

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Charters v. Jordan*,
2023 BCSC 954

Date: 20230605
Docket: M200182
Registry: Vancouver

Between:

Jolene-Ann Charters

Plaintiff

And

Gary Lewis Jordan and Phung Nhi Luong

Defendants

Before: The Honourable Justice Basran

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.
January 9–13, 16–17, 2023

Place and Date of Judgment:

Vancouver, B.C.
June 5, 2023

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Introduction

[1] On January 12, 2019, Ms. Jolene-Ann Charters, the plaintiff, was riding her bicycle towards Science World in Vancouver, BC, when she struck the door of a parked car that suddenly opened (the “Accident”). Mr. Gary Lewis Jordan was the driver of the vehicle and it was owned by Mr. Phung Nhi Luong. They are the defendants in this proceeding and they admit liability for the Accident.

[2] Prior to the Accident, Ms. Charters was in good physical, mental, and emotional health. She worked in a bakery and regularly participated in a range of outdoor activities. The ongoing injury caused by the Accident is right wrist pain. She also suffered some mild right hip and right knee discomfort.

[3] Ms. Charters seeks damages for pain and suffering, past and future loss of income-earning capacity, cost of future care, and special damages.

[4] For the reasons that follow, I have concluded that Ms. Charters is entitled to:

| | |
|--|------------------------|
| a) Non-pecuniary damages: | \$70,000 |
| b) Past loss of income-earning capacity: | \$5,000 |
| c) Cost of future care: | \$2,500 |
| d) Special damages: | \$1,150 |
| Total: | <u>\$78,650</u> |

[5] Ms. Charters is not entitled to damages in respect of future loss of income-earning capacity.

Non-Pecuniary Damages

Relevant Legal Principles

[6] Ms. Charters must prove that the Accident caused her injuries. She need not establish that the admitted negligence of the defendants was the sole cause of her injuries, but she must demonstrate a substantial connection between the Accident and her injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30.

- [7] Some of the relevant factors in assessing non-pecuniary damages include:
- a) the plaintiff's age;
 - b) nature of the injury;
 - c) severity and duration of the pain;
 - d) disability;
 - e) emotional suffering;
 - f) loss or impairment of life;
 - 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 penalize the plaintiff).

See *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46.

The Plaintiff's Position on Non-Pecuniary Damages

[8] Ms. Charters asserts that the Accident caused injuries to her right wrist, right hip, and knee. Her most notable injury is to her right wrist. She experiences weekly right wrist symptoms, including aches and occasional sharp pains. This injury requires her to slightly modify work tasks, such as the manner in which she carries and handles trays. While painting houses, she experiences periodic soreness in her right wrist. Her right wrist symptoms plateaued within six months of the Accident and have remained in their current state since then.

[9] Prior to the Accident, she did not have any hip or knee problems. However, within one week of the Accident, she felt pain and discomfort in her right hip. She suggests that the Accident caused a previously asymptomatic hip condition to become symptomatic.

[10] On the quantum of non-pecuniary damages, Ms. Charters relies on two cases and submits that the Court should award her \$85,000, adjusted for inflation and other increases, for her pain and suffering caused by the Accident:

- a) *Rickett v. Sangra*, 2019 BCSC 167: \$80,000; and
- b) *Jackson v. Jeffries*, 2012 BCSC 814: \$75,000.

The Defendants' Position on Non-Pecuniary Damages

[11] The defendants highlight that Ms. Charters' physical symptoms have significantly improved and she has essentially returned to her pre-Accident level of functioning with occasional discomfort. They dispute the extent to which Ms. Charters continues to suffer from her injuries. Specifically, they submit that Ms. Charters' hip and knee injuries were not caused by the Accident. They argue that her right wrist injury is her primary injury but she would have experienced some of these symptoms absent the Accident because of a pre-existing condition.

[12] Regarding the quantum of non-pecuniary damages, the defendants rely on the following cases and submit that the Court should award her \$50,000 for the pain and suffering caused by the Accident:

- a) *LaFleur v. Kesterke*, 2020 BCSC 1859: \$35,000;
- b) *Pringle v. Pringle*, 2020 BCSC 75: \$50,000;
- c) *Bagri v. Heran*, 2020 BCSC 2002: \$50,000;
- d) *Birrer v. Thomas*, 2019 BCSC 1642: \$55,000; and
- e) *Martin v. Dardengo*, 2016 BCSC 1371: \$60,000.

Findings of Fact on Non-Pecuniary Damages

[13] Ms. Charters was born in 1993 and she is 29 years old. She was 25 when the Accident occurred. At trial, she testified in a clear, coherent, and forthright manner. She made reasonable admissions and her evidence was internally and externally consistent. I have no concerns with the credibility of Ms. Charters' evidence nor with the testimony of the other witnesses who testified at trial.

Ms. Charters' Pre-Accident Condition

[14] Prior to the Accident, Ms. Charters' recreational activities included swimming, snowboarding, extensive hiking, and regularly exercising at a gym. Biking was her primary mode of transportation. She regularly hiked the Grouse Grind and completed other long hikes in the North Shore mountains without limitations.

