Balaski, Gary Martin Balaski, Kathryn Susan Porter and Bakhshish Singh Sandhu

Defendants

- and -

Docket: M180084

Registry: New Westminster

Between:

Jing Xu

Plaintiff

And

Sumir Paneswar

Defendant

- and -

Docket: M180083

Registry: New Westminster

Between:

Jing Xu

Plaintiff

And

Fook An Tan and Toyota Credit Canada Inc.

Defendants

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Plaintiff:

T.C. Schapiro

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K.J. Learn

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Place and Dates of Trial:

New Westminster, B.C.

August 12-16, 19-23,

and 26-30, 2019

Place and Date of Judgment:

New Westminster, B.C.

June 24, 2020

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Introduction

- [1] This case involves three motor vehicle accidents in which the plaintiff, Jing Xu, claims she was injured. Liability has been admitted by the defendants for each of the three accidents.
- [2] The principal issue in this case is the quantum of damages to which the plaintiff is entitled. The defendants also argue that the plaintiff has failed to mitigate her damages by declining to have a particular medical operation.
- [3] The plaintiff seeks compensation under the following heads of damage:
 - a) Non-pecuniary damages;
 - b) Past and future income loss;
 - c) Cost of future care;
 - d) Loss of housekeeping capacity, including a claim for care and housekeeping services performed by family members pre-trial; and
 - e) Special damages.

Agreed Statement of Facts

- [4] The parties entered into an agreed statement of facts, marked as Exhibit 1 on this trial, which describes the three collisions which give rise to this action. Small edits to the agreed statement of facts have been made for clarity:

Motor Vehicle Collision #1: June 16, 2014

(A) On June 16, 2014, Ms. Xu (the "plaintiff") was involved in a multi-vehicle collision near the intersection of Fraser Highway and 140th St. in Surrey, BC. Ms. Xu was a properly restrained driver travelling westbound on the Fraser Highway and stopped at a red light when the collision occurred.

(B) The defendant, Bakhshish Singh Sandhu, struck the rear of the vehicle owned by the defendants, Gary Martin Balaski and Gail Katherine Balaski and driven by Gary Martin Balaski, causing his motor vehicle to strike the rear of the defendant [Kathryn] Susan Porter's motor vehicle, causing her motor vehicle to strike the rear of Ms. Xu's vehicle (the "First Collision").

(C) The plaintiff's vehicle was pushed forward on impact, but not pushed into the vehicle immediately in front of her.

(D) On impact, the plaintiff did not come into contact with any part of the inside of her vehicle.

(E) On impact, the plaintiff felt her seatbelt tighten.

(F) Police and ambulance attended the scene of the First Collision. The plaintiff was not treated by attending paramedics. The plaintiff spoke to emergency personnel before leaving the scene of the First Collision.

(G) The plaintiff did not exit her vehicle following the First Collision.

(H) Following the First Collision, the plaintiff was not transported by ambulance to a hospital for treatment.

(I) Following the First Collision, the plaintiff drove herself home.

(J) The defendant Sandhu admits liability for the First Collision.

Motor Vehicle Collision #2: October 12, 2014

(A) On October 12, 2014, Ms. Xu was involved in another motor vehicle collision (the "Second Collision").

(B) She was a properly restrained driver travelling on 152nd St. and 100 Avenue in Surrey when the defendant, Sumir Paneswar (the "Defendant Paneswar") struck her vehicle from behind.

(C) On impact, no part of the plaintiff's body came into contact with any part of the interior of the vehicle.

(D) On impact, the plaintiff felt her seatbelt tighten.

(E) No emergency vehicles attended the scene of the Second Collision.

(F) Following the Second Collision, the plaintiff drove herself home.

(G) The Defendant Paneswar admits liability for the Second Collision.

Motor Vehicle Collision #3: February 23, 2015

(A) On February 23, 2015 Ms. Xu was involved in yet another motor vehicle collision (the "Third Collision").

(B) Ms. Xu was a properly restrained driver stopped at the intersection of 10th Ave. and 6th Street in New Westminster, behind another motor vehicle making a right turn, when the defendant, Fook An Tan (the "Defendant Tan") struck her from behind.

(C) On impact, no part of the plaintiff's body came into contact with any part of the interior of the vehicle.

(D) On impact, the plaintiff felt her seatbelt tighten.

(E) No emergency vehicles attended at the scene of the Third Collision.

(F) The Defendant Tan admits liability for the Third Collision.

- [5] Ms. Xu reported that she felt immediate pain in her neck, shoulders and upper back following the First Collision. She took over-the-counter Tylenol to ameliorate the pain. She also reported post-collision driving anxiety.
- [6] Ms. Xu did not attend at her family physician, Dr. Ting, following the Second Collision. As she was already attending chiropractic treatment and physiotherapy, she continued with those treatments. Anxiety and insomnia were also present after the Second Collision.
- [7] On February 26, 2015, the plaintiff attended Dr. Ting's office and reported that the Third Collision caused pain in her neck and upper back as well as insomnia and anxiety, especially when seeing vehicles approach from behind while she was stopped at a traffic light or waiting for pedestrians or other vehicles to clear the road ahead. Pain and stiffness in her neck made shoulder checking while driving difficult and painful. She found it difficult to fall asleep and her neck pain and paresthesia, or the sensation of pins and needles and numbness in her arms, caused her to wake up frequently. She remains deeply concerned about her ability to provide care for her disabled daughter while maintaining difficult employment.

Prior to the Accidents

- [8] At the time of trial, the plaintiff was a 42-year-old licensed practical nurse ("LPN"). She is married and the mother of three children: J.X., age 14; and twins, I.X. and M.X., both 8-and-a-half years old at the time of trial. I.X. has muscular dystrophy and is severely disabled.
- [9] The Xu family resides in a 4000 square ft. home in Surrey, British Columbia which features an indoor swimming pool.
- [10] The plaintiff was born and raised in Chongqing, China. She was a single child of her parents, Ms. Wang and Mr. Xu. Her parents had good jobs with a herbal medicine company, her mother in a factory and her father as a truck driver. The family lived comfortably. Ms. Xu was a strong, straight "A" student, and after graduating from high school attended Southwest University, also in Chongqing. There she studied Chinese. She obtained employment as an office assistant after graduating in 2000.
- [11] A relative introduced her to Hakhu Yu, a Chinese man working as a housepainter in Vancouver, Canada. After an extended telephone relationship lasting months and a two-week period where Mr. Yu visited in Chongqing, the couple decided to marry. After the couple married in the winter of 2002, they came back to Canada. Ms. Xu was then 25 years old. She testified that she was eager to get a good job in Canada and raise a family.

- [12] The plaintiff had no friends or acquaintances in Canada, and gradually Mr. Yu introduced the plaintiff to her new surroundings in Vancouver, including gardens, grocery stores and restaurants. Mr. Yu was working as a painter, and Ms. Xu was in charge of household responsibilities. The plaintiff obtained employment as an office assistant and enrolled in night school classes in accounting at BCIT. She continued with these activities until she became pregnant and had J.X., who was born in 2004.
- [13] After she gave birth, the plaintiff was entitled to a one-year maternity leave; at the end of that leave, she enrolled in the LPN educational program at Vancouver Community College. She was required to take five high school courses to upgrade her academic credentials, and over a period of eight months, she completed all of those courses with straight A's to obtain her high school graduation. In order to ease the pressure caused by her intensive school experience, her parents took J.X. to China for a period of time to visit. The plaintiff was then in a positive frame of mind, doing well in school while her husband continued to work as a successful housepainter.
- [14] The employment records of the plaintiff were filed in this proceeding. The plaintiff's record of marks from Vancouver Community College appear in these documents, indicating success at a high level in passing courses dealing with patients with particular diagnoses and participating successfully in three practicums in the periods beginning in September 2007, January 2008, and April 2008, in a long-term care facility setting.
- [15] Unfortunately, shortly after the birth of the first child, the plaintiff's husband began experiencing symptoms of rectal cancer. The cancer was treated with radiation, and later with chemotherapy, and finally with surgery. The couple attended lab tests and chemotherapy treatments together. Mr. Yu was eventually able to return to work as a painter.
- [16] Three years after his surgery, a colonoscopy was performed and Mr. Yu's cancer appeared to be in remission. Gene tests were performed and the results indicated that Mr. Yu was at high risk of a further bout of cancer.
- [17] Mr. Yu was beginning to have his health improve when Ms. Xu was accepted to commence the LPN program. Upon completion of the LPN program with very strong marks in 2008, the plaintiff in early 2009 obtained her first job as an LPN at Cheam Village, a long-term care facility located in Agassiz, B.C. She also took a "first on-call" position at Langley Lodge in 2009, which was a shorter commute from her home than Agassiz. Later, she gave up the full-time position at the Cheam Village and obtained a full-time position at Langley Lodge. She maintained a part-time position at Cheam Village while she worked full-time at Langley Lodge, but eventually gave up the position at Cheam Village as only 12-hour shifts were available.

