

CANADA / JUDGMENT

Zhang v. 328633 B.C. Ltd.

2020 BCSC 1521

COURT

Supreme Court of British Columbia

DECIDED

11 September 2020

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2020 BCSC 1521 Zhang v. 328633 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zhang v. 328633 B.C. Ltd.,

2020 BCSC 1521

Date: 20200911

Docket: M151646

Registry: Vancouver

Between:

Yan Zhang

Plaintiff

And

328633 B.C. Ltd. DBA Wolfe's Langley Mazda, Bartec Fire Safety Systems Ltd., Braden Robert Barrett, South Coast British Columbia Transportation Authority, Rob Pecchia, Insurance Corporation of British Columbia and John Doe and/or Jane Doe

Defendants

Before: The Honourable Justice Branch

Oral Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

August 24-September 9, 2020

Place and Date of Judgment:

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September 11, 2020

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I. INTRODUCTION

- [1] This is a personal injury action arising from two motor vehicle accidents. The first occurred on April 16, 2013 at the intersection of Boundary Road and Lougheed Highway in Burnaby, BC ("First Accident"). The plaintiff was rear-ended. Liability is admitted by the driver, lessor and lessee of the other vehicle, Robin Barrett, Bartec Fire Safety Systems Ltd. and 328633 B.C. Ltd. DBA Wolfe's Langley Mazda respectively.
- [2] The second accident occurred on June 7, 2013 ("Second Accident") while the plaintiff was a passenger in a bus operated by the defendant, Rob Pecchia, and owned by the South Coast British Columbia Transportation Authority (collectively, "Carrier Defendants"). An unidentified driver of a pickup truck sought to make a right turn across the bus lane. The bus braked aggressively, and the plaintiff was thrown out of her seat towards the driver's area. Given that the truck driver was unidentified, the Insurance Corporation of British Columbia ("ICBC") appeared as a defendant pursuant to s.24 of the Insurance (Vehicle) Act, RSBC 1996, c 231. Liability is in issue for the Second Accident.

II. THE FACTS

A. The Plaintiff's Background

- [3] The plaintiff is 62 years old. She was born in China. She married her husband Chang An Xue in or about 1982. While in China, she worked as a nurse, and her husband worked as a teacher. Given the poor wages in China, they decided to emigrate. After some time in the United States, the family immigrated to Canada in 1997. The plaintiff soon started working at T&T Supermarket wrapping vegetables.
- [4] The plaintiff's father passed away in 1999. She subsequently began to suffer from depression and was placed on medication. She was off work for about six months, but her condition eventually stabilized and she was able to return to work.
- [5] The plaintiff became a Canadian citizen in 2001. She began to work as a full-time housekeeper at the Sandman Hotel that same year. This was a substantially better position, increasing her hourly wage from about \$7.75 to \$17.76. She also received tips of about \$60 per month. She enjoyed the work. She also felt that this was the best position she could obtain with her limited English language skills. (The plaintiff testified through an interpreter.) She says that she planned to work until about age 68-70. There are other housekeepers at the Sandman Hotel who have worked until this age. Given that she came to Canada relatively late in life, her Canada Pension Plan and Old Age Security are reduced such that she says she has an incentive to keep working as long as possible.
- [6] The plaintiff's work involved cleaning approximately 18 rooms per shift. She had to push a wheeled cart weighing approximately 200 pounds during the course of each shift.

- [7] The plaintiff was diagnosed with breast cancer in 2009. She had surgery to remove the tumor, and breast reconstruction surgery thereafter. She missed about a year of work. Her cancer has not returned.
- [8] In late 2012, her right knee started to bother her during prolonged periods of standing and walking. Her general practitioner, Dr. Irene Chan, determined that the plaintiff had osteoarthritis. She advised the plaintiff to take some time off and prescribed her pain medication. The plaintiff started her time off on January 15, 2013. She was still off work at the time of the First Accident. Although her knee improved during her time off, she was still feeling some pain when she walked on stairs.

B. The Accidents

- [9] On April 16, 2013, the plaintiff was driving to an appointment at Dr. Chan's office. She hoped to obtain a note allowing her to return to work. As set out above, she was rear-ended in this accident, and liability has been admitted. She had neck and back pain thereafter, as well as some dizziness. After leaving the scene of the accident, the plaintiff continued on to see Dr. Chan. Dr. Chan prescribed some pain medication and physiotherapy. She also wrote the plaintiff a note extending her time off work.
- [10] The plaintiff was still able to do the cooking and cleaning at home. Her husband drove her to do the shopping. She felt this initial accident was not a big event, and that she would eventually be able to recover. By the time of the Second Accident, she estimates that she was 40% recovered.
- [11] On June 7, 2013, the plaintiff was heading home from a physiotherapy appointment on a bus going north on Willingdon Avenue in the bus lane, heading towards the British Columbia Institute of Technology ("BCIT"). She was sitting on the right side of the bus, in the left-hand seat of the first forward-facing row, which is reserved for persons with disabilities. She was tired and a bit dizzy. She was closing her eyes periodically between stops, although she says she never fell asleep. She was not aware of any danger leading up to the Second Accident. For these details, we must turn to the video taken by multiple cameras within the bus, and the evidence provided by the bus driver, Mr. Pecchia.
- [12] The video evidence shows a pick-up truck travelling in the middle of three lanes heading north on Willingdon. The truck moved ahead of the bus after the light turned green at the Sanderson Way intersection. There was a slight incline downhill at that point. The bus driver believes he had his foot resting on the brake pedal. At a certain point, the truck's brake lights came on. It is not possible from the video to determine whether the truck put on its turn signal at the same time. After the truck's brake lights turned on, there are approximately seven seconds before the truck's tires touch the right lane markers into the bus lane. There was another vehicle slightly behind and to the left of the truck during this period. During this seven second period, the truck appears to slow down relative to the speed of the bus. The bus driver says he did not take note of the truck's presence until it started to come into

his lane. The truck continued to move across the bus's lane. At this point, the truck's passenger side, containing an occupant, was directly in the bus's path. The bus driver made a "hard brake", and was able to avoid slamming into the truck. Approximately one second passed between the time the truck first touched the right lane markers to the time the truck was completely across the bus's lane. The bus driver estimates that he came within a foot and half of the truck. The truck continued into a BCIT parking lot.

- [13] When the truck first applied its brakes, the event data embedded in the video shows that the average speed of the bus for the prior two seconds was 20 kph. During the subsequent seven second period, the recorded speed for the bus moves up as follows: 35 kph, 42 kph, 48 kph, and 56 kph. For the period after the truck first touches the lane marker until the truck was almost all the way across the bus lane, the speed moves up again to 58 kph. For the next two seconds, the figure drops to 16 kph, and after a further three seconds, the bus had come to a complete stop.
- [14] During the "hard brake", the plaintiff was flung from her seat and forward about 15 feet. Her head struck something at the front of the bus. She sustained a large cut on her head. She lay immobile at the front of the bus until the fire department and ambulance arrived. During this period, she recalls a young person speaking to her in Mandarin and asking for her phone number.
- [15] The plaintiff was taken to Burnaby Hospital and was later transferred to Royal Columbian Hospital. Hospital staff determined that the plaintiff sustained fractures to her neck and ribs, but none that required surgery. The neck fractures were nondisplaced vertical fractures of the C2 and C3 vertebral bodies, and a bifid C4 spinous process with a nondisplaced fracture. She was kept in hospital for 8 days and then sent home with a hard neck collar.

C. Post Accidents

- [16] After the plaintiff's discharge from hospital following the Second Accident, she had to wear her collar for about four months. Given her lack of mobility, the neck pain, and the dizziness, she was largely confined to bed during this period. Her laceration was generally healed by the end of June.
- [17] The plaintiff has attended visits with Dr. Chan regularly after the accident. Dr. Chan's observations and treatment are described in greater detail below. In summary, Dr. Chan has prescribed physiotherapy, acupuncture, chiropractic, and massage therapy. However, these treatments generally provide only temporary relief.
- [18] The plaintiff has had headaches, neck and back pain since the Second Accident. Her sleep is much disrupted. She will only get perhaps 2-3 hours' sleep before waking up every hour thereafter. She gets dizzy getting out of bed. She uses a personal massager to ease her symptoms.