[15] In 2018, Ms. Charters fractured her ankle while slacklining. She missed approximately three weeks of work because of this injury but she had fully recovered and had no symptoms from it prior to the Accident. She also "tweaked" her back while working at Artisan Bake Shop ("Artisan") but this injury largely resolved in less than a week and she did not miss any work because of it. She experienced some back pain in 2018 while working at Artisan.

[16] Ms. Charters did most of the household chores prior to the Accident. She lives with her boyfriend and estimated that she did approximately 70% of the housework.

[17] Ms. Charters was healthy and active and did not have any injuries or medical conditions prior to the Accident. Specifically, she did not have any issues with her wrist, knees, or hips prior to it.

Circumstances of the Accident

[18] The Accident occurred on January 12, 2019. Ms. Charters was riding her bike on Main Street, Vancouver, BC towards Science World when a car door suddenly opened. The front tire of her bike collided with the interior of the car door. She was thrown forward and landed on her left side, left elbow, and right wrist. There was no impact to her right hip.

[19] Ms. Charters estimated that she was biking at approximately 30 kilometers per hour when she collided with the vehicle door. A bystander helped her to the sidewalk where she exchanged information with the driver of the vehicle she collided with. Next, Ms. Charters was transported by ambulance to St. Paul's Hospital where

an X-ray confirmed a right wrist fracture. She was advised to obtain a brace or splint for it.

Ms. Charters' Post-Accident Condition

[20] Ms. Charters' most significant and enduring injury is to her right wrist. She experiences periodic issues with it, particularly when she does activities that engage her dominant right hand. In the gym, she can no longer do snatches or other similar weightlifting manoeuvres that place significant force on her right wrist. She is also unable to lift heavy items such as large bags of flour or beans.

[21] Ms. Charters missed approximately six weeks of work as a baker due primarily to the wrist injury she sustained in the Accident. After returning to work, she could no longer lift heavy bags, scoop large amounts into an industrial mixer, or reach over head to put bread trays on racks. These activities aggravated the pain symptoms in her right wrist.

[22] In March 2019, approximately two months after the Accident, Ms. Charters did indoor rock climbing, an activity that places significant forces on wrists. She no longer snowboards because she is afraid of falling on her weakened right wrist.

[23] Her right wrist symptoms initially progressed but have not improved over the past three years. Her maximal recovery occurred within a few months of the Accident. She received treatment from a physiotherapist but did not find it helpful.

[24] Ms. Charters can still do long bike rides but she experiences some wrist soreness after a 55-kilometer or longer journey. She can no longer chop wood but she swims without limitations.

[25] While working as a server at various restaurants, Ms. Charters experiences periodic wrist pain and this causes some minor limitations in the tasks she can perform. For example, she has difficulty carrying more than a few dishes.

[26] Approximately a week after the Accident, Ms. Charters experienced pain in her right hip. However, it was not until January or February 2020, one year after the

Accident, that it occurred to her that the pain in her right hip may have been related to the Accident. She came to this determination after someone who had also been injured in a motor vehicle accident suggested a connection between this symptom and the Accident.

[27] Ms. Charters experiences some hip pain when she does squats and lunges at the gym and when descending from a steep hike. This pain prevents her from doing long, steep hikes and walking for more than four hours. She has seen two different physiotherapists for her hip issues but this treatment was not helpful. Her right hip symptoms have improved but not completely resolved.

[28] In May 2019, Ms. Charters first noticed some mild knee pain when she began working at a Boston Pizza location that required her to frequently use the stairs between its two levels. At first, she did not think this pain was related to the Accident. Ms. Charters has not undergone any specific treatment for her knee pain.

[29] After moving to Powell River, BC in January 2020, Ms. Charters began working as a personal care aide for Ms. Shannon Goss. This work involved all aspects of household maintenance, including vacuuming, washing floors, making beds, cleaning the kitchen, carrying and unloading groceries, gardening, and transporting Ms. Goss to various places in a wheelchair. She also dressed, undressed, and bathed Ms. Goss. Ms. Charters did all of the required duties but she occasionally experienced flare-ups of right wrist pain. She did not miss any shifts or shorten any of her workdays because of this symptom.

[30] Kelly McClinchey, Ms. Goss' handyman, is Ms. Charters' live-in boyfriend. The two met in the spring of 2020 while Ms. Charters was working for Ms. Goss, began a relationship in August 2020, and moved in together in approximately December 2020.

[31] Mr. McClinchey's evidence regarding Ms. Charters' condition is based entirely on her post-Accident circumstances.

[32] Mr. McClinchey described Ms. Charters as industrious, with a great work ethic and as someone who resists staying still. Her activity level is “frenetic at times”. They either go hiking or biking once every few days and do each of these activities at least once a week. They also swim regularly and the frequency of this activity has increased during their relationship.