- [18] She worked two 12-hour day shifts followed by two 12-hour night shifts at Langley Lodge, followed by four days off where she worked shifts at Cheam Village. Part-time shifts were worked on an on-call basis and those shifts were often extended due to a shortage of employees with appropriate qualifications.
- [19] In late 2009, a new long-term care facility was opened in Langley at Brookside Lodge. Ms. Xu obtained a full-time position in that new facility. She maintained her on-call position at Langley Lodge, working days off at Brookside. Her shifts were 12 hours for five days with the following two days off, then five days of 12-hour night shifts followed by three days off. On days off she would do shopping, cleaning, laundry and look after her daughter. If she was called on a day off to cover a shift at Langley Lodge, she would work there to ensure that her family had sufficient funds to live on and to ensure a future pension.
- [20] The plaintiff wanted to maintain the relationship with Langley Lodge so that she was in a senior position on the on-call list, which resulted in at least four or five additional shifts each month at Langley Lodge.
- [21] At Brookside, the plaintiff's duties included giving daily medications to 26 patients from a large medical cart on wheels. She was also required to move patients in wheelchairs, change bandages or dressings when required by medical staff, coordinating movements with the families of patients, and provide safety assistance to patients when required.
- [22] It was necessary for the plaintiff to transfer patients to and from wheelchairs and washing facilities using overhead cranes and slings. This work required physical strength and agility to keep patients safe while moving them. Some transfers of patients required manual lifting of patients, which also required physical strength.
- [23] The protocol at the Langley Lodge was that one LPN would perform transfers of patients from bed to wheelchair and back again.
- [24] Another physical task which plaintiff was required to perform was moving a patient's position in their bed to prevent bedsores. This often required the movement of very heavy individuals, which was difficult and physically demanding. A photograph located at exhibit C, tab 12, document 1.54 shows the medical distribution cart, which included not only medications, but milk, juice and water to allow patients to consume medications, as well as charts to record patient medication and equipment such as pill crushers to assist patients who had difficulty swallowing to take medication.
- [25] The cart is constructed of metal and, apart from the items noted above, includes a laptop computer to record delivery of patient medications. Significant strength was required to move the cart throughout the 26-room facility in Brookside.

- [26] Only registered nurses and LPNs are permitted to administer medications in Langley Lodge and Brookside, which happens four times each shift for each patient. Due to the narcotic contents of the medication cart, the nurse providing medication to patients must have the cart in their sight at all times. If the nurse leaves the floor for any reason, the cart must be locked with the laptop computer stowed inside a locked compartment.
- [27] LPNs and care aides are intended to work together to perform transfers of patients, particularly those who are heavy-set. The protocol in these facilities is that when requested to assist by another staff member with a patient transfer, one cannot refuse to provide assistance, as patient safety is a paramount consideration.
- [28] Before the accidents, which are discussed below, the plaintiff had no difficulty performing any of the tasks involving administration of medication, including pushing the medical cart, changing patient dressings or bandages, transferring patients from bed to wheelchair or washing facility, or moving patients to meet family or medical staff.
- [29] The plaintiff also participated in hiking and swimming in the family pool. She took great pride in her housekeeping ability and the cleanliness of her home. She also enjoyed cooking as well as attending restaurants in her community.
- [30] The plaintiff's role as a mother expanded on December 30, 2010, when she gave birth to twin girls born by an emergency caesarean section. Both of these babies required surgery. I.X. was to have surgery first and was transferred to the Children's Hospital in Vancouver because she was suffering from both sepsis and meningitis. Because of treatment of those diseases, her surgery was delayed and it was determined that due to the infection, she had not received a sufficient supply of oxygen. Although the surgery was successful, she was originally diagnosed with a seizure disorder, but that disorder was later diagnosed as quadriplegic cerebral palsy. I.X. remained in hospital for approximately seven months until the summer of 2011. The plaintiff was on an extended maternity leave until mid-2012, during which time she was the children's primary caregiver.
- [31] By late 2011, the plaintiff's parents received permission to immigrate to Canada, with the expectation that their daughter would be able to more easily care for the couple as they aged; a cultural expectation. The grandparents, once settled in Canada, began to provide care for I.X. during the hours when Ms. Xu was at work. Ms. Xu worked as many as six days per week by taking some shifts at Langley Lodge on days off from Brookside. Ms. Xu agreed to pay her mother \$1,000 per month for services rendered caring for the twins, particularly I.X.
- [32] A "day in the life" video was produced by the plaintiff to demonstrate the care needs of I.X. Described in brief compass, the video displays the eight-year-old girl lying in her bed with spastic movements. The plaintiff then wraps a sling around the child by rolling the child physically from side to side to maneuver the sling under her daughter's body. Ankle braces are then fastened with Velcro fasteners to the child's ankles and lace-up shoes are put on over the braces. The braces prevent contracture of the ankle joints. A powered lift is

mounted to the ceiling. When the sling is fully in place and straps fastened around the torso, the child is raised up above the bed and moved by the plaintiff physically guiding the lift into position above a specialized wheelchair. The lift is then employed to lower the child into the wheelchair. That chair has specialized locking supports to keep the torso upright and legs in fixed position. Apart from the wheelchair, there is a shower chair to allow for washing and a commode chair to allow the child to use a toilet. There are a number of bending and forward-reaching movements to position the child to allow the transfer to take place.

- [33] In the video, there is mention that the child weighs over sixty pounds and it is becoming increasingly difficult and painful for the plaintiff to move the child. The evidence was that the child is transferred after waking, taken to the toilet, given breakfast, and then transferred again to prepare for school. After attendance at school she returns home, where she is transferred to bed for a nap. After a one-hour nap, the child is awoken and transferred to a standing frame for about one-hour. Still later, she is transferred to a walker to assist with skeletal development. Finally, she is transferred to her wheelchair to enjoy her dinner with the family and then she is transferred to the shower chair. After her shower, there may be time for some T.V. or reading a book and then another transfer to bed. It was also noted that there may be an additional transfer if I.X. had occasion for a bowel movement during the day. Due to the increase of the weight of I.X., her grandparents look after many of the transfers on a daily basis. There is also a need to transfer the child in her wheelchair into a travel van for transportation to school and medical appointments.

Health Prior to the First Collision

- [34] Dr. Ting was the family physician for Ms. Xu from 2012 forward. In April of 2013, Dr. Ting diagnosed the plaintiff as having a form of depression. His diagnosis was not based on DSM (Diagnostic and Statistical Manual of Psychiatric Disorders), but simply on his experience. He did not believe the depression would interfere with the plaintiff's employment, ability to complete housekeeping tasks or childcare. Ms. Xu was 36 years old at the time of the First Collision, and was otherwise healthy, active and hardworking. She had been involved in two earlier motor vehicle accidents without suffering any injuries.

Lay Witnesses

Mr. Hakhu Yu

- [35] Mr. Yu is the plaintiff's husband. At trial he was 64 years old, working part-time as a housepainter. Mr. Yu testified that his wife did a good job looking after him, caring for him and their children, as well as their household. Mr. Yu has had health problems which cause him concern as he ages. At the time of trial, he was working about 10 days a month.

- [36] Mr. Yu testified that he is not involved in his children's care and while he does play with the children, he does not take part in the care of I.X. and has little knowledge of her daily routines. He was aware that his wife is unable to do heavy lifting and cleaning at home and that most of these activities have been taken over by his in-laws, his wife's parents. Since his wife has been injured in the motor vehicle accidents, he finds her moody and tries to avoid her when she is unhappy.
- [37] He testified he was worried about the future of his family because his wife, the plaintiff, was responsible for both the financial care of the family and the bulk of the housekeeping.

Ms. Qing Bi Wang

- [38] Ms. Wang is the plaintiff's mother. She has come to provide significant assistance with housekeeping and childcare support in the plaintiff's household, in particular in the care of I.X. She detailed in her testimony that she spends approximately one hour each day doing laundry, one hour each day cooking dinner, one hour each day doing vacuuming, two hours cleaning bathrooms every three or four days, and one hour mopping floors each day. Ms. Wang also prepares breakfast and lunch for the members of the household and washes dishes following each meal.

Ms. Maria Santos

- [39] Ms. Santos is a care aide who worked daytime shifts at Brookside Lodge with the plaintiff from 2009 until 2015. Ms. Santos retired in 2016. Ms. Santos testified that there were 20 residents on the floor where they worked, three or four of whom were ambulatory. Initially, Ms. Santos described the plaintiff as someone who worked hard, but following the three collisions Ms. Santos noted that the plaintiff was guarding her shoulders, and missing time from work.
- [40] Ms. Santos gave evidence that the plaintiff assisted her voluntarily with tasks involving patient care, without being asked to do so. Ms. Santos was firm that Ms. Xu did not refuse to provide assistance to Ms. Santos, even after the collisions. Ms. Santos did notice Ms. Xu taking Tylenol at work, and rolling or stretching her shoulders to deal with discomfort.

Ms. Berli Zamar

- [41] Ms. Zamar was a care aide who worked with Ms. Xu since February 2018 at Langley Lodge. These two women worked together approximately two days a week on the third floor in a dayshift. At that time, there were approximately 26 residents on the third floor, only one of whom was ambulatory. They ranged from 70 years of age to over 100 years of age.

- [42] Ms. Zamar was unaware when she first encountered the plaintiff that the plaintiff had previously been involved in three motor vehicle accidents. Ms. Zamar was of the view, prior to receiving that information, that Ms. Xu was simply lazy, and that she did not assist others and that she had a moody attitude.
- [43] Ms. Zamar explained that staff are expected to have the residents up and taken for their breakfast between 7:30 am and 8:30 am every morning. Because Ms. Xu was slower than other LPNs with tasks such as changing and dressings, some residents were not taken to breakfast on time.
- [44] Ms. Zamar was aware of the heavier tasks such as transferring residents and moving them in wheelchairs and noted that Ms. Xu did not assist care aides with these tasks the way that other LPNs did.
- [45] Notwithstanding the foregoing comments, during cross-examination, Ms. Zamar referred to Ms. Xu as a "jolly person" and that as a shift wore on, Ms. Xu's mood would change and she would become quieter.

