

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Murray v. Doe*,
2023 BCSC 918

Date: 20230601
Docket: M199371
Registry: Vancouver

Between:

Tracy Lee Murray

Plaintiff

And

**John Doe and Enterprise Rent-a-Car Canada Company/
La Compagnie de Location D'Autos Enterprise Canada**

Defendants

Corrected Judgment: The front page of the judgment was corrected on
June 5, 2023

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiff: M. Zanic

Counsel for the Defendants: A. Rowshanzamir
E. Bowes

Place and Dates of Trial: Vancouver, B.C.
April 17, 19, 20 and 21, 2023

Place and Date of Judgment: Vancouver, B.C.
June 1, 2023

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Introduction

[1] On September 17, 2017, the plaintiff, Tracy Murray, was sitting in her parked Jeep Wrangler on West Pender Street in Vancouver when the defendant, John Doe (who has now been identified as Reza Dindarlo), backed a rental van into Ms. Murray’s Jeep. Ms. Murray was jolted by the accident and as a result suffers from chronic neck pain, shoulder pain and headaches that have not improved in the five-and-a-half years since the accident. She also says she suffers from a depressed mood because of these injuries and the limitations they have placed on her lifestyle. She claims non-pecuniary damages, damages for cost of future care, and special damages. A claim for loss of earning capacity was abandoned at the start of the trial.

[2] The defendants do not deny that Ms. Murray was injured in the accident or that she continues to experience symptoms of the injuries, including chronic pain in her neck that extends to her right shoulder and headaches. The only disagreement is the extent to which these injuries impede Ms. Murray’s functioning.

[3] With respect to Ms. Murray’s depressed mood, the defendants say a lack of medical evidence and of pre-accident work-related anxiety mean that she has not established this condition was caused by the accident. The defendants also say that other conditions, including a torn meniscus in 2017, a broken wrist in 2022, and osteoarthritis in the hip have at least contributed to any limitations on Ms. Murray’s functioning and her depressed mood.

Facts

[4] Ms. Murray is 61 years old. She was 56 at the time of the accident and was working full time as a sales representative for a building supply company in Vancouver.

Before the Accident

[5] Ms. Murray grew up on a family farm in Biggar, Saskatchewan. She attended school there and worked some physical chores on the farm. She left school about a year short of graduation to marry her former husband. They moved to nearby

Shellbrook, Saskatchewan where her husband ran the funeral home. They lived in a big Victorian house and had three boys in the course of three years (1981, 1982, and 1983). Ms. Murray took an interior design course and then did some renovation work on the Victorian house. This ignited a keen interest in renovation and interior design work that became both a hobby and a small business.

[6] In 1987 the family moved to Richmond, B.C. where her husband worked at another funeral home, eventually coming to manage it. They lived in a residence inside the funeral home which Ms. Murray renovated by changing the floors and moldings. She finished her grade 12 and started working, first by filling in at a café in Steveston and then at Windsor Plywood doing inside sales, deliveries, and tasks such as running the forklift. After three years, the family bought a townhouse in the Fleetwood neighbourhood of Surrey and again Ms. Murray did renovations on the new home, including a new bedroom and an office in the basement, and some work on the bathrooms.

[7] After working about seven years at Windsor Plywood, Ms. Murray moved to McKillan Distribution where she worked as a purchaser. She also started her own small renovation business called Lee Ergonomic Design. She did renovation work at a few different funeral homes around Surrey and Delta and at a few residences.

[8] Around 1992 she started working with Dick's Lumber as an outside sales representative. She visited worksites to take measurements for things like doors and moldings and tried to make sales during these visits.

[9] Socially, she was always active with friends, neighbours in the townhouse complex, co-workers, and visitors from Saskatchewan. She took camping trips with her family and road trips to Saskatchewan to visit her parents. Physically, she took up running after her first son was born, but this was not a year-round activity as she does not like running in the summer heat. However, she did some physical exercise every day, including walking or going to the gym. She often biked to work when she lived in Richmond. She took up golfing with her co-workers at Dick's Lumber and played once or twice a month before the accident. She said in her direct evidence

that she typically played 18 holes but in cross-examination and in her examination for discovery she explained this was during company tournaments and she otherwise mostly played only nine holes.