[33] Mr. McClinchey recalled that Ms. Charters continues to cycle regularly but she was unable to do an extended multi-day road trip that they briefly considered because she did not think that she could comfortably ride a road bike for this duration.

[34] Ms. Charters introduced Mr. McClinchey to bouldering. They did this strenuous activity approximately five or ten times together.

[35] During the time they both worked for Ms. Goss, Mr. McClinchey recalls only one occasion when he observed a physical limitation faced by Ms. Charters. He was installing new windows in Ms. Goss’ house and Ms. Charters assisted him with manoeuvring the heavy and awkward windows into a tight and difficult location. He recalls that she experienced wrist pain after assisting him with this task.

[36] In terms of household activities, Mr. McClinchey described their division of tasks as approximately equal but he does some of the heavier tasks such as picking up and moving large bags of rice, beans, and lentils.

[37] Ms. Charters described the symptoms as making it “slightly” difficult to care for her house, make dinner, and workout at the gym. Her wrist issues affected her ability to work on only a few occasions.

[38] Ms. Charters attends a gym once every three days, and bikes and swims on the other days. She stretches and does balancing exercises on an almost daily basis.

[39] Currently, Ms. Charters experiences wrist pain weekly, usually at the end of the day and it is usually better by the following morning.

Medical Expert Evidence***Dr. Barry Vaisler – Orthopedic and Hand Surgeon***

[40] Dr. Vaisler is a qualified orthopedic and hand surgeon. He examined Ms. Charters on September 16, 2019 and August 15, 2022. His first expert report is dated September 27, 2019 and an addendum to that report is dated August 22, 2022.

[41] Dr. Vaisler opined that Ms. Charters probably sustained an injury to her right wrist as a result of the Accident. He was unable to arrive at a diagnosis for her right hip pain and found no abnormality of it on physical examination. Aside from contusions to her knees that had resolved, he found no abnormal findings on examination of her knees.

[42] Based on a review of an MRI scan, Dr. Vaisler noted that Ms. Charters had a congenital 2 mm variance in her right wrist. He concluded that Ms. Charters probably sustained a non-displaced fracture of the styloid process of the distal ulna along with a tear of the triangular fibrocartilage in her right wrist as a result of the Accident. In his subsequent report, this diagnosis was confirmed based on an MRI scan completed on December 9, 2019.

[43] Dr. Vaisler finds that it is more likely than not that Ms. Charters' periodic right wrist pain is due to the tear of the triangular fibrocartilage of her right wrist caused by the Accident. He does not think that she will benefit from physiotherapy but suggested that she see an occupational therapist to obtain a custom wrist brace.

[44] Dr. Vaisler opined that Ms. Charters has limitations with respect to lifting heavy objects and weight bearing on her right wrist. However, he concluded that it was unlikely that she would require surgery.

[45] Dr. Vaisler determined that there is no risk of Ms. Charters developing osteoarthritis in her right wrist as a result of the fracture she sustained.

[46] In his subsequent addendum report, Dr. Vaisler confirmed his earlier diagnosis, treatment recommendations, and prognosis with respect to Ms. Charters' right wrist. She told him that the frequency and severity of her right wrist pain had improved. Again, he found no abnormal physical findings on examination in respect of her right hip symptoms and he was therefore unable to diagnose her intermittent right hip pain.

[47] Dr. Vaisler's report confirms that Ms. Charters sustained an injury to her right wrist in the Accident and she continues to suffer pain periodic symptoms from this injury.

Dr. J.P. Thompson - Orthopedic Surgeon

[48] Dr. Thompson is a qualified orthopedic surgeon. He assessed Ms. Charters on September 13, 2022 and completed an expert report dated October 4, 2022.

[49] Dr. Thompson opined that Ms. Charters probably sustained a right wrist ulnar styloid fracture with possible triangular fibrocartilage injury caused by the Accident. He also found that her ulnar deviation was a pre-existing condition. Dr. Thompson opined that the wrist injury does not put Ms. Charters at risk of future deterioration.

[50] Dr. Thompson concluded that an acute direct injury to the right hip as a consequence of the Accident was unlikely and that his assessment of Ms. Charters indicated a pre-existing congenital, developmental condition of the hip. He noted that there was no reference to right hip difficulties in the medical records until January 2020. He inferred that the Accident may have made Ms. Charters become aware of symptoms in her right hip but the Accident did not cause or accelerate these symptoms.

[51] Dr. Thompson's prognosis is that Ms. Charters may continue with her usual activities because her symptoms are merely mild although annoying. In particular, she is capable of residential painting or transitioning to other types of similar work. He noted that her ability to enter into trades requiring sustained forceful gripping,

twisting, and ulnar deviation would have been poorly tolerated due to the pre-existing ulnar variance he diagnosed.

[52] In respect of her recreational activities, he concluded that she could choose which ones to participate in based on the expected risk of a significant fall on her right wrist. He agreed that a wrist brace would be reasonable for these types of activities.