- [19] ICBC provided the plaintiff with occupational therapy and homemaking assistance for about 1.5 years after the Accidents. She improved somewhat over this period, but continues to suffer from pain in her neck and back. The occupational therapist, Lorraine Phan, whose evidence is set out in greater detail below, was unable to get the plaintiff to a level where she was able to recommend a return to work.
- [20] The plaintiff wears a dental appliance to manage certain temporomandibular joint ("TMJ") issues. Her jaw clicks, and she is not able to open her mouth as widely as before. She was also prescribed a CPAP machine to address certain breathing problems, but she found it uncomfortable to use, particularly along with the TMJ appliance. She stopped using the CPAP machine after about a year.
- [21] The plaintiff's mood has deteriorated since the Accidents. She is short-tempered with her husband. They have ceased having sexual relations. They have stopped sleeping in the same bed. She describes their relationship as being more like brother and sister now.
- [22] She has taken increased medication for her depression. She has attended counselling as well.
- [23] The plaintiff has not returned to work since the Accidents. She remains an employee of the Sandman Hotel but has (obviously) not received any of the raises that have been implemented since she went off work. Suzan Mounce, from Sandman's human resources department, testified that she would have received those raises had she still been employed. Ms. Mounce also reported that many employees were laid off for several months over the COVID-19 period, but that most of the senior employees have now returned to work, and that the plaintiff would likely have been part of this returning group.
- [24] The plaintiff says she is limited in terms of the housework she can perform on her own. She can only do light cooking and cleaning.
- [25] The plaintiff says that her memory is worse since the Accidents. She is more prone to forget appointments, keys and the like.
- [26] The plaintiff has taken a few long flights since the Accidents. She went to China for several months in 2014. Although this trip interrupted the treatment being organized by Ms. Phan, she did obtain acupuncture treatment while she was in China. She went for further trips to China in 2016 and 2018. She also went on trips to Seattle and Los Angeles.
- [27] The plaintiff's mother has visited her, and she takes over some of the cooking and cleaning duties while staying with the plaintiff and her husband.
- [28] Given her neck and back pain, the plaintiff has not driven a car since the Accidents. ICBC initially provided taxi and Handi-Dart support. Her husband now drives her places or she takes the Skytrain. The plaintiff expresses some anxiety about taking the bus since the Second Accident.

[29] The plaintiff spends most of her days stretching, doing light exercise, attending medical appointments, making simple meals, taking walks of 40 minutes to an hour, listening to English lessons, and watching TV. Her husband drives her to her appointments and serves as her translator. He has also taken over most of the cooking and cleaning. He gives her massages before bed. From her husband's testimony, it was clear that he is under a great deal of strain from the combined workload of his full-time job and his greatly increased responsibilities at home. He testified that the plaintiff is less social than previously, and less able to pursue the travel plans they had before the Accidents. Notwithstanding these challenges, it is clear that he is devoted to his wife and he did not signal any intention of abandoning his commitment to her.

[30] The plaintiff is concerned about the future, given her lack of material improvement over the past number of years.

III. THE EXPERTS AND TREATING HEALTH CARE PROFESSIONALS

[31] The Court received evidence from the following experts and health care professionals.

A. Dr. Irene Chan

[32] As noted, Dr. Chan is the plaintiff's general practitioner. She confirmed that the plaintiff reported neck pain and headaches after the First Accident. Her range of motion had decreased. She had sleep difficulties. Dr. Chan diagnosed soft tissue injuries. She prescribed pain medication and provided a note to support the plaintiff being off work until May 31, 2013. Later, she recommended physiotherapy and, given the ongoing pain, extended the plaintiff's time off work recommendation to June 30, 2013.

[33] After the Second Accident, the plaintiff reported ongoing symptoms including neck, back, shoulder, and right leg pain, as well as headaches, sleep problems and difficulty concentrating. Dr. Chan prescribed pain medication. She wrote a series of notes over time confirming that the plaintiff should remain off work. She recommended physiotherapy, acupuncture and stretching.

[34] In January 2014, the plaintiff reported short-term memory problems and feelings of depression. In July 2014, Dr. Chan referred the plaintiff to a pain clinic. An MRI of the plaintiff's spine in May 2014 showed that her C-spine fractures had healed. Her pain continued, and she obtained only temporary relief from acupuncture and physiotherapy. In 2016, the plaintiff was diagnosed with sleep apnea. She was put on a CPAP machine and was referred to a sleep disorder clinic. Dr. Chan also referred the plaintiff for chiropractic treatment.

[35] Dr. Chan diagnosed the plaintiff with soft tissue injuries, a concussion, scalp laceration, cervical and rib fractures, and an aggravation of her existing depression. Dr. Chan concluded that her ongoing problems had largely become chronic, and that her prognosis is guarded. She recommended the plaintiff continue physiotherapy, acupuncture, and psychiatric treatment. She felt the plaintiff was unable to return to work.

B. Dr. Navraj Heran

[36] Dr. Heran is a neurosurgeon. He saw the plaintiff on one occasion for the purposes of a medico-legal assessment requested by the plaintiff.

[37] Dr. Heran concluded that the plaintiff suffered the following as a result of the First Accident:

- a) Soft tissue injuries to the head, ears, neck, shoulders, chest, arms, back, right leg, right foot, and right hip;
- b) Symptoms of nausea, dizziness, headaches, brief memory loss, memory problems, among others; and
- c) Lost dentition (a broken tooth required replacement after this accident).

[38] In relation the Second Accident, his diagnoses were as follows:

- a) Injuries to the head, neck fractures, rib fractures, multiple contusions, and lacerations to the head requiring stitches;
- b) TMJ and other dental problems.

[39] Dr. Heran found that her spinal injuries and fractures have long since healed, and there are no lasting sequelae from those fractures. There are no neurological issues. The residual stiffness and restricted range of motion is consistent with the soft tissue injuries.

[40] Dr. Heran concluded that there was no craniocerebral injury in the Second Accident. He found that any cognitive dysfunction is likely a consequence of her psychological state and impacting factors.

[41] Dr. Heran found that there is probably interaction between her pain and her depressive features and anxiety. The psychological impact has been quite substantial upon her function.

[42] He concluded that she was partially, but permanently, disabled.

C. Dr. Hubert Anton

[43] Dr. Anton is a rehabilitation specialist. He examined the plaintiff on February 8, 2018 at her counsel's request. He concluded that the plaintiff sustained soft tissue injuries in the First Accident, and that she had not yet recovered from these by the time of the Second Accident. In terms of the probable impact of the Second Accident, Dr. Anton diagnosed:

- a) A head injury with a laceration, a subgaleal hematoma, and a probable mild traumatic brain injury ("MTBI");
- b) Injuries to the cervical spine including fractures at C2, C3 and C4; and
- c) Injuries to the chest, including at least two and possibly three rib fractures.

[44] Dr. Anton found that her neck and back symptoms were probably, at least in part, due to myofascial pain syndrome. He noted that there is a vicious cycle between her pain and her sleep problems. In terms of her report of breathing problems, he suggested that this was a pain problem rather than a primary breathing problem.

[45] In terms of his MTBI diagnosis, he relied on the plaintiff's report of a loss of consciousness or amnesia. He said that her memory problems "could" arise from the residual effects of an MTBI, but that most persons who sustain an MTBI make a good recovery.

[46] He found that the fractures have healed and are probably no longer contributing to the symptoms.

[47] He concluded that her situation after the Accidents was complicated by deconditioning. He also found that psychological factors are playing a role in her persisting symptoms. In particular, her depression may be reducing the effectiveness of any treatment.

[48] In terms of the plaintiff's capacity to work, Dr. Anton states as follows:

It is uncertain whether Ms. Zhang would have successfully been able to return to work if the [First Accident] had not occurred. Imaging studies showed mild osteoarthritis in the right knee. There is an imprecise correlation between changes on an x-ray and symptoms and many patients with such x-ray findings have no significant symptoms.

If Ms. Zhang's self report regarding the improvement in her pain before the accident is accurate, then she probably would have been able to return to work. It is possible her knee pain would have recurred when she tried working and prevented a successful return.

Ms. Zhang has not attempted to return to work since the accidents. It appears she is most limited now by symptoms that developed after the accidents. She would probably not be able to return to work as a housekeeper at present .

Ms. Zhang would have to improve significantly to get back to her former work or any similar demanding physical work. It is possible she may be able to do more sedentary work, but pain, headaches, and depression could be barriers to even that type of work. Non-medical factors like her limited English language skills would also affect her employability

[49] In terms of future treatment, Dr. Anton recommended continuing psychiatric and psychological treatment, and further evaluation of treatment for her disordered sleep and dizziness. There is a "small risk" that post-traumatic arthritis will develop in her neck fractures that might require surgical fusion.

D. Dr. Eyton David

- [50] Dr. David is an otolaryngologist. He prepared a report at the plaintiff's request. He examined the patient on July 6, 2018. He concluded that the mechanism of injury in the Second Accident was sufficient to traumatize the inner ear hearing and balance mechanisms. He stated that the Second Accident and symptoms described by the plaintiff probably indicate benign paroxysmal positional vertigo ("BPPV"). This condition would explain the plaintiff's reports of persistent imbalance.
- [51] BPPV is a common cause of dizziness, in which salt crystals fall out of the natural resting position in the inner ear into a structure that is typically reserved as an angle accelerometer. Although this diagnosis is typically confirmed by conducting a Dix-Hallpike positional test, Dr. David found that the conduct of this test was contraindicated given her incompletely healed neck fractures. Dr. David noted that posttraumatic BPPV is typically of longer duration than the sporadic variety.
- [52] Dr. David also found a "possible to probable" second inner ear gravity disorder which can be seen in some patients with BPPV. Again, the test for this was inconclusive given her restricted neck mobility.
- [53] In terms of treatment, Dr. David advised that physiotherapeutic maneuvers can be effective in curing BPPV. In a minority of patients with symptoms lasting more than 12 months, a surgical cure is also available. He suggested that the plaintiff may require assistive devices in the house to manage her lack of balance, such as hand railings in the shower and bathtub. He said the BPPV will probably recur in the future given her extended period of immobility and restrictions in her neck. In terms of any probable inner ear gravity disorder, it should be considered moderate to severe, and permanent. It could be expected to worsen with age.
- [54] As to her ability to participate in activities, he recommended against those with increased risk of falling, such as bicycling and skiing. He indicated that she would be expected to experience disproportionate motion sensitivity on public transit, boats, or airplanes. These symptoms are expected to worsen with fatigue and age.