[10] In the early 2000s her marriage broke down and she divorced in 2001. She could not afford to keep the townhouse so she moved to a condominium with her sons and worked part-time at other jobs in the evenings to supplement her income. In 2008, she left Dick's Lumber to work at Country Lumber. Around the same time she bought a house in Cloverdale. In 2010 she was laid off from Country Lumber but found another sales job at General Contractor Supply. In 2010 she sold her Cloverdale home and bought a townhome a few blocks away. By this time her sons were grown and had moved out or were ready to do so. In 2015 she changed jobs, moving to Griff Lumber and back to the kind of work she had done at Dick's.

[11] Throughout this time Ms. Murray was in good health. She ran or walked with her dogs and played golf. She travelled to Mexico sometimes and often to Las Vegas and back to Saskatchewan.

[12] In 2016 she was rear ended while driving over the Annacis Island Bridge. She suffered a sore neck and back but these injuries resolved themselves with physiotherapy and acupuncture.

The Accident

[13] The accident occurred when Mr. Dindario backed a delivery van into Ms. Murray's Jeep Wrangler which was parked on West Pender Street in Vancouver. Ms. Murray was sitting in the car with her seatbelt fastened. She was entering her credit card information into a parking app on her phone so she had head down looking at the phone. She did not see the van coming towards her and could not say how fast it was going but said the impact was hard enough to knock things off the console of the Jeep. She said it was "amazing how hard he hit me." The metal frame of the front bumper of the Jeep was sufficiently damaged by the impact that it had to be replaced.

[14] Following the accident, Ms. Murray drove home after having lunch with her son and his fiancé. Her neck and shoulder were sore so she went to the doctor the next day. The doctor did not prescribe anything but Ms. Murray said she usually does not take medications.

[15] In the days that followed, Ms. Murray's neck and right shoulder became more painful and she began having daily headaches. She said her neck felt like there was a knife in it and she had a tingling in her skin at the base of her neck – "like bugs crawling under my skin". Her right shoulder pain worsened and interfered with her sleep because she typically sleeps on her right side. Her sleep in the first week after the accident was not good so she took some sleeping pills that had been prescribed to her for insomnia before the accident. She was having daily headaches and described that pain as "atrocious".

[16] Since her neck was getting worse, she started seeing a chiropractor and got a little relief from this. She also attended physiotherapy but that did not help.

After the Accident

[17] Ms. Murray continued to work full time after the accident. She found it painful to sit at a computer but did not take any time off.

[18] Her neck and shoulder pain continued, as did her daily headaches. She had to give up golfing because it was painful to swing a club when it contacted the ground (making a divot). She eventually sold her clubs.

[19] She stopped running and going to the gym because the impact would jar her head and agitate her headaches. However, she continued to walk and did some home exercises, which the defendants' expert physiatrist described as reasonable. She had to stop her renovation work because activities like pulling up floors was painful. I gather by this point that renovation was mostly a hobby as she has not pursued a loss of earnings claim in respect of any renovation business. However, I accept it was an important hobby that gave her much personal satisfaction. She continued to do her own housework with some adjustment, like using her left arm to

vacuum, and she experienced pain as she did that work. She continued to tend to a small garden in her townhouse but because of the pain she did not work hard at it.

[20] She found driving stressful after the accident and tensed up when driving longer distances. She found her hands cramped up because she kept a firm clasp on the steering wheel which she attributes to driving anxiety.

[21] Starting in 2018 or 2019, Ms. Murray began experiencing a depressed mood. She would break into tears for no apparent reason. She struggled with this because she had not previously experienced psychological or mood problems. She described herself a “hardass” before the accident but by 2019 she could not watch a “silly show on TV without crying.” She was – and still is – deeply uncomfortable talking about her mood challenges as she considers it a sign of weakness. She has not discussed it with her doctors, although she did describe it to Dr. Harpreet Sangha, a consulting psychiatrist who gave expert evidence at trial. She socializes much less than she did before the accident because of her depressed mood. She says she struggles with controlling her emotions and is afraid to expose them to her friends.