Analysis of Non-Pecuniary Damages

[53] I am satisfied that the Accident caused the fracture of Ms. Charters' right wrist and this accounts for her ongoing wrist pain. She had no problems with her wrist prior to the Accident but has experienced periodic right wrist pain since it occurred. I accept the conclusion of both orthopedic experts that Ms. Charters' ulnar deviation was a pre-existing condition.

[54] Ms. Charters has some relatively minor limitations because of pain in her right wrist but she is generally able to do all of the things she was able to do prior to the Accident. For example, she regularly exercises at a gym and enjoys a wide range of physical activities including swimming, hiking, biking, and bouldering. Within two months of the Accident, Ms. Charters accepted an invitation to do indoor rock climbing. This strenuous activity places significant forces on the wrists.

[55] Ms. Charters' work as a residential painter and server requires the use of her wrists and she is able to perform the necessary tasks with occasional discomfort and minor modifications.

[56] Ms. Charters had a pre-existing congenital, developmental condition of the right hip. I accept that the force of the Accident may have triggered some mild hip and knee discomfort because she did not have these symptoms prior to the Accident. These symptoms prevent her from doing a few specific gym exercises and she experiences some soreness after hiking four or more hours but they do not otherwise meaningfully restrict her activities.

[57] In my view, Ms. Charters' right wrist injury is the most significant and enduring impact of the Accident. More than four years later, she continues to experience pain in right wrist on a weekly basis. Ms. Charters avoids a few specific activities such as chopping, lifting heavy objects, golfing, and snowboarding but she is otherwise capable of doing a wide range of physically demanding recreational and vocational activities.

[58] Having considered all of the relevant cases and taking into account Ms. Charters' age, circumstances, and the duration of her right wrist injury, and mild hip and knee pain, I conclude that she is entitled to \$70,000 in damages for pain and suffering caused by the Accident.

Loss of Income-Earning Capacity

Factual Findings

[59] Ms. Charters began working in restaurants and at a dog daycare while attending high school. After high school, she attended Langara College in a general studies program from 2011 to 2013. During this period, she did not take a full course load and earned poor grades. She failed approximately one-quarter of the courses she took and withdrew from at least one class per semester. Ms. Charters did not complete a diploma or certificate.

[60] After leaving college in 2013, she obtained a position teaching English in Columbia. She did this work from March to September 2014.

[61] In January 2015, Ms. Charters attempted to go back to college but only attended for one semester during which she took three courses. She recalls failing one of these classes and either withdrawing from or failing the other two.

[62] In the summer of 2015, Ms. Charters began working as a painter for a house painting company. This work involved working on ladders, sanding, scraping, and painting.

[63] Also in 2015, Ms. Charters worked as a host and server at a Boston Pizza restaurant. This work involved serving customers, carrying trays, moving tables, and changing beer kegs. Ms. Charters did not have any difficulty performing these tasks.

[64] In 2017, Ms. Charters earned \$15,578 from working as a landscaper. This work involved digging, raking, pruning, mowing, trimming, weed whacking, and lifting heavy bags of debris.

[65] After August 2017, Ms. Charters again returned to college with the intention of pursuing a career in education. She only passed two of the four courses she took.

[66] In November 2017, Ms. Charters began working as a baker at Artisan. This work involved mixing large bags of ingredients such as 20 kilogram bags of flour and 25 kilogram blocks of butter. Ms. Charters continued doing this work until approximately March 2019. She was employed by Artisan on the date of the Accident.

[67] After the Accident, Ms. Charters missed six weeks of work at Artisan. At that time, she was earning \$18.50 per hour and working up to 40 hours per week.

[68] Ms. Charters left this position approximately three weeks after returning to it after the Accident primarily because of issues with the owner of this business concerning her remuneration.

[69] After leaving Artisan, Ms. Charters resumed working at Boston Pizza but at a different location that was on two levels. She found working there occasionally challenging because climbing stairs between its two levels periodically provoked knee pain. She could not carry a tray with one hand and instead used both hands. She could also only carry few dishes at a time.

[70] Ms. Charters worked about 20 hours per week at Boston Pizza and her weekly earnings were approximately \$700.

[71] During this time, she also worked at a vegan restaurant, Buddha Full. One of her tasks involve chopping fruits and vegetables which was somewhat challenging

because of occasional wrist pain. She left this position in order to work more frequently at Boston Pizza, not because of difficulty with chopping or any other symptoms related to the Accident.

[72] At the start of 2020, Ms. Charters left her position at Boston Pizza and moved to Powell River. This decision was not influenced by her pain symptoms arising from the Accident. Her father lived in Powell River and she wanted to be able to assist with his care.

[73] As previously described, Ms. Charters worked as a personal care aide for Ms. Goss in Powell River. This work involved a wide range of physically demanding household maintenance and personal care tasks. Ms. Charters occasionally experienced flare-ups of right wrist pain but this symptom did not cause her to miss any time from this work.

[74] Ms. Charters earned \$24 per hour as Ms. Goss' care aide. She also provided care for her father.