E. Dr. Shaohua Lu

- [55] Dr. Lu is a psychiatrist who prepared two reports as requested by the plaintiff.
- [56] Dr. Lu noted that the plaintiff was in stable long-term recovery for depression in the years prior to the Accidents. Based on her clinical course, he concluded that, absent the Second Accident, it was highly unlikely that she would have had a relapse of her major depression. Her pre-existing major depression did increase her vulnerability to psychiatric and mental health deterioration when faced with new stressors.
- [57] Dr. Lu found that the plaintiff's chronic pain has had a direct impact on her psychiatric symptoms. She has suffered a relapse of her depression. Her chronic pain and major depression are mutually aggravating. She has suffered typical symptoms of persistent

sadness, irritability, reduced concentration, a lack of energy, helplessness, loss of interest, poor attention, weight changes, diminished pleasure, and reduced tolerance for frustration and stress. She has health-related anxiety. She has some features of driving-related anxiety, but she does not meet the criteria for post-traumatic stress disorder.

- [58] In terms of causation, he concluded that her physical injuries from the Accidents play a direct and contributing role to the relapse of her major depression.
- [59] Dr. Lu noted that her chronic pain and depression can account for many of the symptoms that could also be attributed to a mild traumatic brain injury. He described MTBI as a "possible" diagnosis.
- [60] In terms of employment, he concluded that "realistically she will not return to gainful employment".
- [61] In terms of future treatment, he concluded that she should continue her therapy with her psychiatrist and psychologist, and that she needs long-term treatment for her insomnia.

F. Dr. Robert Cheung

- [62] Dr. Cheung is a dentist who has treated the plaintiff. He prepared a report at the plaintiff's request.
- [63] Dr. Cheung first saw the plaintiff on February 20, 2014. He notes that he found reduced range of motion in the right side TMJ. He diagnosed TM disorder consisting of right TMJ arthralgia with episodic clicking, right side craniofacial myofascial pain, and right scalp and neck pain. He arranged for TMJ appliances to be used for 3 months. He initiated trigger point injections and infrared therapy. By September 25, 2014, the plaintiff reported a 50% improvement. The appliance required adjustments and replacements. By December 10, 2015, the plaintiff reported no jaw pain, except when eating harder food. On March 10, 2016, the plaintiff reported some increase in her jaw pain. By December 19, 2019, the plaintiff was still reporting some jaw clicking and pain when chewing harder food. He noted that the plaintiff had declined trigger point injections for a long period, but has recently agreed to undergo them again. He has found these effective in pain management. He concluded that her craniofacial conditions have improved by approximately 50%.
- [64] With respect to causation, he noted that studies report that a temporomandibular disorder ("TMD") can develop weeks or more after an accident. He felt that the force of impact of the Second Accident would have been significant, and that her CT scans indicated a high likelihood that her TMJs were compressed. He concluded that her reported headaches, jaw pain, facial pain, neck pain, shoulder pain and certain aspects of her poor sleep were the result of a TMD condition more than likely caused by the First Accident, and further aggravated and caused by the Second Accident. He assigned 30% of her injuries to the First Accident, and the balance to the Second Accident.

[65] In terms of prognosis, he described it as "fair", and opined that her TMD and craniofacial pain could continue to improve, but very slowly, and that it was unlikely for her to recover fully given the chronic and multi-faceted nature of her injuries, including biopsychosocial factors.

[66] In terms of treatment, Dr. Cheung recommended further trigger point injections and continued use of an oral appliance.

G. Pablo Chang

[67] Mr. Chang is an occupational therapist who prepared a functional capacity evaluation at the plaintiff's request.

[68] On testing, he found limitations in overhead reaching and walking at a normal pace without support, and tightness and pain in performing tasks while seated. The plaintiff was able to do some light carrying, but with discomfort. Her balance is "quite" poor, and she fell over during a repetitive crouching test late in the day. He concluded that the plaintiff does not have the physical tolerance to meet the job demands of a housekeeper position.

[69] Mr. Chang recommended further occupational therapy and an exercise program to assist in achieving a gradual return to meaningful physical activity. He suggested that continuing her psychiatric, psychological, vestibular, and massage treatments would likely be beneficial in maintaining her well-being.

[70] Mr. Chang's cross-examination highlighted certain limitations in his report. He was not able to complete all of the tests he had planned because the plaintiff started complaining of nausea at several points throughout the day. He attributed this to her reported balance issues. However, the plaintiff also began burping and retching, a reaction that even Mr. Chang admitted was quite unusual. She required an additional 40-minute break to rest during the day.

H. Dionne Sellick

[71] Ms. Sellick is an occupational therapist. She performed a home visit and prepared a report on the recommended cost of care at the plaintiff's request. Based on the various recommendations made by the experts reviewed above, as well as her own assessment, she recommended the following:

- a) A supervised exercise program and a gym membership given her deconditioning and in order to manage the deterrent effects of her depression;
- b) An occupational therapist to do case management;
- c) Massage tools to replace her aging equipment;
- d) Bathroom equipment given her balance problems;

- e) A new mattress to help with her sleep difficulties; and
- f) Additional homemaking assistance allowing a restoration of the pre-accident family roles.

I. Lorraine Phan

- [72] Ms. Phan was the plaintiff's treating occupational therapist following the Second Accident. She did not provide opinion evidence, but only observation evidence regarding her course of treatment.
- [73] Ms. Phan agreed that the plaintiff never reached a level of recovery that would allow her to return to work after the Accidents, notwithstanding that the plaintiff was largely compliant with her recommendations. She noted that the plaintiff complained of balance problems quite early on. The plaintiff's pace of recovery slowed following her extended return to China in 2014.

J. Ms. Judy Ren

- [74] Ms. Ren is an economist who prepared a report providing various estimates and multipliers to assist in determining the present value of any income loss and future care determinations. I review the details of those calculations under the relevant heads of damages below.

K. Robin Brown

- [75] Mr. Brown is a forensic engineer. He provided data on driver reaction times. In particular, he reported on a study that shows that the 50th percentile of drivers have the following reaction times to scenarios where they are (1) surprised by an object on the road, (2) alerted that there will be an object before them at some point, and (3) told to brake when a specific signal is sent:

Surprised

1.1 seconds

Alerted

.7 seconds

Brake

.6 seconds

- [76] Mr. Brown also provided the following chart indicating when certain events occurred within the video taken by the bus:

Time

Vehicle

Lane

Vehicle Action

22:25.63

Bus

R

Bus departs Sanderson Way stop

34.04

Bus

R

Bus stops for red light at Sanderson Way

44.25

Bus

R

Bus accelerates after traffic light changes to green

46.72

Bus

R

Bus crossing intersection

Pickup

C

Dark compact pickup truck passes bus

49.06

Bus

R

Bus speed changes from 5 to 20 km/h

50.66

Bus

R

Bus in right lane recorded speed 20 km/h

Pickup

C

Brake lights on pickup illuminated

51.06

Bus

R

Bus speed changes to 30 km/h

Pickup

C

Brake lights on pickup illuminated

53.06

Bus

R

Bus speed changes to 42 km/h

Pickup

C

Brake lights on pickup illuminated

55.06

Bus

R

Bus speed changes to 48 km/h

Pickup

C

Brake lights on pickup illuminated

56.26 to 57.26

Bus

R

Bus reduce separation distance to pickup

Pickup

C

Pickup slows and brake lights illuminated

57.07

Bus

R

Bus speed changes to 56 km/h

57.13 to 57.60

Pickup

C

Pickup truck moves wheelbase length (3 meters)

57.53

Pickup

C

Pickup turning left into right lane

58.73

Pickup

R

Pickup angled across right lane, front wheel at curb

59.07

Bus

R

Bus speed changes to 58 km/h

59.46

Pickup

R

Left rear of box in right side of right lane

23:01.07

Bus

R

Bus speed reduces to 16 km/h

L. Dr. Richard Kendall

[77] Dr. Kendall is an orthopaedic surgeon who saw the plaintiff once at the defendants' request.

[78] With respect to her condition prior to the First Accident, Dr. Kendall's opinion was that the plaintiff was not yet ready to return to work at the time of the First Accident.

[79] On examination, he found only a mild restriction in the rotation of the plaintiff's spine. On her reported breathing problems, he states that they may be related to the swelling around the esophagus associated with those fractures. He concluded that any hip pain was likely emanating from her low back or, less probably, her right sacroiliac joint.

[80] In terms of treatment, Dr. Kendall found no indication that acupuncture has changed the course of her recovery. In his opinion, such passive treatments have little or no role in addressing chronic symptoms, although they can be used to manage symptom flare-ups. He recommended education and restoration of a normal lifestyle with stretching, strengthening, and exercise through an appropriate active rehabilitation program.