[22] Ms. Murray’s condition did not improve in the years after the accident despite seeking treatment for the physical conditions. Prior to the accident, she had no difficulties with her neck and shoulder and she only occasionally experienced headaches. She had no anxiety driving or depressed mood before the accident.

[23] In the spring of 2017, shortly before the accident, Ms. Murray tore her meniscus when stepping off a curb while in Palm Springs. She used crutches off and on over the next few months and finally had surgery in February or March 2018. She missed only a day of work after the surgery and said her knee was back to normal within 6 or 8 weeks. Although she did not mention it in her evidence, I infer this knee condition affected her ability to exercise, particularly running, in the months before and after the accident.

[24] In September 2018 Ms. Murray quit her job at Griff Building Supplies because her pay was not on par with male employees doing the same type of work. In

December 2018, she moved back to Biggar, Saskatchewan so she could look after her aging parents. She rented a bungalow which she bought a few months later. The bungalow needed a deep clean and the floors had to be replaced. Ms. Murray said she would ordinarily have done this work herself but was unable to do so because of her accident-related pain. She hired a friend to do the cleaning and paid her brother to do the renovation work.

[25] After moving back to Saskatchewan, Ms. Murray took a job with Saskatchewan Housing where she does some light maintenance work in social housing buildings in Biggar. She also works a small amount of time at Prairie Branches assisting mentally disabled residents.

[26] In December 2021, Ms. Murray slipped on some ice while at work and broke her right wrist. She had it in a cast for at least two months (the first cast was removed but another had to be put on) and then a brace for some weeks after that. She missed work and collected Workers Compensation benefits but started a graduated return to work after the cast came off. The broken wrist has healed and does not interfere with her functioning.

[27] Today, Ms. Murray continues to experience the same pain in her neck and right shoulder. Her pain was particularly acute between December 2021 and early summer 2022 but she has also had some periods when she was feeling fairly good – especially in 2018 when doing kinesiology treatments. The intensity is not constant – it comes and goes – but some level of pain is always present. She also has daily headaches that worsen as the day progresses. She takes Tylenol and Aleve for the headaches and goes to bed when she can no longer bear the pain. She continues to struggle with sleep at night due to pain on her right side that causes her to wake up several times in the night.

[28] Her mood continues to be poor. Her mother, Ruby Gamble, testified that she is “happier” since the accident and her uncle, Paul Leschinski, said he had not observed any change in her personality since the accident, although both have observed her to be in pain. However, her cousin Chad Leschinski has observed her

to be in pain and said this has “taken the wind out of her sail”. He stated that some amount of depression is obvious and her every day mood is often somber.

[29] I find that Ms. Murray’s complaints of a depressed mood are genuine. I accept her evidence that she is not one who is comfortable showing her emotions to others yet she became authentically and involuntarily emotional in describing her mood while giving evidence. Apart from some minor inconsistencies, such as the extent that she golfed before the accident, and some unremarkable memory lapses as to dates, I found Ms. Murray to be a credible and sincere witness. I do not place much weight on Ms. Gamble’s evidence that Ms. Murray is happier after the accident as that is not consistent with the evidence that I accept from Ms. Murray which is corroborated by Chad Leschinski’s observations. Given that Ms. Murray is a care-taker for her elderly mother, it is probable that she is careful not show her depressed mood to her mother but is less guarded in this respect when interacting with Chad Leschinski.

[30] Apart from the Tylenol and Aleve, Ms. Murray is not taking medications. She has not sought and is not receiving treatment for her mood difficulties. She does not want to take anti-anxiety medication or antidepressants. In fact, she is generally resistant to prescription medication which she views as a measure of last resort.

[31] She has resumed golfing, playing nine holes with her friend Amy Schoeler about once a week. She has modified her play by using a tee for all her shots so her club won’t strike the ground. She continues to walk and has started biking with an electric bike. She also does home exercises but has not returned to the gym.