[75] In March 2021, Ms. Goss terminated Ms. Charters' employment because Ms. Charters commenced working as a waitress to supplement her income. Due to her underlying health concerns, including a weakened immune system, Ms. Goss was concerned about exposure to COVID-19 and other infections because of Ms. Charters' work as a server.

[76] After Ms. Goss terminated Ms. Charters' employment, Ms. Charters received employment insurance benefits for the rest of 2021. She looked for service jobs but was unable to secure one, possibly because she had not been vaccinated against COVID-19 and this was a requirement for most of these positions at that time.

[77] In April, Ms. Charters began working as a painter for DK Painting. Darren Kochems owns and operates this business. He is a friend of Mr. McClinchey. The tasks Mr. Kochems assigned to Ms. Charters were quite physical. They included priming, sanding, brushwork, rolling, and cleaning up work sites. He was aware of her wrist injury and slightly modified her duties accordingly.

[78] The painting work she performed for DK Painting is similar to the work she previously did for another painting company except it involves mostly interior painting. In her previous painting position, she had no issues or problems with her wrists but at DK Painting her wrist occasionally became sore and fatigued. She sometimes, but not more than 12 times, wore a wrist brace to ameliorate her right wrist pain symptoms. Approximately weekly, this work caused wrist soreness at the end of a shift but it did not cause pain symptoms in her hip or knee.

[79] Mr. Kochems recalled that Ms. Charters wore a wrist brace approximately three to five times while working and she missed work two or three times because of medical appointments.

[80] Mr. Kochems offered Ms. Charters additional work hours but she was unable to do more work for him because of her online studies and part-time work as a server, not because of pain symptoms caused by the Accident.

[81] Ms. Charters stopped working for Mr. Kochems in November 2022 because he decided not to operate his painting business during the winter months. Mr. Kochems was entirely satisfied with Ms. Charters' work performance and he intends to rehire her when he resumes operating his painting business in 2023.

[82] While working full-time for Mr. Kochems during the summer of 2022, Ms. Charters also worked 15 hours a week as a server in a bistro, for which she earned approximately \$700 per week.

[83] Ms. Charters' income tax returns reveal that she earned the following income from 2014 to 2021:

| | |
|------|----------|
| 2014 | \$1 |
| 2015 | \$4,207 |
| 2016 | \$10,937 |
| 2017 | \$20,855 |
| 2018 | \$23,967 |
| 2019 | \$15,668 |
| 2020 | \$22,937 |
| 2021 | \$6,682 |

[84] Ms. Charters estimated that her 2022 income was approximately \$23,400.

[85] As of January 2023, Ms. Charters also works as a server two days a week at another restaurant, and earns approximately \$500 per week.

[86] Prior to the Accident, Ms. Charters' future career plans were uncertain. She considered working as a registered massage therapist or a carpenter but she has not taken any specific steps towards pursuing these vocations. Since the Accident, Ms. Charters completed a high school math course online and she is currently taking a high school biology course. She is unsure of her future career path.

Functional/Work Capacity Evaluations

Nicholas Altieri – Occupational Therapist

[87] Nicholas Altieri is a qualified occupational therapist. He assessed Ms. Charters on September 2, 2022 and produced an expert report dated September 29, 2022.

[88] Mr. Altieri found that Ms. Charters' self-reported functional abilities and limitations were consistent with her demonstrated level of functioning during the evaluation. The effect of her perceived pain levels on her function was clinically consistent.

[89] He concluded that Ms. Charters is not suited to work activity requiring repetitive forces on her right wrist including heavy or repetitive gripping or pinching using her right hand. He opined that Ms. Charters has functional limitations that have negatively impacted her ability to participate in physically demanding recreational activities, outdoor household chores/maintenance tasks, and work as a landscaper or care aide. It is his opinion that the number of vocational options available to her, including becoming a massage therapist, have been reduced significantly.

[90] Mr. Altieri does not believe that Ms. Charters meets the physical requirements associated with working as a baker. As a server, she meets the individual physical demands but has limitations related to her right wrist specifically related to heavy

pinching and reaching. She is not well-suited to collecting plates of food and the lifting of dry stock items such as flats of juice or pop.

[91] Ms. Charters does not meet the full-range physical demands required of a care aide and would be better suited to work that requires light strength tasks.

[92] Based on the results of his assessment, he opines that Ms. Charters does not meet the physical demands associated with work as a painter and she will continue to have some degree of functional limitations and related symptoms while she undertakes this type of work. Notably, some of the job demands involved in painting are heavy, such as lifting and moving large ladders and pails of paint. For this reason, he disagrees with the opinion of Jeff Padvaiskas, the occupational therapist relied upon by the defendants, who concluded that Ms. Charters is capable of continuing to work as a painter.

[93] In terms of her future work, Mr. Altieri concludes that she is unable to durably work as a massage therapist and is better suited for work in which the demands on her right wrist and hands do not involve heavy forces and repetitive gripping or pinching.

[94] In terms of housekeeping chores, Mr. Altieri accepts Ms. Charters' assertion that she is unable to use an axe or a hammer because of the pain caused on her right wrist. She is also unable to use a shovel.

