IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Warren v. Biswal,*
2023 BCSC 1318

Date: 20230731
Docket: M1811494
Registry: Vancouver

Between:

Deanna Leonora Warren

Plaintiff

And

Amitabh Biswal

Defendant

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

Counsel for the Plaintiff:	C.H. McDougall
Counsel for the Defendant:	R.B. Rogers J.S. Bell
Place and Dates of Trial:	Vancouver, B.C. January 3-6 and 9-11, 2023
Place and Date of Judgment:	Vancouver, B.C. July 31, 2023

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Introduction

[1] These are my reasons for judgment in this motor vehicle personal injury claim. Liability is admitted by the defendant. These reasons reflect my decision on the appropriate quantum of damages.

[2] The plaintiff was involved in a motor vehicle collision on June 16, 2017 (the "Accident"). She was 47 years old at the time. On the morning of the Accident she was driving her 12-year-old son to school on Scott Road in Surrey, BC. When she approached the intersection with 72nd Avenue, a car ahead of her slowed down to make a turn into a gas station. The plaintiff brought her vehicle to a complete stop, and was rear-ended by the defendant.

[3] At the moment of impact, the plaintiff was looking to her right as she was speaking with her son. She described the impact as significant. There was noticeable damage to her vehicle's rear and significant damage to the front of the defendant's vehicle.

[4] The police, ambulance, and the plaintiff's husband attended the scene of the Accident. The plaintiff drove her vehicle home. Her son was assessed by paramedics at the scene but she was not.

[5] After returning home, the plaintiff's husband drove the plaintiff and her son to BC Children's Hospital in Vancouver. From there, the plaintiff took a taxi to Vancouver General Hospital where she was assessed.

[6] As a result of the Accident, the plaintiff claims she suffered a concussion or mild traumatic brain injury ("MTBI"), headaches, neck pain, shoulder pain, upper back pain, lower back pain, right wrist pain and psychological injuries including depression, anxiety, post-traumatic stress disorder ("PTSD"), and cognitive symptoms including balance, memory, concentration, and word finding difficulties.

[7] The plaintiff claims losses under the following heads of damage;

a) Non-pecuniary damages;

b) Past and future loss of earning capacity;

c) Past and future loss of housekeeping capacity;

d) Cost of future care; and

e) Special damages.

[8] The defendant submits that the plaintiff did not suffer a concussion as a result of the Accident.

[9] The defendant also submits that the plaintiff is not entitled to an award for past wage loss or past and future loss of housekeeping capacity.

[10] The plaintiff seeks a total award under all heads of damages of approximately $913,000. The defendant submits the plaintiff is entitled to an award for pecuniary loss, a nominal award for future loss of earning capacity, cost of future care and some of the special damages claimed. Taking into account their submission that the plaintiff failed to mitigate her losses, the defendant submits an appropriate total award is approximately $110,000.

[11] For the reasons that follow, I find that the plaintiff is entitled to compensation under all heads of damages and order a total award of $538,711.05.

Background

[12] The plaintiff grew up in the lower mainland. She had a difficult childhood. She testified that her father was verbally abusive, which resulted in stretches of years without speaking with him. They now have a good relationship. Though she is currently close with her mother, she similarly went long periods of time purposefully estranging herself from her mother.

[13] The plaintiff moved out of her parents' home immediately after graduating high school. She has not attended any further courses or post-secondary education.

[14] The plaintiff was sexually assaulted at age 15, after which she did not obtain any psychological treatment.

[15] She married her spouse, whom she met in high school, in 1993.

[16] Her first son was born in 1995.

[17] After high school, between 1995 and about 2003, the plaintiff worked for the BC Liquor Distribution Branch, in BC Liquor Stores, as a cashier, warehouse worker, and in bottle returns. During that employment, the plaintiff was held at knifepoint and robbed at age 19. She was also held at knifepoint once more at work when she was pregnant with her second child.