[32] She struggles with housework but manages to get it done with some pain. Vacuuming in particular is difficult. She is not able to do the kind of renovation work she did before the accident. Her uncle and cousin help her with snow shoveling and mowing the lawn.

[33] Ms. Murray carries about her a ruggedness that is likely rooted in her background growing up on a farm. She likes to do things herself and takes pride in

being able to do physical work, especially home renovations. I find as a fact that her accident injuries impair her ability to do this kind of work. As discussed below, I accept that she remains physically capable of doing these activities but experiences pain when she does.

[34] Ms. Murray's dad lived to 93. Her mother is now 84 and still lives on the farm. At 61, Ms. Murray considers herself young and believes she should be capable of doing the kind of physical work she did before the accident. She is scared about the future because she has always envisioned herself as "the old lady still shovelling snow when I get old" but she fears she will be unable to be that person because of her continuing pain. She said she has a "bucket list" that includes buying and renovating a house but fears she will be unable to do that.

Expert Evidence

[35] Ms. Murray called Dr. Harpreet Sangha, a physiatrist, as her only expert. The defence called Dr. Hernish Acharya, also a physiatrist, as their only expert. Both experts agree that Ms. Murray is suffering from chronic pain in her shoulder and neck and both attribute this to the accident. They also attribute her headaches to the accident, noting this is common with chronic neck pain. Given the passage of time and the continuation of the pain, neither physiatrist expects the pain to resolve itself in the future.

[36] The main difference between the experts is that Dr. Acharya believes Ms. Murray is physically capable of doing all the things she did pre-accident, but he readily acknowledges that she will experience pain when doing so. He said her functionality is really a matter of how much pain she is prepared to endure while doing the things she wants to do.

[37] Dr. Sagha opines that Ms. Murray is suffering from chronic regional myofascial pain syndrome, most predominantly in the right upper muscle fibres of the back of the neck and shoulders, right shoulder post-traumatic impingement, and cervicogenic headaches (i.e. headaches that start in the neck). He opines that these

physical injuries are consistent with the mechanism of the accident and the forces involved.

[38] He also notes that she has issues with mood related to anxiety about how her pain impacts her ability to function and depressive symptoms relating to chronic pain. He suggests she should have a psychological assessment and he would defer to a mental health expert for any diagnosis. However, he observes from a psychiatrist's perspective that psycho-emotional distress fuels chronic pain and Ms. Murray would likely benefit from appropriate Cognitive Behavioral Treatment and mindfulness techniques to help manage her pain and headaches. As noted, Ms. Murray is not comfortable pursuing this kind of treatment.

[39] Dr. Sagha also notes Ms. Murray suffers from disordered sleep. He acknowledges she had some pre-accident insomnia but does not comment on how this might contribute to her present condition.

[40] Dr. Acharya states that Ms. Murray's symptoms are in keeping with a whiplash associated disorder consistent with the mechanism of the accident. His diagnosis is "chronic nonspecific cervical region pain, possibly facetogenic". He states this is related to the accident. He notes from his review of Ms. Murray's medical records that she has "no significant past medical history" and that her injuries from the 2016 accident had resolved by the time of the 2017 accident.

[41] Dr. Acharya said the treatments Ms. Murray received for her physical injuries were reasonable. He did not consider it to be significant that she has not continued with physiotherapy or related treatments because the objective for those types of treatments is to teach the patient to do the exercises on her own. Dr. Acharya says Ms. Murray is doing that and doing so reasonably.

[42] As I have said, the main difference between the experts is with respect to Ms. Murray's ability to function with daily activities. Dr. Sangha states that given the continuation of her symptoms six years after the accident, "resolution of her underlying impairment is unlikely". He opines that her impairments will limit her

functioning with respect to prolonged static postures, cervicothoracic spine mobility, and activities that place strain on the neck and upper back such as lifting, bending, pushing and pulling. He states that she will “need to pace and modify the way she performs activities” and “delegate more arduous tasks to others if she is to try to maintain reasonable symptom control.” He opines that her condition restricts her employment options in that she is best suited to jobs that are sedentary to light with the ability to alter her posture. He says she will be unable to take on heavier physical demands due to her injuries. He does not see this as changing and opines her functioning in this respect should be considered permanently impaired.