[95] Mr. Altieri opined that although Ms. Charters is continuing to work as a server in a restaurant, she may not be able to do so durably because her right wrist pain symptoms reduce her productivity and this may not be accommodated at various restaurants.

Jeff Padvaiskas – Occupational Therapist

[96] Mr. Padvaiskas is a qualified occupational therapist. He assessed Ms. Charters on October 7, 2022 and completed an expert report, a work capacity evaluation, on October 13, 2022.

[97] Mr. Padvaiskas found that Ms. Charters demonstrated a high level of effort during the assessment.

[98] He found that she was susceptible to transient acute pain with rapid and repetitive forceful gripping. She also appeared to increase her left arm usage during forceful torqueing and demonstrated discomfort with moderate to extreme right wrist flexion or extension and concurrent ulnar deviation.

[99] He found that Ms. Charters' right arm was fully functional for reaching above and below shoulder level. Ms. Charters reported right wrist symptoms with repetitive lifting to shoulder level and carrying in a manner that accommodated the ulnar deviation of her right wrist.

[100] In terms of work endurance, Ms. Charters may have issues associated with repetitive forceful gripping, impact jarring on the right, or handling non-neutral and extreme wrist postures. She was susceptible to pain in her right wrist during some of the testing but was able to tolerate some of these tasks on an intermittent to occasional basis.

[101] In terms of her ability to work, Mr. Padvaiskas found that Ms. Charters is capable of working as a painter because she meets the majority of the required strength requirements. However, he noted that she reported pain symptoms while doing some of this work. He concluded that her pain symptoms appear to represent an irritation of a temporary quality rather than disabling and limiting level of pain and discomfort.

[102] Mr. Padvaiskas also found that Ms. Charters could work as a baker but that it may not be ideal depending upon the specific task demands. He found that she would be able to meet the anticipated job tasks associated with being a retail sales clerk.

[103] Similarly, Mr. Padvaiskas concluded that Ms. Charters would be capable of working as a food and beverage server because she met the strength and body

position demands of this role. However, she may need to modify some of the upper extremity demands to a certain degree.

[104] Ms. Charters would not meet the full upper extremity task demands and heavier bilateral torqueing, hammering, and forceful, repetitive gripping and pinching wrist positions required to be a carpenter. She is not suited to heavy strength work.

Past Loss of Income-Earning Capacity

Relevant Legal Principles

[105] The principles applicable to the assessment for past loss of income-earning capacity are:

- 1) An assessment of a loss of income involves a consideration of hypothetical events.
- 2) The plaintiff need not prove these hypothetical events on a balance of probabilities.
- 3) A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- 4) Once a hypothetical possibility is established, the court must consider the likelihood of the event occurring in determining the measure of damages.
- 5) A causal connection must be established, on a balance of probabilities, between the Accident and the pecuniary loss claimed.
- 6) It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36–37; *Laxdal v. Robbins*, 2010 BCCA 565 at paras. 19–20.

[106] In *Rab v. Prescott*, 2021 BCCA 345 at para. 47, our Court of Appeal set out a three-step process to assess damages for the loss of future earning capacity:

- 1) Whether the evidence discloses a potential future event that could lead to a loss of capacity?

- 2) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

This three-step process applies to both past and future income earning capacity claims: *Siu v. Regehr*, 2022 BCSC 1876 at paras. 162–163.

The Parties' Positions on Past Loss of Income-Earning Capacity

[107] Ms. Charters missed 41 days of work at Artisan immediately after the Accident. She therefore claims approximately \$6,000 in past wage loss in respect of this period based on 40 hours per week at a rate of \$18.50 per hour.

[108] Ms. Charters asserts that but for the Accident, she would have continued working full-time at Artisan until January 2020 when she moved to Powell River. Taking into account her actual earnings during this period, an estimate of \$1,000 for lost wages as a painter, deductions for income taxes and employment insurance premiums, and other contingencies, she claims net past wage loss of \$19,000.

[109] The defendants deny that Ms. Charters regularly worked 40 hours a week at Artisan and point out that there was only one pay period in which she recorded this many hours. They therefore deny that she would have earned \$38,000 per year as a baker at Artisan.

[110] The defendants note that Ms. Charters was able to do all of the required tasks as a server, with some modifications, and that aside from the two month period immediately after the Accident, she did not miss any time from work for reasons attributable to it. They assert that Ms. Charters is entitled to \$5,000 in respect of past wage loss, taking into account the necessary deductions for income tax and employment insurance premiums.

Analysis of Past Loss of Income-Earning Capacity

[111] I am not satisfied that Ms. Charters would have earned \$38,000 per year at Artisan but for the Accident. First, this amount assumes that she would have worked

40 hours per week but the evidence shows that she only worked this many hours during a single pay period. Ms. Charters' income tax returns are the best evidence of her earning history. Second, prior to the Accident, Ms. Charters had several disputes with the owners of Artisan over her pay. In my view, it is likely that she would have left this position regardless of the Accident.