Ms. Susan Griffin

- [46] Ms. Griffin is an experienced Registered Nurse ("RN") who has been practicing since 1984. She worked for about six years at Vancouver General Hospital, working days and evening shifts, pre-operative and post-operative, changing dressings, administering medications and care of elderly long-term care patients. She was aware that the workload of an LPN has changed, but they continue to be supervised by RNs in the clinical part of the hospital.
- [47] She has worked for the Staulo First Nation for approximately one year, providing care as a Nurse Supervisor. Previously, she had supervisory positions at Eden Care home in Chilliwack as administrator for RN and LPN staff for 85 elderly patients; then later was director of care and general manager at Brookside Lodge for RN and LPN staff for 116 patients. Ms. Griffin worked at Brookside from 2009, when it opened, until 2018, when she moved to the Staulo First Nation health care facility.
- [48] Ms. Griffin described the duties and responsibilities of an LPN at Brookside Lodge. In the morning, risk issues noted by the night shift were brought to the attention of the day staff. Notes were made of residents who were remaining in their rooms and those who were going to the dining room for breakfast, as well as those patients whose families were going to attend the facility. Diabetic medications had to be administered at precise times and plans were organized for dressing changes and to coordinate care for bathing residents. The medication cart had to be taken to each of the rooms to make sure that residents received and ingested prescribed medications. Notes were also made of residents showing signs of depression such as crying. Oxygen saturation tests were performed to ensure that residents were not in need of emergency assistance. LPNs registered residents' choices for breakfast or sleeping in. Other health care providers, including dietitians and physiotherapists, would come in to assist residents and it was the responsibility of the LPN to coordinate these

activities.

- [49] At lunchtime, the medications cart would be moved by the LPN to all the rooms again to provide residents with prescription medications. Face and body washes are provided bed side by LPNs. Again, LPNs would provide assistance for moving patients to the dining room. LPNs would also take part in changing dressings for surgical wounds and bedsores as necessary. Dressing changes can take from 15 minutes to over an hour, depending on the complexity.
- [50] Use of the medical cart is a physically demanding job because of the weight of the cart and the responsibility for storing it correctly prior to entering each room. Ms. Griffin described the cart as having "a mind of its own" when being moved. The various transfers of residents also involve significant physical effort by the LPN.
- [51] Ms. Griffin hired Ms. Xu to work at Brookside Lodge around September 2009 in a full-time position. Ms. Griffin considered Ms. Xu a diligent, conscientious and careful employee who was focused on client care. Ms. Griffin considered that Ms. Xu was highly regarded by her colleagues. Other staff found her very collaborative and asked for her opinions on matters relating to patient care. In her first few months following her hiring, there was no problem with the physical requirements of her job.
- [52] Ms. Xu became pregnant with twins, and although careful with her activities, she was able to fulfil all duties when pregnant. Before the accidents, Ms. Griffin was unaware of any problems with transfers, pushing the medication cart or managing residents sitting in wheelchairs. When she left to give birth to twins she was excited to return to work and her staff colleagues were excited to see her back at work.
- [53] Ms. Xu returned to work in June of 2012. She had become the primary wage earner in her family and took particular pride in her work as an LPN at Brookside Lodge working a rotating schedule of five days on, two days off, five days on three days off. On her days off, she picked up additional shifts at Langley Lodge, thereby increasing her income. In 2013, she worked a total of 1789 hours at Brookside Lodge and 112.50 hours of on-call shifts at Langley Lodge, plus 97 hours of paid vacation and sick days. According to her 2013 pay stubs, Ms. Xu was credited with 1,998.50 paid hours in 2013, or approximately 250 paid working days that year, the equivalent of 42 six-day work weeks.

Plaintiff's Expert Witnesses

Dr. Ting

- [54] After the Third Collision, Dr. Ting described the plaintiff experiencing paresthesia, or a sensation of pins and needles in her neck, arms and into her hands, as well as headaches. These symptoms were reported by the plaintiff to be significant enough to cause her to wake up at night. Dr. Ting found that as the paresthesia increased in intensity, the depression experienced by the plaintiff also became more profound. Dr. Ting found that the plaintiff

had a moderate decreased range of motion in her neck, arms and upper back with spasm. The spasm resolved relatively quickly, but pain and decreased range of motion persisted.

- [55] Dr. Ting prescribed Cipralext, but not until after the Third Collision. The plaintiff testified that she did not take the Cipralext consistently. She also was given a prescription for Zopiclone as a sleep aid and Sibelium to address headaches.
- [56] Dr. Ting, after examining the plaintiff, referred her for physiotherapy, massage therapy, chiropractic treatment, and acupuncture treatment as well as prescribed medications to ease her symptoms, particularly pain.
- [57] The plaintiff attended approximately 60 massage therapy sessions between June 30, 2015 and June 30, 2017. She also attended 41 physiotherapy treatments from November 5, 2015 until November 5, 2016.
- [58] Dr. Ting expressed concern that, while the plaintiff was continuing to fulfill her work commitments, she was doing so with pain, stiffness and considerable anxiety. The plaintiff reported to Dr. Ting she was concerned about losing her seniority or losing her job altogether. The plaintiff also reported that the plaintiff's recreational and social activities had slowed, and her swimming had stopped. The doctor recorded that the frequency of the plaintiff's sexual activities had decreased significantly. Household activities, including cooking, cleaning, vacuuming, laundry and shopping were delegated to others. The plaintiff also reported her parents, now in their seventies, were taking on responsibility for transfers, carrying, bathing and feeding of I.X.
- [59] As the plaintiff was continuing to experience neurological symptoms, which were not resolving in the usual course, Dr. Ting referred Ms. Xu to Dr. Heran, a neurosurgeon.
- [60] Dr. Ting confirmed that he discussed Dr. Heran's comments on spinal surgery with the plaintiff. Dr. Ting confirmed that in those discussions, based on his experience, he told the plaintiff the surgery would not cure all of her symptoms, the surgery did not include a guarantee of success, there was a real possibility that symptoms would continue after surgery, there were normal risks and complications associated with every surgery, and recovery time after surgery would range from 6 to 12 months or longer, depending on the results of the surgery.
- [61] Dr. Ting was of the view that although the plaintiff was suffering pain, she should investigate active rehabilitation. She participated in a course of active rehabilitation, but her functionality did not improved and pain persisted, so active rehabilitation was not continued.
- [62] Given the personal circumstances of the plaintiff, particularly the requirements for care for her daughter, I.X., Dr. Ting said that surgery would be a "last resort" treatment.

Dr. Peter Zarkadas

- [63] Dr. Peter Zarkadas is an expert orthopedic surgeon who examined the plaintiff on February 21, 2017. He prepared two medical legal reports, dated February 28, 2017 following his initial assessment, and thereafter a rebuttal report dated December 20, 2018. Dr. Zarkadas was instructed to provide an opinion with respect to the plaintiff's associated injuries sustained during the three accidents, focusing on orthopedic injuries. Dr. Zarkadas' first report included a review of the facts concerning the three accidents and the history of treatment after each of the accidents, where he noted the inability of the plaintiff to continue full-time work or perform full duties after the third accident when she reverted to part-time duties. The doctor noted Ms. Xu's difficulty and pain experienced while performing heavy cleaning and maintenance tasks around her home. He also noted the particular difficulties created by the need to regularly assist with I.X., who then weighed approximately 50 pounds and required regular transfers from morning until night for functions of daily living.
- [64] Dr. Zarkadas described initial x-rays of the cervical spine of the plaintiff in March 2015, demonstrating spondylosis at the level of C4-5 and C5-6. A later x-ray taken on May 9, 2016 demonstrated similar findings, including facet joint degeneration at the level of C7 and T-1. The doctor was of the view that the plaintiff had pre-existing degenerative changes of her cervical spine and that during the three motor vehicle accidents, she likely sustained a whiplash injury to her neck, which aggravated her underlying osteoarthritis. He also noted myelopathic changes related to cervical spine stenosis.
- [65] Dr. Zarkadas expressed the view that while the plaintiff likely had pre-existing degenerative changes in her cervical spine, these were aggravated by the three motor vehicle accidents. The plaintiff showed cervical spine stenosis and associated myelopathic changes in the most recent MRI, which were at least in part caused by the aggravation of the underlying arthritis caused by the accidents.
- [66] With respect to ongoing treatment, Dr. Zarkadas encouraged a referral to a neurologist and a neurosurgeon. He recommended EMG tests of the plaintiff's arms concerning myelopathic changes, and mentioned the potential need for surgical decompression.
- [67] Dr. Zarkadas described the prognosis for the plaintiff as somewhat guarded. He expected improvement over time and was doubtful that the plaintiff would require "a surgical decompression in her lifetime". He expected that Ms. Xu would have ongoing symptoms in the long term as a result of the motor vehicle accidents. Whatever symptoms resulted from degenerative changes in her cervical spine, it was doubtful that the neck pain in her cervical spine would have occurred with the severity and early onset that it had in the absence of the motor vehicle accidents.