[43] Dr. Acharya opines that Ms. Murray “should be able to engage in all activities including the vacuuming which is the only functional intolerance that she is having at this time.” He states:

There is no clear evidence for any medical restriction to be imposed nor any expected physiological capacity limitation. It is reasonable to encourage Ms. Murray to reengage with all activities of her choosing at any time of her choosing be it household, vocational, or recreational.

[44] As noted, though, Dr. Acharya acknowledged that Ms. Murray will experience pain if she does reengage in her activities. It is a question of how much pain she can tolerate.

Non-Pecuniary Damages

[45] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. A common but non-exhaustive list of factors typically considered include the plaintiff’s age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; loss or impairment of family, marital, or social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff’s stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

[46] I find that Ms. Murray is experiencing chronic pain in her neck and shoulder and daily headaches that relate to the neck pain and, as the experts agree, the accident was the cause of these chronic conditions. Ms. Murray did not suffer these

problems chronically before the accident. She had experienced some neck and back pain following her 2016 accident but there was no dispute on the medical evidence that this was fully resolved by the time of the 2017 accident. I find it significant that Dr. Acharya, the defendants' expert physiatrist, did not consider these to be factors in Ms. Murray's present condition.

[47] I accept that Ms. Murray's neck and especially her right shoulder pain makes sleep difficult. I accept Dr. Bangha's evidence that sleep challenges are commonly associated with these types of myofascial injuries. However, I also find Ms. Murray struggled with insomnia before the accident. I accept the shoulder pain at night has made her sleep problems worse but I consider that she suffered and probably continues to suffer from some anxiety-based insomnia that is unrelated to the accident.

[48] A defendant is liable for injuries that it caused and need not put the plaintiff in a better position than she was prior to the accident. The defendant need not compensate a plaintiff for the effects of a pre-existing conditions which the plaintiff would have experienced anyway: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35. I must therefore consider Ms. Murray's pre-accident sleep difficulties and compensate her only for the sleep challenges caused by the accident.

[49] Here, I find that Ms. Murray would have experienced some amount of insomnia regardless of the accident but I find the accident has made the problem worse in that she now wakes up several times during the night due to her discomfort. This is different in nature the kind of stress-related insomnia she had before the accident.

[50] The defendants argue that Ms. Murray's torn meniscus and her broken wrist have likely contributed to her overall diminished physical condition and her depressed mood. They point out that the meniscus gave her problems for at least a year or more and the broken wrist caused her to miss several months of work. This theory of the ongoing effects of these injuries was put to Dr. Sangha in cross-examination but he did not agree with it. He noted that both the knee and wrist

injuries were temporary and resolved fully. They do not cause the ongoing daily pain or discomfort that the accident injuries do. Dr. Acharya's evidence was also consistent with this.

[51] With respect to Ms. Murray's depressed mood, I accept that it is largely attributable to the accident. She had not experienced a depressed mood of this nature before the accident and it began to emerge in its present form as her neck and shoulder pain became chronic. Dr. Sangha indicated depressed mood is commonly linked with chronic pain.

[52] That said, Ms. Murray was certainly not anxiety-free pre-accident and she was prescribed Zopiclone before the accident to help her sleep. She said her pre-accident sleep challenges were related to work anxiety and other stresses in life.

[53] The difficulty I have with Ms. Murray's post-accident depressed mood is the lack of medical evidence that addresses it. While a medical diagnosis is not required for a court to find a plaintiff is suffering from a mental affliction relating to the accident (*Saadati v. Moorhead*, 2017 SCC 28), it is difficult to understand the full cause and extent of the condition without some assistance from a medical professional. Because Ms. Murray is not comfortable speaking about her mental health, including with her own doctor, I am not able to assess the extent to which her current depressed mood is connected to her pain or to pre-existing features of her personality. Nor am I able to determine the extent which it could be managed or improved with some treatment, which Ms. Murray has declined to pursue.