[18] The plaintiff's second son was born in October 2004. Prior to his birth she stopped working at the BC Liquor Store. Part of the reason she stopped working was due to changes at the BC Liquor Store which required her to work more hours. She testified she stopped working to raise her children and the family could afford for her to not work.

[19] At the time of the Accident in 2017, the plaintiff and her husband testified she was a fully functional full-time homemaker. She kept the family house very clean and did about 80% to 90% of the housework including cooking, laundry, daily vacuuming, sweeping, window washing, grocery shopping, and deep cleaning.

[20] The plaintiff took a very active role in raising her two children. She volunteered at their schools. Both children were active in sports and the plaintiff took them to their sporting activities almost all of the time and would stay and watch. In 2017 her youngest son was attending up to 11 sporting events a week including hockey, soccer, and rock climbing. The plaintiff attended almost all of these events.

[21] In 2014, after her youngest son undertook a school project about reptiles, the plaintiff began collecting snakes. By the time of the Accident she had 70 snakes, including pythons and boa constrictors. She testified that what began as a hobby turned into a business idea. She intended to breed snakes and sell them. She had

acquired equipment for this purpose, including an incubator for the eggs and special enclosures for baby snakes. She had not bred any snakes at the time of the Accident, but testified that she planned to start around the fall or winter of 2017/2018. She was increasing the number of snakes she had and cared for them diligently. She had a growing social media presence on Instagram revolving around her snakes. She had researched snakes and snake breeding.

[22] The family also had pet cats and dogs.

Prior Anxiety and Depression

[23] The plaintiff had issues with depression and anxiety requiring medical intervention leading back to the birth of her first son. At that time, she had what she described as post-partum depression which was contributed to by the fact that her son was a colicky infant who experienced stomach pain and did not sleep well.

[24] During that time and at the direction of her family doctor, the plaintiff was put on a course of anti-depressants which ended sometime prior to the birth of her second son in 2004. However, the plaintiff had another bout of post-partum depression after the birth of her second child. That child also experienced pain and did not sleep well as an infant. He was diagnosed with myositis at age eight and began experiencing panic attacks when he was 11 years old. The plaintiff cannot recall if she began a course of anti-depressants at that time, but she may have. If she did, she stopped before 2013.

[25] In 2013, her eldest son became seriously ill with Crohn’s disease. He lost a lot of weight and required extended hospital stays over the course of about a year and three months. His illness was stressful for the plaintiff and she again took anti-depressants and anti-anxiety medications to treat her symptoms. She remained taking these medications up until the Accident. She continued to see her doctor regarding stress and anxiety. He had suggested counseling, but she did not do any prior to the Accident. She was also going through menopause, which she testified affected her mood to some degree.

[26] The plaintiff's parents-in-law passed away close in time to each other. This was soon after her sons began experiencing health problems. She stated that these events worsened her depression.

[27] The plaintiff described herself as a "worrier", particularly when it came to her children.

[28] In 2015, her eldest son moved out of the family home. The circumstances were acrimonious. His illness was stressful for the family. He has had irregular contact since that time.

[29] At the same time, the plaintiff's husband moved out of the family home due to marital difficulties with the plaintiff. The plaintiff attributed this to her growing snake collection, but he attributed it to stress around their eldest son's illness. Her husband did not move far, and saw the plaintiff and their youngest son regularly over a period of about five months before moving back to the family home.

[30] Though the plaintiff continued to be anxious about her relationship with her husband, her husband testified that he never considered ending the marriage since that period of separation in 2015.

Post-Accident Falls

[31] On a few occasions since the Accident the plaintiff has fallen.

[32] One fall occurred in October 2017, when the plaintiff lost her balance in her home.

[33] Another fall occurred in January 2021, when the plaintiff lost her balance in a parking lot while doing exercises, waiting for her son to finish physiotherapy.

[34] A third fall occurred in March 2021, which may have been an episode of fainting.

Treatment

[35] In the first two and a half years after the Accident, the plaintiff regularly consulted her family doctor, Dr. Kason, and attended appointments at the Vancouver General Hospital, where she was treated by a psychiatrist and a neurologist. She continued taking prescription medication for her psychological symptoms.