Dr. Rajasekaran

- [68] Dr. Rajasekaran testified as an expert physiatrist, having assessed the plaintiff on June 3, 2018. His practice focused on chronic pain symptoms and musculoskeletal injuries. Dr. Rajasekaran noted that Ms. Xu had "brisk" reflexes in the lower limbs, which in his view warranted a consultation with a neurosurgeon because this might indicate cervical myelopathy.
- [69] During cross-examination, Dr. Rajasekaran agreed swimming would be a helpful treatment modality, however the choice of swimming strokes had to be considered carefully to ensure a positive therapeutic result. Dr. Rajasekaran also confirmed that it was not possible to predict if the plaintiff's asymptomatic spinal degeneration would have become symptomatic without the three motor vehicle collisions. Noting an error in his report, Dr. Rajasekaran found there was an impairment in Ms. Xu's ability to function fully in the course of her employment. Finally, Dr. Rajasekaran opined that given the length of time the plaintiff had continued to suffer pain symptoms and difficulties with daily living as a result of the three motor vehicle collisions, her prognosis was poor.

Dr. Navraj S. Heran

- [70] Dr. Heran, a neurosurgeon, provided expert evidence concerning the plaintiff's injuries and ongoing symptoms from the three motor vehicle accidents referred to above. Dr. Heran refers to typical whiplash-type symptoms, but with a warm burning sensation extending towards the plaintiff's arms which takes hours each morning to settle. On February 21, 2017, Dr. Heran noted that on examination she demonstrated slightly brisk reflexes in her lower extremities and right triceps. Her MRI scan report of June 28, 2016 showed evidence of spinal cord change, and cord compression at the C4-5 level. Dr. Heran stated that the plaintiff presented with elements of cervical myelopathy and may require surgery.
- [71] On June 15, 2017, Dr. Heran examined the plaintiff, and again reported continuing numbness and tingling in her arms. Dr. Heran stated a follow-up MRI demonstrated evidence of moderate foraminal stenosis at C5-6, milder at C4-5. In his letter of that date to Dr. Ting, Dr. Heran states "there is nothing indicating surgery at this point in time."
- [72] A medical legal report was prepared by Dr. Heran dated August 30, 2018, and filed as Exhibit 43 in this trial. At page 5 of that report, Dr. Heran recites the following diagnoses:
- 1) Aggravation of underlying quite innocent asymptomatic structural arthritic changes consistent with degeneration of the cervical spine;
 - 2) As a consequence of number one, progressive deterioration of the C4-5 and C5-6 level with early evidence of left-sided foraminal stenosis and now bilateral foraminal stenosis;
 - 3) Cervical myelopathy as a consequence of disc protrusion that has likely since regressed, at more likely C4-5 than C5-6 levels;

- 4) Cervicogenic headaches; and
- 5) Features of post-traumatic stress disorder and augmentation of pre-existing depression.

[73] Dr. Heran attributed the causes of the above directly to the three accidents, noting that none of the symptoms in her cervical spine or upper torso, nor cervicogenic headaches, were occurring prior to the accidents. He noted an improvement in symptomatology following the first accident, but symptoms returned following the second and third accidents at a site of vulnerability, which based on imaging reviews was identified as C4-5 and C5-6 levels.

[74] Under the title heading "Prognosis and Recommendations", Dr. Heran describes the condition of the plaintiff as follows:

Ms. Xu has persisting symptoms involving her neck and upper torso with extension to her arms in a radicular fashion, causing headaches, cervicogenic type. She has now support for preceding with more aggressive approaches or management as conservative routines have not improved her, and if anything, she has slowly worsened, particularly more recently. Repeat MRI scan should be obtained. Even without this, my recommendations for management of her would remain the same

I recommend that she have an anterior cervical discectomy and fusion at C4-5 and C5-6 with interbody cages and a plate with six screws. The risk of this surgery are those of, including but not limited to infection, bleeding complications, injury to the neural elements, failure to resolve her problem, need for subsequent procedures and treatments and particularly those of difficulty swallowing and change in voice. Together these add up to about 2% to 3%. Difficulty swallowing changes in voice are the most common complications presenting in about 1% of the patients permanently. Transient problems occur in about 8% of patients each.

This surgery has a marked likelihood of improvement in her clinical state. All her presentations have been consistent with mechanical pain and nerve root irritation, albeit vaguely. Therefore, I suspect she would have about an 85 to 95% chance of marked improvement, notably 70% or more reduction in her pain. She probably has some underlying myofascial source of symptoms to that accounts for her symptoms, particularly with extension of her upper torso. These symptoms likely would not be affected to the same extent. Improvement here is expected, as these are often triggered by a structural source in the spine or from nerve irritation. The typical recovery time will be two months of no heavy lifting, bending, twisting activities and thereafter getting back to usual routines slowly over the next month. Most patients are markedly improved, if not near plateauing by six months. Plateauing is typically established one or two years following surgery. Rehabilitation is best recommended to be implemented with physiotherapy/kinesiology and return to work programs between the three and six-month period postoperative.

- [75] During cross-examination, it was noted that the plaintiff could become involved in less strenuous employment and beyond that less strenuous level Dr. Heran expressed the view the plaintiff would not be capable. He expressed the view that headaches would be expected to improve following a surgical remediation of her neck. The doctor also agreed that without surgery in the future, the plaintiff is at increased risk for progressive deterioration, as was being demonstrated immediately before the trial. With surgery, this risk is more limited.
- [76] Dr. Heran also prepared a further addendum to his medical legal report, dated January 18, 2019. In the addendum, Dr. Heran noted that while the proposed surgery, an interior cervical discectomy, has a likelihood of improving her clinical state, the plaintiff would continue to have a substantial likelihood of an underlying degree of soft tissue mediated pain, as well as cervicogenic headaches. The surgery proposed would rectify the structural sources of pain such as nerve root compression and cord compression. However, Dr. Heran opines that because the plaintiff has already had chronic pain for a number of years, he expects the chronic pain to continue post-surgery. Dr. Heran also opines "the choice for surgery is personal and there are risks. The potential for recovery or improvement is not absolute. Therefore, it is not unreasonable for an individual to decline such surgery. This happens on a routine basis."

Ms. Giovanna Boniface

- [77] Giovanna Boniface, a Registered Occupational Therapist and certified Canadian Life Care Planner, provided a cost of future care assessment for the plaintiff. Ms. Boniface is a clinical assistant professor in the UBC Faculty of Medicine, Department of Occupational Science and Occupational Therapy.
- [78] The cost of future care report, which is also known as a life care plan, provides a concise plan for current and future needs with the associated costs for individuals who have experienced catastrophic injury or have chronic health care needs. The report was based on an assessment of clinical records and medical information, as well as a meeting between Ms. Boniface and Ms. Xu which took place on November 23, 2018. Ms. Xu reported her current symptoms as a result of the motor vehicle accidents as neck pain and stiffness, bilateral shoulder pain, headache, left arm tingling, disrupted sleep and worry about her future as breadwinner for the family and caregiver for I.X.
- [79] Ms. Boniface reviewed the potential courses of treatment which Ms. Xu might follow, including the interior cervical discectomy and fusion outlined by Dr. Heran, which would require post-surgical rehabilitation and return to work support, as well as home support and childcare support to replace the care and daily living tasks to complete in her household. A conservative approach to treatment, which does not include surgery, would require access to physiotherapy and massage therapy to sustain quality of life and symptom management. In addition, Ms. Boniface was of the opinion that Ms. Xu would benefit from consultation with a physiotherapist to review and adapt an exercise and stretching program to be carried out independently in her home, as well as access to regular consultations with an occupational

therapist to provide recommendations for activity or environmental adaptation to mitigate exacerbation of symptoms.

- [80] With respect to productivity issues explored by Ms. Boniface, Ms. Xu reported that she is the main income source for her family, supports her parents and three daughters and "can't afford any time off". Pushing the medication cart, assisting with patient transfers, wound and skin care, and other tasks have become more difficult after the accident. She outlined how her mother and father are assisting significantly with household management, particularly with I.X.'s extensive care needs.
- [81] On Ms. Boniface's recommendation, a powered ceiling lift to assist with lifting and transfer of I.X. was installed in the plaintiff's home to assist with these activities of daily life for the plaintiff and I.X. The original powered ceiling lift was paid for in part by a charitable organization, but there is no assurance that a ceiling lift would be provided by that charitable organization in the future.
- [82] Ms. Boniface made a number of medical and rehabilitation recommendations which included regular consultation with her family doctor and specialists (as required), surgical intervention, medications, physiotherapy, massage therapy, occupational therapy, a home exercise program, a chronic pain program, home making support (pre and post surgery), a personal support worker (to assist with morning and evening transfers for I.X.), and adaptive equipment, including sleep positioning aids, vehicle aids, transfer aids, and a specialized mattress for I.X. The sleep positioning aids were recommended to improve the quality of sleep and positioning of the plaintiff so as not to exacerbate symptoms following the Collisions. The vehicle aids were panoramic mirrors and seatbelt pulls to minimize neck turning and pain reactions while driving. The specialized mattress for I.X. was designed to reduce the need to for I.X. to be turned in her bed at night and thereby improve the plaintiff's hours for sleep. The overhead fixed ceiling lift was designed to minimize re-aggravation of the plaintiff's neck and back while transferring I.X. from her bed to a wheelchair or similar device. All of these devices were necessary to ameliorate the effects of the three collisions.
- [83] Ms. Boniface cited future care items and services that would permit the plaintiff to maintain her function, maximize her independence and provide support for activities she is no longer able to perform. Ms. Boniface stated the goals of the recommendations are:

to enable Ms. Xu to have a quality of life which resembles as closely as possible, that which she would have led but for the motor vehicle collisions on dates of June 16, 2014 October 12, 2014 and February 23, 2015; function optimally daily; develop and maximize her skills to allow her to pursue a meaningful and productive life, including personal relationships and recreational pursuits; optimize her ability to live independently (including the provision of paid assistance so that she does not have to rely on family, friends or charitable organizations to enable independent community living); access aids and supplies that are now necessary because of her limitations: reduce (or prevent) future complications; reduce the need for crisis-based

interventions.