[81] His opinion on her ability to return to work was as follows:

In regard to a return to work, the prognosis remains guarded given her age, number of years since the apparent onset of her symptoms, and her present lack of response to the passive modalities which she has been receiving. However, only upon adequate rehabilitation would one be able to provide a final prognosis about her employability I would suggest that she is currently only capable to work for more than short periods of time in sedentary occupations.

[82] In terms of a division of between the two Accidents, he opined that she would have fully recovered from the symptoms of the First Accident were it not for the Second Accident.

M. Dr. Andrew Kolchak

[83] Dr. Kolchak is a psychiatrist retained by the defendants. He had an extended video appointment with the plaintiff, using the services of a translator. His report was entered without the need for cross-examination.

- [84] Dr. Kolchak diagnosed a moderate form of major depressive disorder. He concluded that her prognosis is not favourable. He expected that her recovery will be protracted and complicated. Furthermore, should her physical condition remain the same, her depressive symptoms will likely remain difficult to treat for the rest of her life. Her lack of English proficiency may also limit her treatment options. The chronic pain and depression will likely continue to have a mutually perpetuating effect on each other.
- [85] In terms of treatment, he opined that her psychological treatment regime could be more aggressive. He recommended continued psychological treatment for at least 16-20 sessions. Her insomnia will require aggressive multi-dimensional management. He felt her prognosis would be able to be better projected once her treatment regimens were optimized. He agreed that she would need antidepressant medication for the rest of her life.

N. Shannon Smith

- [86] Ms. Smith is an occupational therapist retained by the defendants. She did not see the plaintiff, but prepared responsive opinions to those of Mr. Chang and Ms. Sellick.
- [87] Ms. Smith raised the following concerns regarding Mr. Chang's approach:
- a) There was insufficient information provided regarding the plaintiff's effort and reliability;
 - b) His conclusion about walking difficulties was not wholly supported by the testing;
 - c) The reported observations about dexterity, reaching, crouching and standing were not well documented; and
 - d) There was no exploration or explanation for the reported nausea difficulties that restricted the scope of the testing.
- [88] Ms. Smith did accept that there were objective observations of difficulties relating to neck flexion and overhead reaching that would impact the plaintiff's ability to meet the full physical demands of her work, and that she did not demonstrate the ability to meet the strength demands of this work.
- [89] In terms of Ms. Sellick's home evaluation and cost of care evaluation, Ms. Smith noted that:
- a) there was, again, insufficient evaluation of effort and reliability, particularly where the reported symptoms appeared to be inconsistent, in some aspects, with the plaintiff's demonstrated performance; and
 - b) the amount of treatment recommended was inconsistent with the consensus that the plaintiff's condition was chronic and unlikely to improve.
- [90] Ms. Smith suggested that the plaintiff should shift "to more natural adaptation in every life". In terms of future care, she recommended the following:
- a) Family physician and psychiatric care: already covered by MSP.

- b) Trigger point injections: one-time cost of \$3200.
- c) An oral appliance for sleep apnea: \$3500, and \$4000 ever five years hereafter, or continued use of her current appliance at \$850 every 1-2 years.
- d) Medications at a reduced generic cost.
- e) Vocational evaluation at \$660-\$1800 to evaluate the plaintiff's capacity and barriers to returning to work, whether paid or volunteer.
- f) Supervised exercise program: 20-24 sessions at \$1390-\$2280.
- g) Physiotherapy or massage therapy: 12 sessions per year at \$1008-\$1320 annually.
- h) Occupational Therapy: 10-15 hours at a cost of \$1000-\$1650, 2-4 times over her lifetime.
- i) Psychology: As recommended by Ms. Sellick, being 8-16 sessions in the first year, followed by 2-12 session per year thereafter (at a cost of \$1760-\$3600 for the first year, and \$440-\$2700 per year thereafter).
- j) Safety Equipment: Replacement of shower chair every 10-15 years at a cost of \$70, and grab bars at a cost of \$132.98.
- k) Homemaking: As recommended by Ms. Sellick, being 2 hours per week of regular support and 8 hours annually of seasonal support, at a cost of \$25-\$30 per hour.
- l) Gym Pass: As recommended by Ms. Sellick, being \$421.92per year; and \$315.36 after 65 years old.
- m) Self-massage equipment: As recommended by Ms. Sellick, being a one-time expense of \$192.98.
- n) Fusion Surgery contingency: Ms. Smith agrees that further support will be required should this eventuality come to pass.
- o) Additional support with meal preparation, grocery shopping and assistance with finances should her husband not be able to provide the current level of support: 4 hours per month for batch cooking, or \$1581-\$1920 per year; and 2-3 hours per month of support for heavier grocery shopping or \$790.80-\$1440 per year.

IV. LIABILITY AND CONTRIBUTORY NEGLIGENCE

- [91] As noted, liability for the First Accident is admitted.
- [92] In terms of liability for the Second Accident, as noted above, the court had the advantage of reviewing the omnidirectional video of the accident taken from inside the bus.
- [93] I begin by noting the heightened standard of care applicable to public carrier drivers, helpfully summarized by Justice Dardi in *Prempeh v. Boisvert*, 2012 BCSC 304:

- [15] The principles that govern the disposition of this case are uncontroversial. The reasonable foreseeability test informs the analysis of liability. The standard of care owed to a plaintiff passenger by a defendant bus driver is the conduct or behaviour that would be expected of a reasonably prudent bus driver in the circumstances. This is an objective test that takes into consideration both the experience of the average bus driver and anything the defendant driver knew or should have known: *Wang v. Horrod* (1998), 48 B.C.L.R. (3d) 199 at para. 39 (C.A.); *Patoma v. Clarke*, 2009 BCSC 1069 at para. 6.
- [16] It is well-settled on the authorities that the standard of care imposed on a public carrier is a high one. However the principle to be derived from the authorities is that the standard to be applied to the bus driver is not one of perfection nor is a defendant bus driver effectively to be an insurer for every fall or mishap that occurs on a bus: *Patoma* at para. 7.
- [17] *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433, is the seminal case dealing with the liability of public carriers. The plaintiff, a passenger in a street car owned by the defendant, while standing and picking up a parcel in preparation to disembark, was thrown to the floor and injured by the sudden application of the emergency brake. The articulation of the standard of care was stated as follows by Hudson J. at 441:

Although the carrier of passengers is not an insurer, yet if an accident occurs and the passenger is injured, there is a heavy burden on the defendant carrier to establish that he had used all due, proper and reasonable care and skill to avoid or prevent injury to the passenger. The care required is of a very high degree: 4 Hals., p. 60, paras. 92 and 95. In an old case of *Jackson v. Tollett* (1817) 2 Starkie 37, the rule was stated by Lord Ellenborough, at p. 38, as follows:

Every person who contracts for conveyance of others, is bound to use the utmost care and skill, and if, through any erroneous judgment on his part, any mischief is occasioned, he must answer for the consequences.

- [18] The principles articulated in *Day* have been interpreted by the courts in this province as endorsing the following analytical approach - once a passenger on a public carrier has been injured in an accident a *prima facie* case of negligence is raised and it is for the public carrier to establish that the passenger's injuries were occasioned without negligence on the part of the defendant or that it resulted from a cause for which the carrier was not responsible: *Planidin v. Dykes*, [1984] B.C.J. No. 907 (Q.L.)(S.C.); *Visanji v. Eaton and Coast Mountain Bus Co. Ltd.*, 2006 BCSC 656 at para. 26.
- [19] However it must be noted that in *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 46 B.C.L.R. (3d) 1, Major J. in discussing the doctrine of *res ipsa loquitur* in the context of a single car accident, observed as follows:
- [27] It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal with circumstantial evidence. That evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct

evidence, if any, to determine whether the plaintiff has established on a balance of probabilities a prima facie case of negligence against the defendant. Once the plaintiff has done so, the defendant must present evidence negating that of the plaintiff or necessarily the plaintiff will succeed.

[20] In *Visanji*, the court after canvassing the pertinent authorities provides the following helpful formulation of the principles which govern the determination of negligence against a public carrier:

[29] Whether the burden upon a public carrier in cases of injury or accident sustained by a passenger can be referred to as the shifting of the burden as in *Day*, or a matter of inferences to be drawn from the evidence once the plaintiff has established a prima facie case of negligence against the defendant carrier as articulated in *Fontaine*, it is for the defendant to present evidence to answer, or be found negligent: *Nice v. Calgary (City)* (2000), 83 Alta. L.R. (3d) 1, 2000 A.B.C.A. 221, at ¶46, leave to appeal to S.C.C. ref'd, [2000] S.C.C.A. No. 483 (S.C.C. Mar. 29, 2001).

[94] Applying this approach, I find that the plaintiff was injured by a sudden stop, and the public carrier defendants have not established that the plaintiff's injuries were occasioned without negligence on the part of the bus driver, or that it resulted from a cause for which the carrier was not responsible.

[95] The plaintiff does not fault the bus driver for his actions in the last second before the hard brake. Disregarding the facts up to the point where the truck's wheels hit the bus' right lane markers, the scenario faced by the bus driver would fall most closely into the "surprise" category noted in the reaction studies outlined by Mr. Brown. When surprised, the 50th percentile reaction time is 1.1 seconds. Here, the bus driver's reaction from the moment the truck's tires hit the lane marker was within a reasonable range of this reaction time.