[54] Thus, while I find that Ms. Murray is experiencing a depressed mood and I accept that it has at least some connection to the chronic pain she is experiencing in her neck and shoulder and her headaches, the evidence only permits me to find it as a relatively minor component of her pain, suffering and loss of enjoyment of life arising from the accident. As stated in *Saadati* at para. 38:

[38] ... In assessing whether the claimant has succeeded, it will often be important to consider, for example, how seriously the claimant's cognitive functions and participation in daily activities were impaired, the length of such impairment and the nature and effect of any treatment (*Mulheron*, at p. 109).

To the extent that claimants do not adduce relevant expert evidence to assist triers of fact in applying these and any other relevant considerations, they run a risk of being found to have fallen short...

[55] For these reasons, I would make a relatively modest accommodation for Ms. Murray's depressed mood in this case. I note, however, that if I had made this a larger component of her non-pecuniary damages, a substantial discount would have been in order for her lack of mitigation for this condition, having not even discussed it with her doctor let alone sought out treatment.

[56] Ms. Murray has not advanced a separate claim for loss of housekeeping capacity but raises it as part of her non-pecuniary damages claim. She continues to do her own housework with some accommodation (vacuuming with her left arm, for example) and experiences some pain in doing so. She has assistance from family doing heavier outdoor tasks such as snow shovelling.

[57] I find that Ms. Murray is capable of doing many of the things she did prior to the accident, including walking, golfing (with some adaptation), riding her bike (though now an electric bike) without difficulty. I accept that she is unable to run or do home renovation work without experiencing pain. I accept Dr. Acharya's opinion that her condition does not make her physically incapable of these activities. The medical evidence respecting her range of movements satisfy me that she is physically capable of doing these. The problem, as Dr. Acharya willingly acknowledged, is the extent to which she is prepared to tolerate pain while doing so. The fact she cannot do these same activities without suffering pain is certainly compensable. It is evident that the pain she experiences while attempting some of these activities – like running or home renovations – is enough for her to find no more enjoyment in these activities.

[58] Dr. Acharya testified it would be best for a medical professional to have a frank discussion with Ms. Murray about her physical capabilities and how she might return to her pre-accident activities while managing her pain. He refers to this as "hurt vs. harm" counselling. Ms. Murray has testified that she is not doing home renovation work because of her pain and she worries she will not be able to do in the

future. However, she has not resigned herself to never picking up her tools again and she may well benefit from the kind of advice Dr. Acharya suggests.

[59] In short, I find that Ms. Murray, though physically capable of doing the activities she would like, cannot find enjoyment in them because of the pain she experiences while doing so. There is some prospect of her returning to some of those activities but she will have to experience and manage pain while doing so. As I have said, this is compensable through an award of non-pecuniary damages.

[60] Ms. Murray seeks an award of non-pecuniary damages of \$90,000. She cites *Javan Parast v. Curry*, 2020 BCSC 877; *Friesen v. Iwanaka*, 2022 BCSC 1072; *Lewis v. Worth*, 2020 BCSC 57 and *Neil v. Martin*, 2021 BCSC 1727 as indicative of the range of non-pecuniary damages for a person of her age and with her type of injuries. The damage awards in these cases range (in 2023 values) from \$85,000 to \$120,000. The cases at the higher end of this range involve more severe injuries and in all of them depression or mood changes and their impacts are more clearly comprehensible with medical expert evidence or evidence of treatment and its effects. That evidence is not present in this case.

[61] Ms. Murray – or at least her counsel – also argues that an assessment of non-pecuniary damages should consider the special context of the accident injuries interfering with the enjoyment of her “golden years”. Counsel cites *Fata v. Heinonen*, 2010 BCSC 385 where Griffin J. (as she then was) said this of a 63-year-old plaintiff (59 at the time of the accident):

[88] The retirement years are special years for they are at a time in a person’s life when he realizes his own mortality. When someone who has always been physically active loses his physical function in these years, the enjoyment of retirement can be severely diminished, with less opportunity to replace these activities with other interests in life. Further, what may be a small loss of function to a younger person who is active in many other ways may be a larger loss to an older person whose activities are already constrained by age. The impact an injury can have on someone who is elderly was recognized in *Giles v. Canada (Attorney General)*, [1994] B.C.J. No. 3212 (S.C.), rev’d on other grounds (1996), 21 B.C.L.R. (3d) 190 (C.A.).