[84] Appendix C reviews costs of medical care, including medication, expedited private surgical services for the anterior discectomy in the amount of \$17,000, and therapy services, including physiotherapy either post surgery or with no surgical intervention, as well as massage therapy, occupational therapy, psychological intervention and a chronic pain program. The Appendix also reviews the costs of home support services in the circumstances of surgery or without surgery, costs of a personal support worker, and costs of the specialized items above for I.X.

Mr. Pivnenko and Mr. Benning - Costs of Future Care

[85] Mr. Pivnenko provided evidence of forensic accounting as an expert witness for the plaintiff. In particular, his report contained actuarial multipliers with the calculation of future costs based on information provided by Ms. Boniface. Mr. Benning prepared a report in response to that of Mr. Pivnenko. The report of Mr. Benning, in particular, discussed labour market contingencies not referred to in the report of Mr. Pivnenko. Such labour market contingencies included negative contingencies such as not participating in the workforce, part-time work and unemployment. A difficulty with applying Mr. Benning's assessment of contingencies is that the plaintiff has a history of continuous work with extra shifts, shift premiums and overtime hours, all in a unionized setting which would provide above-average job security and not be subject to the negative contingencies suggested by Mr. Benning in this regard. These two experts did not disagree with respect to the calculations in each of their reports.

Defendants' Expert Witnesses

Dr. Marc Boyle

[86] Dr. Boyle was qualified as an orthopedic surgeon with particular knowledge of musculoskeletal pathology, specifically the diagnosis, treatment, prognosis and management of chronic pain and functionality. Dr. Boyle examined the plaintiff on August 21, 2018.

[87] Dr. Boyle testified that in his initial years in practice, he focused on surgeries "below the neck". He testified he left Vancouver General Hospital for the Fraser Valley where he stated he was the only spinal surgeon in the valley area during his last 20 years of practice. He retired from practice in 2009.

[88] During cross-examination, he agreed his only experience with spinal surgery was in the lumbar area of the spine, and that he had never performed cervical spine surgery during his practice. When asked to define "below the neck", Dr. Boyle summarized the phrase as meaning "the pelvis and upper and lower extremities".

- [89] The expert report prepared by Dr. Boyle dated November 21, 2018 did not contain a list of facts and assumptions upon which the report was based. His report was revised, dated August 8, 2019, where additional facts and assumptions were marked by underlining shown in Exhibit 46.
- [90] During cross-examination, Dr. Boyle agreed that certain facts and assumptions not contained in his report were important. For instance, Dr. Boyle agreed that there was no record of the plaintiff complaining about pain or other difficulties in her neck, shoulders, or upper back prior to the three motor vehicle accidents. Further, he agreed that the plaintiff had no difficulties performing her employment duties or housekeeping prior to the three accidents. Dr. Boyle spent some time explaining normal healing processes of the human body, but agreed that such processes were interrupted when three motor vehicle accidents occurred within eight months of each other.
- [91] Dr. Boyle testified in cross-examination that the plaintiff scored 0 out of 7 on Waddell tests, and as a result, there was no basis for indicating maladaptive pain responses and her reports of pain could be taken at face value, not as exaggeration. It is problematic that the lack of Waddell signs, when known to this doctor, were not included in the report, particularly as he conducted the testing.
- [92] Dr. Boyle also expressed in his report the view that, absent the motor vehicle accidents, early surgery may be necessary because of the natural progression of the plaintiff's spinal degeneration. Again, in cross-examination, Dr. Boyle agreed that this statement was speculation as the plaintiff had no pre-accident symptoms. He also agreed in cross-examination that the presence of degenerative changes in a person's spinal column shown in imaging is not a predictor of future pain symptoms.
- [93] During his evidence-in-chief, Dr. Boyle confirmed that the physical symptoms now suffered by the plaintiff were caused by the three motor vehicle accidents. He also agreed that the collisions and resulting inflammation caused the arthritic condition of the plaintiff to become symptomatic, and the bulging spinal disc was also a likely result of the collisions.
- [94] While he agreed that experience of pain by individuals is subjective, he agreed that the injuries suffered by the plaintiff reduced her capacity to work and to perform childcare or housekeeping.
- [95] When balanced against the evidence of Dr. Zarkadas, I did not find the evidence of Dr. Boyle helpful, particularly because of his retirement approximately ten years ago and the lack of any experience, surgical or otherwise, with examination or treatment of the cervical spine.
- [96] Dr. Boyle initially opined that Ms. Xu would have become symptomatic absent the collisions due to her pre-existing asymptomatic spinal condition. He gave the opinion that the collisions only changed the time when surgery would have been required. Dr. Heran explained that "irrelevant findings" of spinal damage or decay may appear on an MRI, but the presence of such damage on an MRI is not predictive of future problems. The evidence

of degenerative change is the "normal process of aging" but not predictive of a schedule of symptoms.

- [97] Dr. Boyle, during cross-examination, resiled from his opinion above and agreed that predicting any symptoms in these circumstances without the collisions was speculative. He eventually agreed that the collisions caused the symptoms experienced by the plaintiff and that the bulging disc noted in the radiography may also have been caused by the force of the collisions. Given the inconsistency of Dr. Boyle's evidence and the clear consistency of Dr. Heran's evidence, I prefer the evidence of Dr. Heran on this issue.
- [98] I do note, however, that Dr. Boyle agreed with the proposition that because it had been more than five years since the first accident and the plaintiff's symptoms continued, there is little likelihood that plaintiff's condition would improve.

Mitigation of Damages

- [99] The defendants submitted that the plaintiff failed to mitigate her damages by refusing to have surgery recommended by Dr. Heran. The defendants seek a discount of 70% to the plaintiff's awarded damages for that failure.
- [100] The defendants bear the onus of proving the following four elements to establish that the plaintiff failed to mitigate her losses:
- a) A qualified medical expert has made a recommendation for a particular form of treatment;
 - b) The plaintiff failed or refused to undertake that treatment, although it was available;
 - c) That failure or refusal was unreasonable; and
 - d) There is "some likelihood" that he would have obtained "substantial benefit" from it without exposing the plaintiff to significant risk.

See *Janiak v. Ippolito*, [1985] 1 S.C.R. 146; *Chiu (guardian ad litem of) v. Chiu*, 2002 BCCA 618 at para. 57.

- [101] Reasonableness is based on a subjective/objective test in the sense that two questions are asked: would a reasonable patient in the same situation as the plaintiff, and having the same information, have undertaken the recommendation; and to what extent would treatment have reduced the plaintiff's losses: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.
- [102] However, the plaintiff submitted that the defendants are required to demonstrate that the recommendation for treatment, in this case spinal surgery, was given to the plaintiff by the proposed treating surgeon, Dr. Heran. It is clear on the evidence that after an initial appointment, Dr. Heran told the plaintiff that she might require surgery in the future. Dr. Heran had not at that time seen the MRI films necessary to form the opinion that surgery would be necessary. At that time, Dr. Heran had not formed an opinion with respect to the

need for surgery. That opinion was not formed until Dr. Heran wrote his second medical legal report on August 30, 2018. Dr. Heran and the plaintiff did not discuss his change of opinion prior to the trial of this action. While there was some discussion with Dr. Ting about the potential for surgery, Dr. Ting said he supported the plaintiff's decision to avoid surgery in her present circumstances.

[103] The defendants argue Ms. Xu failed to mitigate her losses in three ways:

- i. failing to follow Dr. Heran's recommendation for surgery;
- ii. delaying that surgery; and
- iii. refusing to proceed with surgery without a guarantee of success.

[104] The defendants submitted that Dr. Heran told the plaintiff that if she began exhibiting stereotypic radiation to her arms during the course of the day, worsened with extension type maneuvers consistent with foraminal stenosis that would be an indication that she required surgery. The plaintiff testified that Dr. Heran told her if she started to feel numbness and tingling for 24 hours, she should get surgery. At some recent point in the last month before trial, she began to have periods of tingling during the day time. In other words, the trigger point which Dr. Heran set for surgery was about to be met at the opening of trial. That timing, as argued by the plaintiff, would defeat a claim for failure to mitigate damages, as it had only just arisen at the time of trial.

[105] A further difficulty which arises in the case at bar is that the plaintiff saw Dr. Heran on February 21, 2017 and June 15, 2017. On neither of those occasions, according to his evidence, did Dr. Heran recommend surgery as a course of treatment for the plaintiff.

[106] The defendants have failed to demonstrate that the plaintiff refused to follow a course of treatment recommended to the plaintiff by her doctor, in this case, Dr. Heran. Hence, there is no basis for deduction of any amount for failure to mitigate by the plaintiff.