[96] However, the real question is whether the bus driver should have been so surprised at that moment. As noted, the parties agree that the truck's brake lights had already been on for approximately seven seconds before the truck's wheels touched the lane markers.

[97] What was the extent of the bus driver's awareness of this key fact? Extremely limited. The bus driver's discovery evidence read in by the plaintiff was as follows:

Q. So you didn't see him before he was right in front of you turning across -

A. No.

Q.--the front of your bus; is that right?

A. Yeah. That was not something I was expecting as far as an abrupt right-hand turn coming from lane two, the lane beside me to come straight across. Like, it was horizontal when it came across, like straight.

Q. Okay. I'm just wondering - I understand that.

A. Yes.

Q. No one would expect that or want that to happen to them.

A. Mm-hmm.

Q. When is the first time you recall seeing this vehicle? Was it when it was horizontal in front of you and you don't know if he came up beside you or if he was ahead of you and you were gaining on him or can you tell me when is the first time you saw it?

A. I saw it was when it was starting to come across.

Q. When it was horizontal?

A. Horizontal in front of me, yeah.

[98] The video shows that the truck was clearly there to be seen during these seven seconds. More importantly, the truck should have been notable, given the brake lights being illuminated on each side and on the roof of the cab. The bus driver should have at least seen or noticed the truck at the point that the brake lights were applied.

[99] I accept that the engagement of the brakes by the truck did not necessarily suggest that the truck intended to cross into the bus's lane. The truck could also conceivably have been slowing down because of (1) a concern that his speed was over the speed limit, (2) an intention to merge into the left hand lane rather than the right hand bus lane, (3) a need to avoid striking an object on the road or a jaywalker coming from his left, or (4) some other reason.

[100] But that uncertainty about the truck's intentions should have at least put the bus driver on notice that there was a potential risk to himself and the bus's passengers that required some caution on his part. At a minimum, the uncertainty should have caused him to slow down in order to better assess the truck driver's intentions. The bus driver should have considered that the truck driver potentially intended to merge into the bus's lane. Indeed, there was a strong possibility that this was the truck driver's intention given that:

- a) the bus was gaining on the truck, suggesting the truck was not travelling at an excessive speed, unless the bus was also travelling at an excessive speed;
- b) the video shows no hazards coming from the left that could explain the application of the brakes. To the left of the truck was a wide grass median between the north and southbound lanes, and forested parkland on the far left, further minimizing the possibility of hazards coming from the truck's left; and
- c) there was a parking lot entrance to a large, active educational institution coming up on the right.

- [101] Rather than slow down however, the bus driver's average speed increased from 20 kph to 58 kph for two-second blocks over the key period. The bus was travelling over the 50 kph speed limit during the latter part of the relevant period.
- [102] I find that it was negligent on the part of the bus driver to not have noticed that the truck's brake lights were on for seven seconds leading up to the change of lanes, and to not have slowed down until the truck's intentions were clear.
- [103] The plaintiff also suggested that the bus driver should have yelled out to the passengers or honked his horn when he saw the brake lights engage on the truck. Given the ambiguous nature of the truck's intentions, I find that honking or yelling would have been an overreaction to the extent of the threat. Slowing down alone would have been sufficient to guard against the potential threat.
- [104] The period leading up to the truck's turn distinguishes the present situation from that in *Papaspyros v. Cox*, 2014 BCSC 1569, where no liability was found given the finding that a merging vehicle "cut in front of [the bus] suddenly and that [the driver] had no time to react other than as he did" (para. 66).
- [105] In *Patoma v. Clarke*, 2009 BCSC 1069, where a hard stop was necessitated by pedestrians who appeared "suddenly" (para. 2) and out of a blind spot (para. 27), the bus driver was still found at fault:
- [28] In my view, the driver either failed to check that blind spot as he started to lift his foot off the brake, or failed to sweep the area to the left of the bus far enough out to detect the two young women as he moved to check his left mirror before he pulled out. The two pedestrians were, at that time, crossing the street in some fashion from his left.
- [29] Mr. Clarke in all respects struck me as a careful and prudent driver who takes his responsibilities as a bus driver seriously, but I find that Mr. Clarke in this instance, however fleetingly, breached the standard of care owed to Mr. Patoma, and the other passengers. It was dark, but the area was relatively well lit, according to the testimony of most of the witnesses. I note that there was no evidence that Mr. Clarke was rushing or pulling out too quickly because he was behind schedule.
- [30] In finding that Mr. Clarke was negligent in failing to check properly to his left before pulling out, I distinguish this case from *Fung v. British Columbia Transit*, (8 April 1994), Vancouver Registry No. B922434 (B.C.S.C.) a 1994 decision; and *Shishvan v. Wood*, 2005 BCSC 1304. In those cases, the bus was already in motion and travelling along when a pedestrian jumped or stepped out into traffic unexpectedly from the curb, leaving the driver no option but to stop suddenly to avoid hitting the pedestrian.
- [106] In *Tchir v. South Coast British Columbia Transportation Authority*, 2014 BCSC 1119, the bus driver was found negligent for not reacting appropriately to a vehicle that had come into his lane. The facts and findings relevant to the present case were as follows:

- [25] His evidence was that as he was driving the bus in the curb lane southbound on Lonsdale Avenue somewhere near Keith Road North (about one block south of 8th Street NW), a car started to drift into the curb lane until there were only a few feet between the front of the bus and the back bumper of the car. Mr. Tougas knew the situation was potentially dangerous and that he had to create space because of the possibility the car might brake suddenly. If that happened he would not be able to stop in time to avoid a collision.
- [26] Mr. Tougas did not wait for the car to fully enter his lane of travel before slowing down from the speed of 35 to 40 kilometers per hour at which he was travelling. He began to apply the brakes on the bus as the car edged into the curb lane and he was able to create a gap of about one and one-half bus lengths by decreasing the speed of the bus by between five and 10 kilometers per hour.
- [27] On discovery Mr. Tougas said he did not believe the passengers were aware of the existence of the car in the curb lane that required him to begin to brake to slow the bus down.
- [28] That same car then came to a full stop in the curb lane just before Keith Road South. Mr. Tougas pressed very much harder on his brakes so that he was able to come to a stop about five to 10 feet from the rear bumper of the unidentified vehicle.
- [29] That hard braking caused Mrs. Tchir's fall onto the floor from her seat.
- [52] After considering the totality of the evidence and the submissions of both counsel, I have concluded the Transit Defendants have not proven that Mr. Tougas' conduct met the requisite standard of care required of him in the circumstances.
- [53] I say that because:
- 1) It is well established that drivers of all vehicles must allow a sufficient distance between their vehicle and those in front to stop safely in the event of sudden or unanticipated stops in their lane of travel. See: *Rai v. Fowler*, 2007 BCSC 1678; *Pryndik v. Manju*, 2001 BCSC 502 at para. 21; and *Stanowski v. Samant*, [1993] B.C.J. No. 1455 (S.C.) at para. 29.
 - 2) A higher standard of care is required of drivers of transit vehicles carrying passengers. See: *Planidin*; *Prempeh* and *Erickson* as previously discussed
 - 7) He was also following a vehicle driven by an erratic driver who had caused a near collision by changing lanes precipitously in front of the bus at Lonsdale and Keith Road North in what Mr. Tougas considered to be a "ridiculous" move.
 - 8) Mr. Tougas reacted to the situation by braking gently and decelerating to create more headway but did not anticipate that the unidentified driver would create another dangerous situation by stopping at an intersection where he could not make a right-hand turn rather than continuing through the intersection.

- 9) The actual headway created by Mr. Tougas after the dangerous lane change by the unidentified driver at Keith Street North before the near collision at Keith Street South was only about one and one-half bus lengths and the fact of the hard stop that was necessary to prevent the collision satisfies me that one and one-half bus lengths was, in all of the circumstances, insufficient headway.
- 10) The fact that insufficient headway was created by Mr. Tougas would not alone ground a finding of liability if he had not had the opportunity to create more than he did. The evidence does, however, establish that he could have made a gentle stop at the crosswalk on Lonsdale at Keith Road South had he begun decelerating about 50 meters from that crosswalk.
- 12) Although Mr. Tougas did not anticipate that the unidentified driver would stop abruptly where he did, he also testified that he was aware that cars were stopped at the stop sign on Keith Road South at Lonsdale, and acknowledged that in his experience drivers will at times risk "scooting" across Lonsdale at the intersection from west to east when they consider it safe to do so. If so, that can necessitate sudden stops by vehicles travelling on Lonsdale which had occurred at least once in the past while he was driving a bus on that same route.
- 14) Although I am satisfied that the near collision was primarily caused by the conduct of the unidentified driver on whose behalf ICBC has admitted negligence, I am also satisfied that in all of the circumstances, the most important of those being the previous erratic driving of that driver which Mr. Tougas had already experienced, Mr. Tougas did not sufficiently anticipate further problems by creating sufficient headway to protect his passengers from injury when he had the opportunity to do so.
- [107] As in *Tchir*, I find that there was insufficient anticipation by the bus driver in the present case.
- [108] Turning to the question of legal causation, from my review of the video, I conclude that maintaining a more reasonably controlled speed would likely have avoided the need for such a hard brake at the end of the incident. This, in turn, would have averted the plaintiff's fall.
- [109] Turning to the truck, I find the unidentified driver clearly merged into the bus lane when it was unsafe to do so, contrary s.151(a) of the Motor Vehicle Act, R.S.B.C. c.318. As such, the unidentified truck driver is also at fault for the Second Accident: *Papaspyros v. Cox*, 2014 BCSC 1569 at paras. 6770.
- [110] The defendants argued that there was contributory negligence on the part of the plaintiff for sitting where she did. They argue that, given that the plaintiff was tired and dizzy when she got on the bus, and that she was sleeping in between stops, she should not have sat in the disabled seats at the front of the bus, given the risk that a short stop would toss her forward.