[62] I am not sure Ms. Murray would accept her counsel's characterization of her being in her "golden years", although she is in the same age range as the plaintiff in *Fata*. I accept the principle in *Fata* is a consideration in this case, but I note that Ms. Murray has continued with many of her pre-accident activities, albeit with some modification (golfing with a tee for every shot and riding an electric bicycle). However, I accept her evidence that she is genuinely fearful of not being able to grow old in the way she has always envisioned and this fear is not unreasonable given that her pain is chronic.

[63] The defendants acknowledge Ms. Murray's injuries and her entitlement to non-pecuniary damages for them. They suggest Ms. Murray's non-pecuniary damages should be assessed in the range of \$30,000 to \$60,000. They rely on *Parker v. Martin*, 2017 BCSC 446 (appeal dismissed: 2018 BCCA 488); *Kelly v. Kotz*, 2014 BCSC 244; and *Mothe v. Silva*, 2015 BCSC 140.

[64] These cases are somewhat dated so the range of damages they disclose is not in current values. The injuries described in *Parker* seem less debilitating than Ms. Murray's injuries and there had been some resolution of them. *Kelly v. Kotz* has some strong parallels to this case although it is somewhat dated so its award of \$45,000 perhaps too low as a comparator. The court there also found the plaintiff had little or no loss of housekeeping capacity whereas I have found some limitations for Ms. Murray in this respect.

[65] Non-pecuniary damages should be fair to all parties: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Use of comparator cases is one aspect of measuring fairness but these serve only as a rough guide and each case must turn on its unique facts: *Trites* at para. 189. The assessment is necessarily influenced by each plaintiff's own experiences in dealing with the injuries and their consequences: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[66] The defendants argue that Ms. Murray is still able to do her pre-accident activities and the overall award should consider other injuries she has suffered, including her broken wrist and torn meniscus. They also argue that the fact she

missed no work because of the accident or the ongoing effect of the injuries suggests the injuries are not especially severe.

[67] With regard to the torn meniscus and broken wrist, these were temporary injuries that have fully healed. To the extent they limited Ms. Murray's activities or caused her pain during the time those injuries were extant, I take that into account, recognizing that only the accident-related injuries are compensable. However, the torn meniscus and broken wrist only impacted Ms. Murray's condition and functioning for relatively short periods of time compared to the six years she has lived with the chronic pain from the accident injuries and the fact she will continue to live with the accident-related pain indefinitely.

[68] I place little significance on the fact Ms. Murray missed no work as a result of the accident injuries. Ms. Murray is obviously a stoic woman who takes pride in her abilities and her work ethic. I believe that others who suffer the same type of injuries could reasonably have been expected to miss some work as a result. However, it is not in Ms. Murray's nature to do so.

[69] Having regard to Ms. Murray's circumstances, the *Stapley* factors, and using the cited authorities as a rough guide, I find that **\$80,000** is an appropriate award for non-pecuniary damages.

Contingency Discounts and Mitigation

[70] The defendants argue there should be a contingency discount to Ms. Murray's non-pecuniary damages claim on the basis that she suffered pain and loss of enjoyment of life from her torn meniscus and broken wrist. I do not accept this. Both experts, including the defendants', confirmed that Ms. Murray fully healed from both injuries and neither is expected to cause problems for her in the future. There is no medical evidence of a real and substantial possibility that they will cause her problems in the future. In fact, the medical opinion is that they will not. I see no basis for a contingency discount to the non-pecuniary award for these items.

[71] With respect to the osteoarthritis in Ms. Murray's hip, there is no medical evidence as to the severity of this or that it will, as a real and substantial possibility or otherwise, become so severe as to interfere with Ms. Murray's activities or enjoyment of life. Again, there is no evidentiary basis for a contingency discount for that item.