[107] If this finding is not correct as a matter of law, then upon the objective/subjective test cited above, the circumstances of the plaintiff must be considered to determine the reasonableness of her decision. The plaintiff is the primary wage earner for a family which includes herself, Mr. Yu, her parents and three children entering teenage years. One of these children has quadriplegic muscular dystrophy and requires 24-hour per day care, including a number of physical transfers each day. In keeping with strong cultural traditions, Ms. Xu has provided strong support to her parents, husband and children as wage earner, caregiver and responsible helper. She has been able to continue working despite significant pain and discomfort.

[108] The proposed surgery is not going to solve all of the pain problems experienced by the plaintiff. Dr. Heran agreed that the surgery which he proposed in August of 2018 would only deal with structural sources of pain, not the myofascial pain typical of whiplash injuries which the plaintiff suffered. Dr. Heran agreed there were significant risks for anyone going

onto an operating table under general anaesthetic. While Dr. Heran stated that the risks of an adverse event might be 3%, any realized risk that prevented the plaintiff from her familial role as wage earner and caregiver would be catastrophic in the circumstances of this plaintiff. Dr. Heran agreed that there is no particular urgency for the plaintiff to have surgery at this precise time and that it was "an individual choice" for the plaintiff to make in her particular circumstances. Surgery was not based on emergency circumstances.

- [109] There is clearly no guarantee that the surgery will be successful. Her condition may remain unchanged and myofascial pain will continue, in any event. The required recovery time following the surgery will be measured in months. Ms. Xu is the most significant breadwinner in her family, essentially supporting herself and six others. She is very frightened and concerned about the prospects of surgery and, to date, considering the foregoing factors, has declined to have the surgery performed. Dr. Ting supports her decision to decline to have surgery at this time.
- [110] Courts have previously found that a plaintiff's personal circumstances, including obligations to support other family members, may justify a plaintiff declining to pursue a suggested course of medical treatment: *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at para. 227; *Rozendaal v. Landingin*, 2013 BCSC 24 at paras. 67-76. The Court in *Janiak* also noted that where medical opinion is divided, as long as a plaintiff follows one of the recommended courses of treatment, her conduct will not be considered unreasonable.
- [111] Here, the plaintiff faces immense pressure to provide for the extensive and varied needs of her family, and a prolonged interruption to her ability to work could put a significant strain on her ability to provide care to I.X., the plaintiff's parents, and on her family's finances. The plaintiff's family doctor also supports her decision not to have surgery at this time.
- [112] Counsel for the defendants argued that the plaintiff should schedule surgery immediately, and be provided with a \$17,000 payment as compensation for this surgery. Counsel acknowledged that this Court has no power to compel the plaintiff to have surgery. The submission was not made in relation to argument about how the plaintiff's damages should be reduced for her alleged failure to mitigate. As such, this submission is properly characterized as a settlement offer, and I have not considered it in my analysis of the plaintiff's alleged failure to mitigate.
- [113] Based on the foregoing reasoning, I am satisfied that the decision by the plaintiff not to have surgery at this time is not unreasonable. On the whole, I find that the defendants have not proven that the plaintiff has failed to mitigate.

Non-pecuniary Damages

- [114] Damages for non-pecuniary losses are an attempt at restitution for pain and suffering, loss of enjoyment of life and loss of amenities.
- [115] In assessing non-pecuniary damages, the leading case is *Stapley v. Hejslet*, 2006 BCCA 34:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

[Emphasis removed.]

[116] In other words, in assessing non-pecuniary damages, it is not only a matter of comparing the injuries suffered, but also the effect of those injuries on the lifestyle and personality of each person.

[117] In *Clark v. Kouba*, 2012 BCSC 1607, the court stated the following with respect to the law of non-pecuniary damage assessments:

[71] In *Hartnett v. Leischner*, 2008 BCSC 1589, [2008] B.C.J. 2242, Russell J. provides a helpful summary of the law with respect to general or non-pecuniary damages:

[80] The purpose of non-pecuniary damage awards is to compensate the plaintiff for "pain, suffering, loss of enjoyment of life and loss of amenities": *Jackson v. Lai*, 2007 BCSC 1023, [2007] B.C.J. No. 1535 at para. 134; see also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Kuskis v. Tin*, 2008 BCSC 862, [2008] B.C.J. No. 1248. While each award must be made with reference to the particular circumstances and facts of the case, other cases may serve as a guide to assist the court in arriving at an award that is just and fair to both parties: *Kuskis* at para. 136.

[81] There are a number of factors that courts must take into account when assessing this type of claim. Justice Kirkpatrick, writing for the majority, in *Stapley v. Hejslet*, 2006 BCCA 34, 263 D.L.R. (4th) 19, outlines the factors to consider, at para. 46:

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

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of pain;

- d) disability;
- e) emotional suffering; and
- f) loss or impairment of life.

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

- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54 (B.C.C.A.)).

[118] The plaintiff submits that she is entitled to non-pecuniary damages for pain and suffering and loss of enjoyment of life. The defendants agree that the plaintiff suffered soft tissue injuries, pain in her neck, upper back, shoulders and arms, paresthesia in both arms, headaches, aggravation of pre-existing insomnia, depression, anxiety and post-traumatic stress disorder.

[119] Each party submitted a selection of cases which provide some assistance in determining the quantum of non-pecuniary damages.

[120] The plaintiff was 36 years old when the first motor vehicle accident occurred. To that point in her life, she had been a strong academic student with success in high school, university, the working world and in a transition to being an LPN and working in a long-term care facility. She was identified by an administrator as one of the top 5% of LPNs with whom that administrator had worked.

[121] She had immigrated to a new country and was enjoying the experience of learning about culture and society in Canada.

[122] She was happily married and the mother of three children, one of whom required round-the-clock care. Her specialized training as a nurse gave her particular skills to assist this child.

[123] The injuries caused by the three accidents, essentially soft tissue in nature, had negative effects on all aspects of the plaintiff's life, and she lives with a significant amount of pain. Prior to the accidents, the plaintiff, with some assistance from her mother, did the cleaning of her house. The plaintiff did the grocery shopping for her family and cooked meals in the morning and at dinner; her mother prepared lunch for the children. The plaintiff also worked with her husband to clean the home swimming pool, to mow the lawn and to garden. With her family, she enjoyed swimming and going to the beach in the summer. She also went with her family on walks in the park and to the zoo. The family enjoyed going to restaurants for special meals.

- [124] After the accidents, her ability to care for her children, particularly I.X., was greatly diminished. It had been her intention to support and care for her children, her husband, some 20 years her senior, and her parents. She noted the special responsibility that daughters in her culture have to provide care for senior members of their family. The plaintiff now seeks support and assistance from her parents.
- [125] Her mother has taken over household chores, including heavy cleaning and cooking as well as caring for I.X. The plaintiff is still able to perform some housework, albeit with increased difficulty and pain. Her family members have come to know her post-accident as irritable and at times angry. She carries considerable guilt over her inability to fulfil the cultural responsibilities which she carries as a heavy burden.
- [126] Her workload has had to be reduced since the accidents. She worked night shifts for a period of over two years in order to potentially obtain lighter duties at work with patient transfers during the night. She has lost the respect of others because some view her as lazy, and she knows she is no longer able to assist other LPNs and care aides as she once did. She requires the aid of others to complete her own work, but at the same time, because of her private nature, she has not disclosed her afflictions widely, particularly to coworkers.
- [127] The plaintiff submitted that non-pecuniary damages in the case at bar should be \$190,000. The plaintiff cited *Gill v. Apeldoorn*, 2019 BCSC 798, *Chaudhry v. John Doe*, 2017 BCSC 1895, *Sebaa v. Ricci*, 2015 BCSC 1492; and *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 in support of her claim for non-pecuniary damages.
- [128] The defendants submit that non-pecuniary damages should be in the range of \$80,000-\$100,000. The defendants rely upon the cases of *Carreon-Rivera v. Zhang*, 2014 BCSC 709; *Dhillon v. Singer*, 2017 BCSC 414; *Dabu v. Schwab*, 2016 BCSC 613; and *Tsalamadris v. MacDonald*, 2011 BCSC 1138.
- [129] After a review of each of the cases and their respective distinguishing features and similarities to the case at bar, and considering the plaintiff's unique circumstances, the plaintiff is awarded \$145,000 for non-pecuniary damages. This award does not include compensation for the plaintiff's complete inability to perform some housework, which is addressed separately in the loss of housekeeping capacity section below.

Past Income Loss

- [130] The plaintiff's claim for past income loss is based on a series of estimates. The plaintiff took very little time off from work following each of the three accidents and worked through significant pain. Eventually, she chose to resign her position at Brookside Lodge. Thereafter, she accepted a part-time job with night shift hours at Langley Lodge. She preferred the night shift hours because there were fewer patient transfers required during the night, and fewer medications are distributed at night. One of the results of the plaintiff's changes in employment to manage pain was that the plaintiff did not work as many hours, and did not work in a consistent position to enjoy seniority increases.

- [131] Langley Lodge has also advanced a subrogated claim for paid sick days where the plaintiff took sick days because of accident-related injuries. The plaintiff relies on the authority of *Gormick v. Amenta*, 2013 BCSC 1998, which confirms that banked sick time is recoverable as a gross amount. The plaintiff submits that amount is \$3,267.98.
- [132] Her total claim under this head of damages is \$37,000.
- [133] The defendants submit that the claim for past wage loss must have a sum deducted for taxes and EI premiums pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231. The defendants submit this deduction should be at a rate of 28%. This deduction would not apply to the recoverable sick time because tax would have been paid already on that sum. The defendants submit that the total award of damages for past wage loss should be \$16,085.52.
- [134] I appreciate that the defendants have acknowledged there is a basis for a claim for past wage loss, but both parties have adopted calculations which include considerable estimates such as hours worked, average wage rates with shift premiums, use of sick days, and tax and EI premium deductions.
- [135] Doing the best that I can with the conflicting information I have, the award for past wage loss shall be \$30,000, including the subrogated claim.