- [111] I reject this submission. First, I do not find that the plaintiff was sleeping. She specifically denied that she was sleeping. It would be difficult to reach a state of sleep in between each stop. I conclude she was simply resting with her eyes closed. I cannot fault the plaintiff for sitting with her eyes closed, or even sleeping. The carrier provides no signs or warnings advising people that they should not sleep on the bus, or not sit in particular locations if they intend to sleep. Absent unique facts, it would be unreasonable to require bus passengers to remain awake, alert, and vigilant throughout their trip to guard against the potential for such an unexpected hard stop. Unlike the situation in *Erickson v. Sibble*, 2012 BCSC 1880, the plaintiff here was not forewarned of a potential problem by earlier erratic driving by the bus driver. Nor was her health condition at the time of the Second Accident so troubled that she needed to take special precautions for her safety. She was not using a cane, unlike the plaintiff in *Erickson*.
- [112] Second, I do not fault the plaintiff for sitting where she did. It is quite unusual for the Carrier Defendants to argue that its own disabled seating has a heightened risk of injury given the absence of a seat in front.
- [113] In terms of the allocation of fault, I find that the truck driver was clearly far more at fault than the bus driver. The truck driver made an unsafe lane change contrary to statute in front of a bus containing multiple passengers without due regard for their safety. The bus driver's negligence was more a matter of not being as cautious as he should have when faced with ambiguous conduct on the part of the truck driver. I would allocate 15% of the fault to the Carrier Defendants, and 85% to the truck driver.

V. CAUSATION

- [114] The plaintiff must prove on a balance of probabilities that her injuries would not have occurred "but for" the Accidents: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at para. 14. The Accidents do not need to be the only cause of the plaintiff's injuries but it must be a causal factor beyond the "de minimis" range: *Athey* at para. 15. I find that causation is established in relation to both Accidents, and the defendants did not suggest otherwise.

VI. CREDIBILITY AND RELIABILITY

- [115] In *Dorsey v. Bhindi*, 2016 BCSC 499, the court introduced its consideration of a plaintiff's credibility with a helpful summary of principles germane to the present case:
- [10] To the extent that Ms. Dorsey's claim involves subjective complaints of pain, it is particularly important to exercise caution about and examine her evidence carefully: *Price v. Kostryba* (1982), 70 B.C.L.R. 397 at 399 (S.C.). Among other things, if her account is not convincing, the hypothesis upon which her medical evidence rests may be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 15, 43-44.

- [111] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] SCCA No. 392. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying her recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted, whether the witness changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections, the witness's demeanor, and whether the witness's evidence seems generally unreasonable, impossible, or unlikely.
- [116] The plaintiff in this case had a reasonably good recall of the basic facts and her course of treatment. Her cross-examination did not result in any clear indications of concern as to her credibility. She did tend to be verbose, and somewhat defensive in cross-examination, but not to such an extent that it created any red flags with respect to her credibility.

VII. MITIGATION

- [117] The defendants argue that the plaintiff failed to mitigate her damages and that her damages should be reduced accordingly: *Graham v. Rogers*, 2001 BCCA 432, leave to appeal refused [2001] S.C.C.A. No. 467. The defendants bear the onus of proof on this issue: *Graham* at para. 35, citing *Michaels v. Red Deer College* (1975), [1976] 2 S.C.R. 324 at 331, 57 D.L.R. (3d) 386 at 390, and *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633, 89 D.L.R. (3d) 1.
- [118] In particular, the defendants argue that the following conduct by the plaintiff should reduce her damages by 15-20%:
- a) The failure to continue with treatment at the Change Pain clinic;
 - b) The interruption of treatment with her psychologist, Dr. Du;
 - c) The failure to follow Dr. Cheung's recommendation to take trigger point injections.
- [119] In relation to Change Pain, the evidence was somewhat muddled. The plaintiff suggested that the reason she did not do more than a few visits was a language problem. Dr. Cheung's records suggest it was due to a fear of needles. I find that the defendants have not met their burden to show that the plaintiff was acting unreasonably in deciding that she was not going to be able to benefit from treatment at this clinic.
- [120] In relation to Dr. Du, the evidence is that the interruption in treatment was due to being forced out of treatment after the clinic's discovery that she was no longer in the clinic's catchment area. However, the plaintiff did eventually make efforts to recommence treatment with Dr. Du, and I find no fault in her conduct in this respect.
- [121] In relation to the trigger point injections, Dr. Cheung clearly recommended them to reduce or potentially negate the pain symptoms in her jaw and head area. He also indicated that there were no material side effects. The plaintiff did agree to some early shots, but then

declined them for a number of years, up until quite recently. I accept that this was a failure to mitigate, but across the entire constellation of her issues, and given that she has now restarted such treatments, I find that this failure should have a very modest effect on her non-pecuniary claim below.

VIII. DAMAGES

A. Non-Pecuniary Damages

1. Generally

[122] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. The compensation awarded should be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Fairness is measured, in part, against awards made in comparable cases: *Beaton v. Perkes*, 2016 BCSC 2276 at para. 51, citing *Boyd v. Harris*, 2004 BCCA 146 at para. 41. That said, other cases are helpful but serve only as a rough guide. Each case still depends on its own facts: *Trites* at para. 189.

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

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

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

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

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

2. Key Factors

[124] I find the following factors and findings germane to the determination of the proper non-pecuniary award in this case:

1. The plaintiff had osteoarthritis in her right knee before the Accidents. The plaintiff had seen some improvement, but I find that the condition was still active at the time of the First Accident. I also find that there was a reasonable possibility that this condition could have continued to cause her difficulties into the future.
2. The plaintiff had ongoing depression at the time of the Accidents, but it was well managed through medication. There is little dispute that her depression has been seriously aggravated by the Accidents and her subsequent frustration with her course of recovery.
3. The plaintiff has not established that she sustained a concussion in the Second Accident, or a mild traumatic brain injury. The early reports were that there was no loss of consciousness. Although the plaintiff suggests that she may have suffered some amnesia or loss of consciousness, there are no missing facts in her account between her fall and being cared for by another passenger. I find that the opinion of Dr. Heran that there was no brain injury should carry the most weight in this evaluation.
4. The plaintiff sustained fractures to her neck and ribs in the Second Accident, which have healed, but which required the plaintiff to remain generally immobile for several months.
5. The plaintiff sustained soft tissue injuries to her neck and back in the First Accident that were seriously aggravated by the Second Accident, and which are ongoing with only marginal improvement over the many years since the Accidents.
6. The plaintiff suffered TMJ problems which have only partially resolved.
7. The plaintiff suffered vertigo problems which are being treated but are ongoing.
8. The plaintiff continues to feel substantial pain that will prevent her from working in her employment as a housekeeper.
9. The plaintiff's life has become very small and limited. She has little exposure to the outside world, and no activities that provide any joy. Her condition has seriously impacted her relationship with her husband.
10. The plaintiff's prognosis is poor. I find that she is likely to have chronic pain on a permanent basis. However, with more aggressive psychological care, occupational therapy, and active rehabilitation treatment, I expect (and hope) that she can reduce her pain symptoms to some degree.

3. Plaintiff's Authorities

[125] The plaintiff put forward the following authorities to help guide the Court's assessment of her non-pecuniary damages:

· *Howell v. Machi*, 2017 BCSC 1806: The court awarded \$275,000 to a plaintiff who suffered an organic brain injury causing executive dysfunction, chronic pain, a Somatic Symptom Disorder, and an aggravation of certain pre-existing mood difficulties.

· *Roussin v. Bouzenad*, 2005 BCSC 1719: The court awarded \$200,000 (or approximately \$253,351.60 in today's dollars). The plaintiff was 40 years old at the time of the accident. She suffered a mild traumatic brain injury, a skull fracture, a left wrist fracture requiring surgery, and soft tissue injuries to her hip, back and neck. The plaintiff had scarring on her face, wrist and arms. She also experienced dizziness and vertigo, tinnitus and headaches. The plaintiff's brain injury caused her fatigue, difficulty sleeping, and impaired executive functioning. Her brain injury restricted her employability and prevented her from pursuing her chosen career. She was still independent in her daily living activities, was able to perform some type of meaningful work, play golf, and excel in university courses.

[126] Based on the guidance from these cases, the plaintiff suggests that an appropriate award for non-pecuniary damages would be \$275,000.