[112] Ms. Charters was able to perform the required tasks as a server at Boston Pizza and Buddha Full with some modifications. She also earned more per hour as a server at these restaurants compared to her earnings at Artisan.

[113] Although there were some gaps in her employment after the Accident, I am not convinced that they were attributable to the Accident. For example, she left her position at Boston Pizza to move to Powell River in January 2020 so that she could care for her father. She began looking for work in March 2020 but was unable to find employment because of the pandemic shutdown. She eventually began working as a care aide for Ms. Goss but lost this position in March 2021 for reasons described at para. 75 above.

[114] I agree with Mr. Padvaiskas' finding that the occasional wrist pain experienced by Ms. Charters is more of a temporary irritation rather than disabling and limiting level of pain and discomfort. This is because Ms. Charters successfully worked and thrived as a house painter and server while continuing to do a range of physically demanding recreational pursuits. Mr. Kochems is entirely satisfied with the quality of Ms. Charters' work and he intends to rehire her in 2023. She was unable to do more work for him because of her online studies and part-time work as a server, not because of symptoms from the Accident. Taken together, this evidence suggests that her wrist symptoms are not disabling.

[115] Although Ms. Charters suggested that she aspired to become self-employed as a carpenter or a registered massage therapist, she took no concrete steps towards these career goals. Her academic history is uneven. Taking courses such as high school math and biology are not sufficiently tangible steps taken in furtherance of these career objectives. I accept that carpentry and massage therapy

may be too hand-intensive for her but I am not convinced that she would have pursued these careers but for the Accident.

[116] Ms. Charters is entitled to \$5,000 in respect of past loss of income-earning capacity for the period of work she missed immediately after the Accident. She has not established a real and substantial possibility that she lost any other income attributable to it.

Future Loss of Income-Earning Capacity

Relevant Legal Principles

[117] The court's assessment of a plaintiff's future loss of income-earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise. The court engages in an assessment that depends on the type and severity of a plaintiff's injuries, and the nature of the anticipated employment at issue. Economic and statistical evidence provides a useful tool to assist in determining what is fair and reasonable in the circumstances: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.

[118] As noted earlier in these Reasons, in *Rab* at para. 47, the Court set out a three-step process to assess damages for the future loss of income-earning capacity:

- 1) Whether the evidence discloses a potential future event that could lead to a loss of capacity?
- 2) Whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If yes, the court must assess the value of that possible future loss, which must include assessing the relative likelihood of the possibility occurring.

[119] The third step may involve either the "earnings approach" or the "capital asset approach". The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial. The capital asset approach is appropriate where the plaintiff suffered a loss of a capital asset rather than a loss of earning capacity. It

is also helpful when a plaintiff has yet to establish a settled career path as it creates a more holistic picture of a plaintiff's potential future: *Ploskon-Ciesla* at paras. 16–17.

The Parties' Positions on Future Loss of Income-Earning Capacity

[120] Ms. Charters submits that there is a real and substantial possibility that her right wrist injury could lead to a loss of earning capacity. She submits that the Court ought to use the capital asset approach because of her young age and uncertain career trajectory and suggests that she has lost 15% of her capacity as a result of the Accident. On this basis, she claims \$170,310 as compensation and suggests that no further contingency deductions apply.

[121] The defendants note that Ms. Charters returned to full-time work after the Accident and completed the required tasks of her work as a care aide, painter, and server with some modifications and occasional discomfort. They deny that Ms. Charters established a real and substantial possibility that she would have become a carpenter or registered massage therapist. They therefore submit that a comparison of Ms. Charters' pre- and post-Accident work activities suggests that she is not entitled to damages for loss of future income earning capacity.

Analysis of Future Loss of Income-Earning Capacity

[122] Ms. Charters is relatively young and her right wrist symptoms have persisted since the Accident. She works as a residential painter and server and doing so periodically aggravates her right wrist symptoms. Her work actively engages her right wrist so it is possible that this injury could lead to a future loss of capacity. I am not convinced that any symptoms related to her right hip or knee could lead to a future loss of capacity.

[123] The next issue I must consider is if there is a real and substantial possibility that Ms. Charters will suffer a future loss of income as a result of her right wrist injury.

[124] With occasional wrist discomfort, Ms. Charters remains physically capable of working as a residential painter which includes tasks such as rolling, cutting, and sanding. She also continues to work as a restaurant server.

[125] Dr. Vaisler and Dr. Thompson both concluded that Ms. Charters' wrist symptoms are unlikely to degenerate. Dr. Vaisler opined that there was no risk that she would develop osteoarthritis as a result of her wrist injury. This view is supported by Ms. Charters' evidence that her right wrist symptoms improved over the first three to six months after the Accident then plateaued and remained stable over the past few years.