Future Loss of Earning Capacity

- [136] The plaintiff must establish that there is a real and substantial risk that there will be a pecuniary loss in the future based on the principle of full compensation: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.
- [137] In *Parker v. Lemmon*, 2012 BCSC 27, the court summarized the proper approach to claims for future loss of earning capacity as follows:
- [42] The approach to such claims is well set out in the decision of Garson J.A. in *Perren v. Lalari*, 2010 BCCA 140 (B.C. C.A.) at paras. 25-32, which I summarize as follows:
- (1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;
 - (2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;
 - (3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;
 - (4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;

- (5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;
 - (6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;
 - (7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;
 - (8) An earnings approach will be more useful when the loss is more easily measurable;
 - (9) The capital asset approach will be more useful when the loss is not easily measurable.
- [138] Ms. Xu has difficulty responding to the physical requirements of the tasks of an LPN, including the transfers of residents (with and without assistance of a mechanical or ceiling lift), placing and refreshing dressings on surgical wounds and bed sores, maneuvering patients in wheelchairs, moving the medication cart with its heavy load, and assisting in emergency occurrences such as falls by patients.
- [139] The description of the duties and requirements of LPNs was confirmed in testimony by Ms. Griffin, Ms. Santos and Ms. Zamar. Ms. Griffin confirmed that an LPN unable to complete these tasks could only be accommodated on a very short term, such as a week, by a long-term care facility. There is no doubt that there is a real and substantial risk Ms. Xu will suffer a loss of future income as her limitations are disclosed to her employer.
- [140] The progressive deterioration of symptoms, according to medical witnesses, will lead at some point in the future to a quality of life that Ms. Xu can no longer endure. As medical opinions noted, individuals respond to and cope with pain in individual ways. While the proposed surgery may have a positive effect on the structural causes of pain, Dr. Heran was very clear that surgery would not resolve myofascial pain consistent with whiplash injury.
- [141] In addition to pain, the plaintiff has to face challenging psychological injuries. One of the results of the potential for worsening psychological injuries is a lack of competitive employment prospects.
- [142] In the case at bar, but for three motor vehicle accidents, the plaintiff would likely have continued her most desirable position working full-time at Brookside Lodge while still maintaining the ability to work some on-call shifts at Langley Lodge. The plaintiff's seniority, but for the accidents, would have assured her employment at least to the age of 65 if not beyond, as supported by the evidence of Ms. Griffin, an administrator at Langley Lodge.
- [143] The plaintiff presents three scenarios for her future working experience, all three of which suppose the number of hours she will work in a given year will be reduced year-over-year. The three scenarios are complicated by the fact that at some point in time in the future, the plaintiff will likely undergo surgery to address her structural pain problems. Dr. Heran accepted the proposition that following surgery, full rehabilitation will likely take two full years. The suggestion put to him that six months was a sufficient time for the plaintiff to be

rehabilitated was not sustained by him, nor did Dr. Ting agree that six months was the likely time within which rehabilitation could be accomplished with the plaintiff. Dr. Heran also noted that a return to work prior to full healing would cause adverse consequences and increase the plaintiff's vulnerability to further injury. Ms. Xu made it clear she has a capacity to push through pain, but at the same time, it is less than certain if she could work full-time or some reduced number of hours only.

- [144] The first scenario proposed by the plaintiff involved surgery at age 55, assuming she can continue to work to that age. That age is significant as it is the earliest age at which Ms. Xu can obtain an unreduced pension. The other two scenarios involved surgery at 50 and 45 years of age, and all scenarios considered different possibilities for the plaintiff returning to work after surgery.
- [145] Ms. Xu testified that at retirement at age 55, she could obtain an unreduced pension, a matter that was of some significance to her as she is the most significant income earner in her family. Retirement at age 50 would be consistent with Ms. Xu's ongoing medical problems and employment history, which demonstrate a clear continued decline in her functional capacity. The evidence of Dr. Benning was that she would suffer a 10 to 12% reduction to the value of her future pension, on the basis of gross future earnings. Loss would accrue as a result if Ms. Xu retired at age 45, simply because she could not remain in the workforce. An annual additional loss of about \$5,964 per annum occurs in this case.
- [146] Each of these scenarios is based on Ms. Xu's hours worked and hourly rate in the year 2013. In that year she worked a total of 1998 hours at \$30 per hour or \$59,940. 2013 was the last full year that the plaintiff worked prior to the series of accidents beginning June 16, 2014. The plaintiff was born on June 27, 1977. In the year on June 27, 2013, she was 36 years old.
- [147] The following table provided by the plaintiff sets out the losses claimed by the plaintiff in the various scenarios:

Surgery at age

45

50

55

No return to work

\$1,324,673

\$930,867

\$809,732

Return to work with 25% of pre-collision capacity

\$1,056,635

\$732,355

\$674,743

Return to work with 50% of pre-collision capacity

\$843,144

\$583,574

\$585,672

[148] The plaintiff submitted that it was necessary to consider contingencies, both positive and negative, provided that contingencies considered are not simply speculative. It would be speculative, for instance, to consider that the pre-existing asymptomatic osteoarthritis would become symptomatic, when it had not previously done so. The defendants' submission did not refer or otherwise account for positive contingencies such as overtime work, shift premiums for holidays and weekends, and extra shifts at different facilities.

[149] The defendants' calculations used the plaintiff's loss from 2014, and based on an allegation that the plaintiff had agreed she planned to retire at age 65, simply multiplied 19.1 years by the annual loss of \$6578.15 for a total of \$125,050.63. The defendants then submitted that in order to take into account labour market contingencies, a cumulative discount of 14.808% should be applied, resulting in \$97,409.25 of future loss. Mr. Benning, called as an expert for the defendants, asserted that a participation contingency for the fact the plaintiff was working was already built into that multiplier. Finally, the defendants submit that the plaintiff's future loss should be reduced for her failure to mitigate.

[150] I find this submission, as noted above, which begins in a partial year after the first accident occurs, fails to properly account for actual work experience of the plaintiff, and as a result, is of little assistance to the court. The defendants submitted that the plaintiff is entitled to an amount up to \$60,000 for loss of future income in the "surgery recovery period". This amount is included in the award for loss of earning capacity set forth in the paragraph below.

[151] I am unable to accept either of these submissions. The plaintiff's submission, which includes a maximum of 50% of present working capacity upon return to work, has no basis in the evidence called; particularly the evidence of Dr. Heran, which supports a much higher figure for post-surgery working capacity based on successful surgery. The defendant's submission, as noted above, begins with a partial year where all positive premiums are excluded and then applies the discount for contingencies twice.

- [152] Using the plaintiff's starting number of approximately \$60,000 in annual income multiplied by a 30% reduction in working capacity, consistent with Dr. Heran's evidence, then the annual loss is \$17,782. The number of years to retirement is 19 (age 65) to 21 (age 67) years, or a range of \$337,858 to \$373,422. A 1.5% discount must also be applied to these amounts pursuant to s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253.
- [153] Having considered the evidence on various contingencies and the submissions of counsel, and bearing in mind that this award is an assessment and not a precise mathematical calculation, the loss of earning capacity of the plaintiff is awarded as loss of a capital asset in the amount of \$250,000.

Cost of Future Care

- [154] The plaintiff is entitled to full compensation for future care costs. The test for determining an appropriate award under this heading is an objective one based on the medical evidence of whether the claims are reasonable: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22.
- [155] Ms. Boniface was the sole occupational therapist who attended at trial and gave evidence regarding the care needs of the plaintiff, present and future. Her recommendations were contained in Appendix C, pages 19 to 25 of Exhibit 42-1. Ms. Xu gave unchallenged evidence that she followed the recommendations of Ms. Boniface and Dr. Ting for treatment and rehabilitation.
- [156] The recommendations made by Ms. Boniface, when costed, were not challenged by evidence called by the defendants. The defendants submitted that one medication, Zopiclone, had been taken before the accidents. It was apparently prescribed after the accidents. No evidence was called to suggest that a further prescription was inappropriate to treat post-accident symptoms. Other medications were accepted by the defendants.
- [157] Again, I note that the defendants' suggestion that the plaintiff should immediately schedule surgery is not properly considered here.
- [158] With respect to several of the recommendations of Ms. Boniface, the defendants have submitted correctly that some items, such as a motorized ceiling lift and a special mattress, were provided by charity, and have argued that no further award should be granted for such items. That submission does not take into account that such items in daily use will be worn out of over time and replacements are necessary, as are regular repairs or maintenance, all recommended by Ms. Boniface.