[127] I do not find either of these cases particularly helpful, given that I have not concluded that the plaintiff suffered a brain injury affecting executive functioning.

4. Defendant's Authorities

[128] The defendant put forward the following authorities:

· *Ranahan v. Iron Horse Enterprises & Logistics Inc.*, 2017 BCSC 759, aff'd 2018 BCCA 75: The 55 year old plaintiff suffered a broken collarbone, three broken ribs, and internal injuries in the thoracic region. His collarbone and some of his ribs did not heal properly. He suffered from chronic pain in the chest, collarbone and neck area. The court found that the injuries had a profound effect on his psychological well-being. The plaintiff had been able to continue to work for part of the year, and the court found that he retained some ability to work. The court awarded \$145,000.

· *Karlsson v. Noormohamed*, 2015 BCSC 911: \$120,000 was awarded to a 63-year old claimant who suffered a comminuted fracture dislocation of her dominant right shoulder that required hemiarthroplasty, a fracture to her left ankle, a sprain to her right ankle and injuries to her knees and jaw. She also experienced anxiety, depression and a driving phobia.

· *Jacobs v. Basil*, 2017 BCSC 1339: The plaintiff was 25 years old and involved in two accidents that occurred 15 minutes apart. He had suffered from pre-existing anxiety and depression. As a result of the first accident, the plaintiff sustained soft tissue injuries to his chest, collarbone, back, right leg and hip. In the second accident, he sustained fractures, contusions, injury to the right knee and a mild traumatic brain injury. He also complained of an aggravation of his anxiety and depression. He was going to require knee surgery in the future and was at risk of developing osteoarthritis. He was still able to stand or walk for a couple of hours periodically (para.147). Non-pecuniary damages in the total amount of \$120,000 were awarded.

· *Tchir v. South Coast British Columbia Transportation Authority*, 2014 BCSC 1119: The plaintiff was a 65 year old caretaker. She sustained serious injuries to her right cheek, chest, neck, and back. She also suffered from a rotator cuff tear of the right shoulder and a torn meniscus of the right knee. She required shoulder and knee surgery. She experienced anxiety and depression. By the time of trial, she was unable to work. She was also having a difficult time keeping up with heavier housework. The Court accepted that "that suffering has had a disastrous impact on her personal life as she has moved from being a dynamic, highly social individual who enjoyed outings with her daughter and husband to existence in life in which she is in constant pursuit of pain relief and medical treatment" (para.114). Non-pecuniary damages were awarded in the amount of \$110,000, although it should be noted that the plaintiff was only seeking between \$100,000 and \$120,000 (para. 116).

[129] The defendant suggested an appropriate figure for non-pecuniary damages would be \$110,000 to \$145,000, less the mitigation deduction discussed above.

5. Other Authorities

[130] I had regard to the following additional authority:

· *Neufeldt v. Marcellus*, 2020 BCSC 427: As in the present case, the plaintiff was involved in two accidents. The court's assessment of non-pecuniary damages outlines the similarities with the present fact pattern:

[112] The plaintiff at age 40 suffers from chronic neck pain, back pain, headaches, vestibular disturbance, hearing issues, depression and anxiety. His efforts to return to full-time employment after the first accident were limited by chronic pain, frequent headaches and a need to stop regularly during his duties to stretch and walk, even though most patrol duties were carried out behind the wheel of a police cruiser. The plaintiff asserts that the second accident exacerbated the chronic neck and back pain and headaches, adding additional symptoms of mild traumatic brain injury and vestibular injury. There was no pre-accident history of any physical or emotional complaints prior to the second accident. The plaintiff has since considered suicide on at least two occasions.

[113] The injuries have placed significant strain on the plaintiff's marriage and family dynamics. The plaintiff has had to remove himself from various family events, including a Christmas party where lighting and noise were too irritating for him to remain. Among other difficulties, the plaintiff has difficulty reading, using screens, multi-tasking, and balancing. The plaintiff's physical symptoms have also prevented him from participating in sports he used to enjoy, either at or separate from family events.

- [114] The plaintiff cited a number of cases for the purpose of fixing the award of non-pecuniary damages, including *Young v. Anderson*, 2008 BCSC 1306. In that case, Boyd J. awarded \$200,000 to a plaintiff in a single accident having found that the accident caused a constellation of symptoms, the main features of which were in a mild traumatic brain injury with personality changes and cognitive deficits, chronic pain, headaches and depression. The plaintiff was to remain chronically unemployable for the rest of his life.
- [115] The defendants and the third party in this case made a submission that the non-pecuniary damages for both accidents together, although treated divisibly, should be \$190,000.
- [116] Based on the similarity of the quantum of the submissions for the two accidents on the subject of non-pecuniary damages, and based on the variety of difficulties the plaintiff has faced due to his injuries, the non-pecuniary damages awarded in this case are \$200,000.00.

6. Determination of non-pecuniary damages

- [131] Applying the factors identified above, and with guidance from the case law, I find that the appropriate award for non-pecuniary damages is \$180,000. I find the decision in *Neufeldt* to be a helpful guide, despite Mr. Neufeldt's mental condition being somewhat worse, particularly given his suicidal ideation. Further, Mr. Neufeldt did not suffer from pre-existing knee arthritis or depression, which "original position" needs to be accounted for in the present case: *Tchir* at para. 130. Finally, I have considered the need for a small mitigation deduction to account for the failure to take the recommended trigger point injections.

B. Loss of Earnings

- [132] Justice Goepel canvassed the proper assessment of a loss of earning capacity claim in *Grewal v. Naumann*, 2017 BCCA 158. While he dissented in the outcome, the majority agreed with the following summary of the principles (see para. 66):
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

- [133] An assessment of the loss for both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility, and not mere speculation: *Athey* at para. 27; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34-40.
- [134] The legal principles relevant to determining loss of earning capacity were also neatly summarized by Justice Voith in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
1. Past Loss of Earnings
- [135] Ms. Ren calculated that the past loss of earnings would be \$257,316 net of income tax, assuming the court found that the plaintiff was deprived of full-time work at the Sandman Hotel from May 1, 2013 through to the date of trial. This amount did not include tips, which the plaintiff calculated at \$3480. No contingencies were applied to this figure for labour force participation, unemployment, or part time work. It also presumed that the plaintiff would have received the raises Sandman has given since the Accidents.

[136] I find that the appropriate figure under this head of damage is \$200,000. I find that there should be an approximate 30% negative contingency applied to Ms. Ren's calculation to account for the real and substantial possibility of the following events occurring in the pre-trial period, had the plaintiff sought to return to work full-time:

- a) The potential that Dr. Chan would have concluded that she was not yet ready to return to work at the time of the appointment scheduled on the day of the First Accident. I rely on the opinions of Dr. Kendall and Dr. Anton in this regard;
- b) The potential that the plaintiff's progressive knee condition would have caused additional time off up to the date of trial had she returned to full-time work in such a physically demanding position; and
- c) The potential for layoffs, particularly during the COVID-19 period (while accepting that she would likely have been entitled to some offsetting compensation through the Canadian Emergency Response Benefit).

[137] I do not impose a mitigation deduction to this head of damage, as I am unable to find that any trigger point injections would have improved her condition to such an extent that she would have been able to return to work.

2. Loss of Future Earning Capacity

[138] Ms. Ren calculated that the net present value of the earnings of a housekeeper at the Sandman Hotel to age 75 at \$160,350, incorporating deductions for labour force participation, unemployment, and part-time work,. Given the plaintiff's age, the labour force participation rate factor drives a steep deduction given the plaintiff's move into the standard retirement age period.

[139] As a first step, I must determine whether the plaintiff has proven that there is a real and substantial possibility of a future event leading to an income loss.

[140] I conclude that the plaintiff has become "less valuable to [her]self as a person capable of earning income in a competitive labour market": *Perren v. Lalari*, 2010 BCCA 140 at para. 11, citing *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.). The medical evidence suggests that the plaintiff is unlikely to have any residual earning capacity, and the defendants did not argue otherwise.

[141] I apply a 35% positive contingency to Ms. Ren's calculation for the fact that the plaintiff was less likely to withdraw from the labour market or move to part time work than the general Statistics Canada statistics suggest. She is not wealthy, does not have a company pension, and her government pension benefits are restricted by the shorter period of time that she has been in Canada, all of which create an increased incentive for her to continue to work.

[142] On the other hand, I apply a negative contingency of 10% to account for her pre-existing knee problems.

[143] I do not apply a negative contingency for her depression since it appears to have been well-managed prior to the accident.

[144] Hence, I find that an award of \$200,000 is reasonable.

C. Special Damages

[145] The defendants largely accepted the plaintiff's special damages claim of \$18,200.16 except for the following items:

- a) Epson salts;
- b) Humidifier;
- c) Vinegar to clear her CPAP machine;
- d) Distilled water for her CPAP machine;
- e) Cordless phone;
- f) Heel Massager; and
- g) Foot spa.

[146] I agree that those items should be excluded. None were incurred to address conditions I have found were reasonably caused by the Accidents. In final argument, plaintiff's counsel conceded that the plaintiff did not suffer from sleep apnea, and many of these expenses were related to this diagnosis. The defendant's submission that the special damages should be restricted to \$17,778.76 is accepted.[1]

D. Costs of Future Care

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

[141] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.