[126] Mr. Padvaiskas' opinion on Ms. Charters' future vocational abilities as a painter and server are consistent with Ms. Charters' work history. She has worked as a server, care aide, and painter since the Accident, and has successfully performed almost all of the tasks associated with these types of work with minor modifications. I accept that working periodically causes some right wrist discomfort but I agree with Mr. Padvaiskas that this is more in the nature of an annoyance or irritation and these pain symptoms are not disabling. They have not prevented Ms. Charters from pursuing a range of vocational and recreational pursuits that engage her right wrist.

[127] I do not accept Mr. Altieri's finding that Ms. Charters may not be able to durably continue working as a painter and server. She has had no difficulty finding and keeping these positions over the past few years. Mr. Kochems is entirely satisfied with her work as a painter and he intends to re-hire her when he restarts his painting business in 2023.

[128] As previously described, Ms. Charters has not taken any courses or other concrete steps towards her stated objectives of becoming either a carpenter or registered massage therapist. The evidence does not establish that she would have successfully pursued these careers so, in my view, it is not necessary to consider them for the purpose of determining if there is a real and substantial possibility that Ms. Charters wrist injury will lead to a future income loss.

[129] Ms. Charters' income has not varied substantially since the Accident. Taking into account the totality of the evidence regarding her work history since the Accident, I find that she will continue to work as a painter, server, or in another similar vocation.

[130] I accept that Ms. Charters' wrist injury might lead to a loss of capacity but I am not convinced that there is a real and substantial possibility that this injury will cause a future loss of income. It has not affected her ability to earn income in varied roles as a care aide, server, or painter, all of which involve some level of physical exertion. Accordingly, I do not find that she has established that she is less capable overall, less marketable, or unable to take advantage of all jobs that may be available to her because of this injury.

[131] I therefore conclude that Ms. Charters is not entitled to damages for future loss of income-earning capacity and that the periodic pain symptoms she experiences are more appropriately dealt with as part of her claim for non-pecuniary damages.

Cost of Future Care

Relevant Legal Principles

[132] The principles applicable to the assessment of cost of future care are:

- a) Providing adequate damages for future care of an injured plaintiff is of paramount importance.
- b) The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident.
- c) The test for determining an appropriate award is an objective one based on medical evidence.
- d) The focus should be on the plaintiff, with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable.
- e) The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable.
- f) "Medical justification" is broader than "medically necessary".

- g) Medical experts need not expressly approve specific items of future care; it is sufficient if the totality of the evidence supports the award for specific items.
- h) Common sense should be employed in this assessment.
- i) No award should be included for items that would be incurred in the absence of the accident.

See: *Thompson* at para. 149.

The Parties' Positions on Cost of Future Care

[133] Ms. Charters seeks \$5,093 for the cost of her future care. This amount is based on the present value to age 70 of annual care costs of \$200 for over-the-counter medication, a custom wrist brace, and mileage for wrist brace assessments.

[134] The defendants deny that Ms. Charters is entitled to an amount for the cost of her future care because she is not receiving any formal treatment for her injuries and has not purchased a custom wrist brace even though Dr. Vaisler recommended she obtain one in September 2019. Alternatively, the defendants submit that she should receive \$900 for a custom wrist brace.

Factual Findings and Analysis of Cost of Future Care

[135] Ms. Charters occasionally uses over-the-counter anti-inflammatory medication to manage the periodic pain symptoms in her right wrist.

[136] Dr. Vaisler and Mr. Altieri agree that Ms. Charters would benefit from using a custom wrist brace. She has worn a non-customized wrist brace while working approximately 12 times and found it to be helpful.

[137] Mr. Padvaiskas recommended a wrist brace assessment every one to two years and testified that the cost of a custom wrist brace is \$100 to \$200.

[138] I am satisfied that Ms. Charters is entitled to an amount for over-the-counter pain medication to manage her occasional right wrist pain symptoms. A modest annual amount for this type of medication is medically justified and reasonable.

[139] I am also satisfied that Ms. Charters will benefit from a custom wrist brace. She has periodically used an off-the-shelf wrist brace so I am satisfied that she will use one that is customized for her specific needs. As Ms. Charters does work that routinely engages her right wrist, she will need to reassess her needs and obtain a replacement wrist brace every four years.

[140] Ms. Charters is entitled to \$2,500 for the cost of her future care for over-the-counter pain medication and a custom wrist brace to be reassessed and replaced every four years.

Special Damages

[141] The parties agree that Ms. Charters is entitled to \$1,150 in respect of special damages.

Conclusion

[142] Ms. Charters is entitled to a damages award of \$ consisting of:

| | |
|--|------------------------|
| a) Non-pecuniary damages: | \$70,000 |
| b) Past loss of income-earning capacity: | \$5,000 |
| c) Cost of future care: | \$2,500 |
| d) Special damages: | \$1,150 |
| Total: | <u>\$78,650</u> |

Costs

[143] If the parties wish to make submissions on costs, they may be filed within 30 days of the date of this judgment. If the parties wish to make oral submissions on costs, or other matters related to the implementation of this judgment, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe. If no submissions are received, the plaintiff will have her costs at Scale B.

“Basran J.”