- [159] The defendants submitted that the award for cost of future care should be in the range of \$58,055 to \$62,982.50, plus the cost of medication. Unfortunately the defendants did not specify a figure for the cost of medication. The plaintiff claims the cost of medication until the plaintiff reaches 80 years of age in 2057 in the amount of \$347,701.00. The claim of the plaintiff for medication is therefore 38 years times \$9,150.00 per annum as specified in Ms. Boniface's report.
- [160] The defendants did note that Zopiclone was taken before the accidents, but it was also prescribed by doctors after the accidents and continuing thereafter. In particular, at page 4 of Exhibit 32, Dr. Ting stated that the prescription for Zopiclone was prescribed for the plaintiff because of post-accident insomnia and anxiety. Dr. Ting also noted that pre-accident depression was made worse by the accidents.
- [161] The defendants did not make any submission concerning particular medications except Zopiclone. The defendant did object to the "duration/frequency" of the medication which "can reasonably be affected" by proposed surgery. The defendants did not make any submission setting forth what they considered a reasonable cost for medication.
- [162] The base amounts for cost of future care was adjusted upwards by \$3,200.00 by the defendants due to an incorrect treatment of a charitable donation which represented a portion of a cost of the ceiling lift purchased by the plaintiff.
- [163] The plaintiff seeks \$400,000 as an award under this head of damages, calculating the cost of non-medication items for future care as a range between \$58,055.00 and \$62,982.50 exclusive of the cost of medication. The costs calculated in the report of Ms. Boniface refer to the contingency of surgery, reduction of some support worker costs as a ceiling lift was installed (2018) and other contingencies. Other contingencies which must be considered include the retirement of Ms. Xu as an LPN at either 65 or 67. Again, a 2% annual discount rate must be applied to the costs of future care pursuant to s. 56 of the Law and Equity Act.
- [164] I find that Ms. Xu will likely undergo surgery at some point in the future, and that successful surgery will significantly reduce her medication needs.
- [165] Taking into account the contingencies mentioned, the award for the cost of future care in this case is \$280,000.

Past Loss of Housekeeping Capacity

- [166] The plaintiff claims that because of the three accidents, she has lost her capacity to look after her own home. The plaintiff relies upon the case of *Kim v. Lin*, 2018 BCCA 77. That case follows the Court of Appeal decision in *Campbell v. Banman*, 2009 BCCA 484, which establishes that an injured plaintiff is entitled to claim damages for loss of housekeeping capacity, including loss of an ability to provide childcare.

- [167] As noted by Sewell J. in the trial decision of Kim (indexed at 2016 BCSC 2405) at para. 193, the claim should "be recognized as the plaintiff's claim for damages rather a claim made in trust for an unpaid caregiver". Such an award may be treated as either an award for non-pecuniary damages or as a segregated pecuniary head of damages. In the case at bar, the loss of housekeeping capacity is more in keeping with a loss of capacity than a loss of amenities. In Kim, the plaintiff was found to have lost the capacity to look after her house or care for her children. While this court has heard evidence that Ms. Xu has some ability in each of these areas, she completes some tasks with increased difficulty, and is unable to complete other tasks at all. The tasks she is able to complete with difficulty have already been addressed under the non-pecuniary damages section. This court should therefore treat the tasks she is unable to perform as pecuniary damages.
- [168] Kim is distinguishable from the case at bar in two major ways. First, the plaintiff in Kim was more seriously impaired than Ms. Xu. Second, the plaintiff in Kim had fewer pre-existing household and childcare responsibilities than the plaintiff in this case. These differences suggest a decrease and an increase, respectively, in the plaintiff's damages compared to Kim.
- [169] The plaintiff submitted that Kim is authority for the proposition that there is no upper limit on an award for loss of housekeeping capacity. Kim does not suggest an open season on damages, but rather an award of damages without a fixed range in a "regime of reasonableness" designed to provide an award based on the evidence of the plaintiff's incapacity and commensurate with the plaintiff's loss: Kim at para. 38.
- [170] In the case at bar, the plaintiff seeks an award of damages, not a claim made in trust for an unpaid caregiver. That approach was also adopted in Kim. In Campbell at para. 26, the court made it clear that this head of damages is to be generally assessed rather than precisely calculated.
- [171] There is little doubt that the plaintiff was and continues to be a capable homemaker with very high standards. Her ability to perform housecleaning is limited to a great extent as noted above. Ms. Xu has become dependent on her parents for assistance.
- [172] The defendants noted that there was a pre-existing agreement between the plaintiff and Ms. Wang that provided Ms. Wang payment in exchange for services around the house. However, I note that this agreement was entered into prior to the three accidents. At the time that agreement was made, it provided some assistance for the plaintiff, and support for the parents consistent with cultural norms of this family. The three accidents created completely unforeseen circumstances well outside the contemplation of the contracting parties.

- [173] In the case at bar, Ms. Boniface, the expert occupational therapist called by the plaintiff, recommended a home support worker for 1.5 hours each day. The plaintiff testified she required 2.5 hours of assistance each day at a rate of \$25 per hour. In Campbell, the Court of Appeal endorsed a rate of \$15 per hour. The same rate of \$15 per hour was also applied in Kim, where the plaintiff sought a cost of homemaking assistance at \$25 per hour.
- [174] It appears that the plaintiff seeks an award of loss of childcare for the balance of her life. That sort of an award is outside "the regime of reasonableness" because there is no consideration of contingencies such as the life expectancy of I.X. (of which there is no evidence at all); when the other children will leave the family home; when and how the plaintiff may retire from her employment; whether the plaintiff's physical condition would permit her to continue to provide care as her daughter grows and ages; or whether institutional housing would be in the best interests of I.X. I am satisfied that Ms. Xu will look after her daughter as best as she is able for as long as she is able.
- [175] The plaintiff relies first on the report of Ms. Boniface at para. 398 to say the housekeeping support should be calculated until age 75 and then reduced at 20% per annum, discontinuing at age 80. Further down the same page, the plaintiff refers to multipliers for the life span of the plaintiff.
- [176] The plaintiff claims \$87,000 for past loss of homemaking capacity, \$450,000 for future loss of homemaking capacity, and \$1,200,000 for future loss of housekeeping capacity in relation to childcare.
- [177] The defendants submit that the past loss of housekeeping capacity should be between \$35,878.50 and \$42,210 based on 1.5 hours/day of services at \$15/hour, and the award for past loss of childcare should be \$49,275 for the period from June 16, 2014 to September 16, 2016, together with \$65,700 for the period of the last three years, for a total of \$114,975.
- [178] Unfortunately, the parties have not used the same nomenclature to designate individual heads of damage and the defendants have approached the calculation of damages as though the plaintiff was about to have surgery. The defendants did not make submissions on the plaintiff's future loss of housekeeping and childcare capacity, and appeared to rely on their submission that the plaintiff failed to mitigate by not having surgery. As previously noted, I do not find that the plaintiff has failed to mitigate her damages. Similarly, the plaintiff has not made a clearly distinguished claim for past loss of childcare capacity.
- [179] I accept that the cost of housekeeping services may have increased since Kim, and that a rate of \$25/hour is reasonable. However, I find the figure of 1.5 hours/day provided in Ms. Boniface's report to be a reasonable estimate of the amount of housekeeping Ms. Xu is unable to perform. Following the guidance provided by the reasons of the two courts in Kim, I have assessed the damages for past loss of homemaking capacity at \$70,000.00.

[180] I assess the future loss of housekeeping capacity for housecleaning to the age of 70, a more realistic age than others submitted above. I have also considered that the plaintiff's eventual surgery is likely to improve her symptoms and allow her to complete more housework. I therefore assess her future loss of housekeeping capacity for housecleaning at \$125,000.

[181] Finally, I assess the plaintiff's past and future loss of housekeeping capacity in relation to childcare at \$375,000.

Special Damages

[182] The plaintiff, in Exhibit 30, submitted a listing of items claimed for special damages including prescriptions, physiotherapy, massage therapy, and other items which totalled \$17,490.05. The plaintiff also claimed monthly payments of \$1,000 per month for the care of I.X. paid to Ms. Wang for the period from October 1, 2016 until July 31, 2019 or 34 months.

[183] During final submissions, the defendants challenged three of the items claimed. The defendants challenged the claim by the plaintiff for the cost of a ceiling lift used to transfer I.X. from her bed to several different types of chairs. The challenge was based on a charitable contribution to the original purchase of the ceiling lift. Following the case of *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359, the parties agreed that the appropriate claim for the lift, taking into account the charitable claim, should have been \$5,200, rather than the \$9,343.75 originally claimed for the lift. The plaintiff's claim is therefore in the amount of \$47,346.

[184] The second challenge was based on the purchase of two vacuum cleaners. I will allow the cost of one vacuum cleaner in the circumstances. This results in a reduction of \$379.48 from the costs claimed.

[185] The final item challenged is for a prescription dated on May 14, 2014, prior to the first accident. The prescription was filled after that accident in June of 2014. The amount to be deducted from the claim is therefore \$225.20.

[186] The award of special costs is \$46,741.32.

Summary of Awards

Non-pecuniary Damages

\$145,000.00

Past Wage Loss

\$30,000.00

Loss of Future Earning Capacity

\$250,000.00

Cost of Future Care

\$280,000.00

Past Loss of Housekeeping

\$70,000.00

Future Loss of Housekeeping Capacity - House Cleaning

\$125,000.00

Future Loss of Housekeeping Capacity - Childcare

\$375,000.00

Special Damages

\$46,741.32

Total

\$1,321,741.32

[187] The plaintiff is also entitled to interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[188] Unless there are facts of which the court has not been advised concerning the award of costs, the plaintiff is entitled to her costs of this action, payable forthwith after assessment, pursuant to the Supreme Court Civil Rules, Appendix B, as a matter of ordinary difficulty.

[189] The parties have the liberty to apply, within 60 days hereof, with respect to settling of tax gross-up, management fees and costs if they are unable to settle these issues between themselves.

"Ball J."

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