[142] The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

- [143] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [144] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
- [148] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.
- [149] Applying the recommendations provided by Ms. Sellick, Ms. Ren provided a net present value range for the care recommendations from \$317,112 to \$673,714. The range is based primarily on two factors: (1) whether low or high cost item estimates are used; and (2) whether it can be assumed that Mr. Xue will be able to continue to provide some of the recommended homemaking assistance at no cost.
- [150] In their closing argument, the defendants made a series of critiques based on Ms. Smith's report but did not propose or calculate a specific figure for this head of damage.
- [151] I make the following findings to guide my assessment, largely driven by Ms. Smith's and Dr. Kendall's critiques. Where I make no critique, I accept Ms. Sellick's analysis. In particular, I agree with Ms. Sellick that, given the plaintiff's depression, chronic pain, and language challenges, it will be important to have an occupational therapist "quarterback" in place to ensure that (1) any program is well designed, (2) the various health care practitioners are well coordinated, and (3) the plaintiff sticks to the program. I also agree with Ms. Sellick that, given the extent to which the chronic pain symptoms are now largely driven by psychological impacts, maintaining a healthy budget for psychological services is important. Moving to the critiques:
- a) I see no obvious reason to adopt the high end of Ms. Sellick's cost estimates. A more reasonable approach is to begin the analysis from the rough mid point, or \$495,000. This approach also effectively applies a 50% deduction to the potential that Mr. Xue will not be available to provide assistance, which I find to be a reasonable approach;

- b) While I agree that a kinesiologist should be involved with the plaintiff at the outset, I do not see the necessity for their long term involvement, other than periodic check-ins, after the basic program has been established. Reducing the mid-point net present value of the proposed kinesiology services after the first year in half results in a reduction of about \$64,000[2];
- c) The medication costs must be reduced given that the plaintiff was previously using name-brand anti-depressant medication, and there are cheaper generic equivalents available. Dividing the amount claimed in half results in a deduction of about \$32,000[3];
- d) I find that the extent of passive physiotherapy and massage therapy proposed is excessive, and should be reduced in half (a reduction of about \$29,000 at the midpoint)[4];
- e) Given the plaintiff's concession that she does not have sleep apnea, removal of the net present value of that equipment supports a further reduction of about \$16,000[5].

[152] These findings support a global future care costs assessment of \$354,000.

E. In Trust Claim

[153] As noted, the plaintiff's husband has taken on increased cooking, cleaning, and grocery shopping duties since the Accidents. He also provides support for the plaintiff in the evenings in terms of massage. The plaintiff estimated that he spends about 2.5 hours per day caring for her. This was even higher closer in time to the Accidents.

[154] In *Bystedt v. Hay*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124, the court identified the following factors to be considered when assessing an in-trust claim:

- a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship;
- c) the maximum value of such services is the cost of obtaining the services outside the family;
- d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services;
- f) the family members providing the services need not forego other income; and
- g) there need not be payment for the services rendered.

[155] I find that the plaintiff's husband's efforts meet the required test. He has gone above and beyond what could reasonably be expected of a husband, serving as cook, driver, cleaner, translator, and masseuse for the plaintiff, all in and around his own full-time work. It has clearly taken a toll on him.

[156] The defendant relied on *Heo v. Kennedy*, 2020 BCSC 464, where no award was made to the plaintiff's husband. However, I find that case to be distinguishable given that the plaintiff wife was less disabled than the plaintiff in this case. For example, the plaintiff in *Heo* was able to continue working at least part time, and she underwent successful surgery that reduced her neck pain. Her pain at trial was described as "residual". Furthermore, there was a conflict in the evidence as to whether the husband was actually doing the degree of cleaning and cooking alleged (para.143).

[157] The defendant also relied on *Provost v. Bolton*, 2018 BCSC 1090, where the award was limited to \$10,000. However, the additional services provided in that case were limited, particularly in time, lasting only "the first few months" after the accident (para. 42).

[158] The plaintiff proposed an award of \$43,750 under this head, calculated as follows:

Assuming 100 hours of extra care per year over the past 7 and ½ years and 10 years into the future and multiply that by \$25 per hour equals 100 hours x 17.5 years x \$25 per hour or \$43,750 in trust for Mr. Xue.

[159] I find there is an element of double counting in this analysis with respect to the forward-looking aspect. The cost of future care has already incorporated services required by the plaintiff in the future, but presently provided by the husband. Also, a further discount should be applied to account for the fact that there were two years from December 2014 where the plaintiff's mother was living with them and doing much of the work otherwise performed by Mr. Xue. As such, I find that an award of \$15,000 under this head is more appropriate in the circumstances.

F. Divisibility

[160] The identified defendants argued that the injuries sustained in the two accidents were divisible, and that a separate award of \$10,000 should be made against the defendants for the First Accident.

[161] The BC Court of Appeal in *Bradley v. Groves*, 2010 BCCA 361, held that indivisible injuries are those injuries that cannot be separated from one another or have liability attributed to the constituent causes (at para. 20, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 at paras. 22-25). The Court stated:

- [32] There can be no question that *Athey* requires joint and several liability for indivisible injuries. Once a trial judge has concluded as a fact that an injury is indivisible, then the tortfeasors are jointly liable to the plaintiff. They can still seek apportionment (contribution and indemnity) from each other, but absent contributory negligence, the plaintiff can claim the entire amount from any of them.
- [37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.
- [162] I agree with the plaintiff that the fact that the injuries from the Second Accident were more severe does not mean her injuries from the First Accident are divisible. The Accidents were in close proximity to each other. The plaintiff estimated that she was only about 40% recovered from the First Accident when the Second Accident occurred. I am unable to project when or if she would have returned to her pre-accident state. Further, the core complaint from both Accidents is the same--neck and back pain. That pain, derived from both Accidents, has in turn resulted in the chronic pain condition and the aggravation of her depression. Although the plaintiff suffered certain limited collateral injuries in the Second Accident, they are not sufficiently dominant to allow a division.
- [163] I am supported in this conclusion by the similar approach adopted by Justice Ball in *Neufeldt*:
- [106] The defendants submitted that the plaintiff's injuries from the first accident were fully resolved prior to the second accident because the plaintiff had returned to full-time work.
- [107] This submission is without merit because, while a return to work may be a feature in assessing recovery from injury, it is not a medical diagnosis. The plaintiff also continued to experience pain after his return to work which continued to the date of the second accident and was aggravated thereafter. As noted by the BC Court of Appeal in *Bradley v. Groves*,

2010 BCCA 361 at para. 37, "While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up." I do not find that the injuries to the plaintiff's lower and upper back and neck coupled with ongoing headaches are divisible. The defendants are therefore jointly and severally liable for the plaintiff's neck and back injuries.

[108] The evidence of the plaintiff and the medical evidence related above are clear that there was no complete resolution of the symptoms of the first accident by the time of the second accident. The evidence of Dr. Mansingh and Dr. Cameron supports this conclusion, particularly given the proximity of the injured areas of the plaintiff's body. The plaintiff experienced neck pain and chronic headaches after the first accident. While he developed additional symptoms related to balance, vision, and other areas of mental capacity after the second accident, I do not find it possible to separate the role played by the first accident in these injuries from the role played by the second accident. As such, the injuries from the two accidents are not divisible on the particular facts of this case.

[164] The identified defendants also sought to rely on Jacobs, but their own summary of the case highlights why that court was able to put the injuries into divisible buckets:

He sustained soft tissue injuries to his chest, collarbone, right hip, right leg, and back as a result of the first accident and a right knee injury, mild traumatic brain injury, and multiple fractures and contusions as a result of the second accident.

[165] I note that the defendants did not file claims for contribution as against each other, and hence there is no need to make an apportionment for that purpose.

IX. SUMMARY

[166] In summary, damages are awarded as follows:

General Damages

\$180,000.00

Past Wage Loss

\$200,000.00

Future Loss of Capacity

\$200,000.00

In Trust Claim

\$15,000.00

Future Cost of Care

\$354,000.00

Special Damages

\$17,778.76

TOTAL:

\$966,778.76

X. COSTS, TAXES, INTEREST AND S.83 OF THE INSURANCE (VEHICLE) ACT

[167] I leave it to the parties to consider the results of this judgment and address any residual costs, tax, and interest implications, or any deductions required by s.83 of the Insurance (Vehicle) Act. If they are unable to agree, they are at liberty to make further written submissions, with the plaintiff filing her materials and submissions on issues other than s.83 one month from today, the defendants responding to same within one month thereafter, and the plaintiff replying 14 days after that. With respect to s. 83, the schedule will be the same, but with the defendants providing their material first. If I am unable to make a decision based on the written materials, I will advise the parties and a date for oral argument will be arranged.

"The Honourable Mr. Justice Branch"

[1] I note that the defendants did not argue that this head of damages should be reduced by any failure to mitigate.

[2] $(68183+186399)/2 \times 50\%=63,646$

[3] $(2004+61823) \times 50\%=31,914$

[4] $(25021+20062+50042+20062)/2 \times 50\%=28,797$

[5] $3456+12834=16,290$

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