[72] The defendants also argue there should be a discount for Ms. Murray's failure to take steps to mitigate her depressed mood. As I have said earlier, though, I have not made her mood a significant part of the non-pecuniary damages for the very reason that she has not sought treatment for it. This impaired the court's ability to assess the extent of the problem or how it might be managed or treated with therapy. A further discount is unnecessary.

Cost of Future Care

[73] Ms. Murray seeks an award of \$3,000 for cost of future care. She has not specified a list of items needed for her future care but points to Dr. Sangha's recommendation for Nortriptyline or Amitriptyline to manage her myofascial pain symptoms. Given her reticence for prescription medications, it is improbable that Ms. Murray will take these regularly.

[74] Dr. Sangha also suggests passive treatments, such as physiotherapy, chiropractic treatments, or massage therapy when her conditions flare-up, which they may be expected to do from time to time. Given Ms. Murray's past efforts to obtain these treatments, I accept there is a reasonable likelihood that she would do so again in the future in case of a flare-up. Counsel argues the cost of those treatments as set out in the evidence of Ms. Murray's special damages claim provides sufficient guidance for a suitable award.

[75] The defendants acknowledge that Ms. Murray is entitled to some amount for cost of future care, despite the fact the precise treatments proposed and their costs are not outlined in a cost of future care report. In written submissions delivered concurrently with Ms. Murray's submissions, the defendants suggested that cost of future care should not exceed \$5,000.

[76] Given that Ms. Murray is only seeking \$3,000 and the defendants say they should not exceed \$5,000, it appears there is agreement on \$3,000. Counsel did not take issue with that suggestion when it was put them in closing argument. I therefore award Ms. Murray \$3,000 for cost of future care.

Special Damages

[77] Ms. Murray claims special damages of \$6,517.38. The only disputed elements of her special damages claim are \$459.36 for mileage while pursuing treatments, a \$400 bill for housecleaning in December 2018, and \$1,976.91 in labour costs for installing flooring and drywall and painting in January 2019. Both of these relate to Ms. Murray's new home in Biggar when she moved there in December 2018.

[78] The defendants state that they "take no position on the mileage amounts sought ... as same falls outside the scope of the trial evidence." I am not sure what it meant by this submission. Ms. Murray did not speak to the mileage claim specifically in her testimony but it is particularized in calculations, with maps and driving distances, in documents that were admitted into evidence by consent. I find the claim is adequately explained and made out.

[79] The deep cleaning of the Biggar house and some of the renovation work was needed because of the state in which the previous owner had left it. He was an elderly gentleman who lived alone and struggled with incontinence. Ms. Murray said a very thorough and deep clean of the house was needed before she could move in and the floors had to be replaced. The claim for drywall and painting work related to renovation work that was needed on the home. Ms. Murray paid her brother to do this work. Her claim is for labour only and not materials.

[80] Were it not for her accident injuries, Ms. Murray would have done all of this work herself but was unable to do so without significant pain. I accept her evidence on this point. As I have said, she takes particular pride in being skilled at home renovations and I find she would much rather have done the work herself and would

have done so if she felt she could manage the pain. I also accept she would have done the deep clean of the house had she been able to without significant pain.

[81] The defendants argue the fact Ms. Murray makes no specific claim for loss of housekeeping on an ongoing basis suggests these one-time costs are unnecessary. I do not agree. She is able to cope with daily upkeep with her home chores, including making accommodations and working through pain when vacuuming, but this one-time deep cleaning was far more intensive than the regular housekeeping she maintains. I accept both of these amounts are reasonable and would not have been incurred but for the accident.

[82] I therefore award Ms. Murray \$6,517.38 in Special Damages.

Conclusion

[83] I award the following damages to Ms. Murray:

Non-Pecuniary Damages	\$80,000.00
Future Care	\$3,000.00
Special Damages	\$6,517.38
Total Loss	\$89, 517.38

[84] In my view, Ms. Murray has been substantially successful and I would be inclined to award her costs. However, if the parties are unable to resolve the matter or if further submissions are required, they may submit a request to make submissions through Supreme Court Scheduling.

“Kirchner J.”