[36] After that period of time, the plaintiff began massage therapy, physiotherapy, psychological counselling, vestibular therapy, and kinesiology.

Assessment of the Evidence

Credibility of the Plaintiff's Evidence

[37] Assessing credibility involves a consideration of a number of factors as set out in *Bradshaw v. Stenner,* 2010 BCSC 1398 at para. 186 (aff'd 2012 BCCA 296):

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[38] The plaintiff acknowledges there is some inconsistency in her testimony, however, she submits that overall her evidence is credible. The defendant submits that the plaintiff is an unreliable witness because she overstated or contradicted her own evidence beyond the point of occasional forgetfulness. They submit the plaintiff also gave conflicting recounts to her treatment providers, and admitted to lying on the stand and to some of her treatment providers.

[39] The plaintiff volunteered her pre-existing depression and anxiety in direct testimony. Her apparent level of function before the Accident was confirmed by her spouse, Jose Perez and Susan Hood and is not contradicted by any evidence.

[40] The situational stressors in her life prior to the Accident, including her brief separation from her spouse, were corroborated by her medical records.

[41] When she was cross-examined on some matters, including her breathing issue, her account of what happened (using her son's inhaler to good effect) was later corroborated in the medical records.

[42] When she was cross-examined regarding the snake breeding business idea, she displayed a level of knowledge about snakes and snake breeding consistent with someone who took the idea seriously, not just as a hobby. She testified that she accidentally killed some of her snakes through mistakes like setting the temperature too high, or through neglect by not being able to adequately treat them after a mite infestation. She has lost 30 snakes since the Accident. This clearly upset her. Her testimony in this regard was not challenged.

[43] Her weight gain after the Accident is objective, corroborated by her family doctor, and consistent with her account of her activity level after the Accident.

[44] She testified that she stopped going to the dentist after the Accident. These are details which corroborate her stated level of distress after the Accident.

[45] The defendant highlights the plaintiff's testimony that she deliberately lied to a psychiatrist during her first appointment. During direct examination, when counsel asked the plaintiff about her experience with that psychiatrist the plaintiff stated she did not care what he has to say about her because she was "just playing him". The more she described the incident, it came out that she was not expecting to see a psychiatrist. She stated that she did not want to talk about deep personal things with a male psychiatrist, and she was personally uncomfortable in that meeting. When counsel asked the plaintiff for clarification during cross-examination, she admitted

that she was “just telling stories” to counsel because she did not know the answers to his questions.

[46] The plaintiff testified that Dr. Kason “never” referred her for any treatment, when questioned about external treatment, and that she initiated recommendations with him. She did admit that treatment was recommended but that the reason for not obtaining treatment early on was primarily due to financial concerns. Dr. Kason testified that he repeatedly encouraged the plaintiff to attend treatment, although he did not have a good memory apart from what was recorded in his clinical records. His records are do note he recommended the plaintiff take an “active role” in her recovery, that she “has not adequately managed symptoms … needs to”, that she was recommended to “increase exercise”, “encouraged to go to P[hysio]T[herapy], offered to refer to a concussion clinic if PT doesn’t work well”. He later noted she “hasn’t gone for physio (can’t afford it)”. He noted that the plaintiff advised she did not seek treatment initially for financial reasons.

[47] The plaintiff did act on consultation referrals to a neurologist and a psychiatrist. After the consultation with the psychiatrist, Dr. Kason noted: “long discussion about mood etc. not sure where to go from here. The difficulty is that patient’s personality makes it difficult for her to open up.” This was confirmed in the plaintiff’s own testimony noted above about her inability to open up to the male psychiatrist. Dr. Kason testified he often dreaded his appointments with the plaintiff. The plaintiff testified she had similar feelings since she did not like being treated by a male doctor, but given the shortage of family doctors and long wait lists she preferred to stay with Dr. Kason. The plaintiff’s testimony regarding treatment is consistent with her testimony about the associated cost being a deterrent. Her son was receiving physiotherapy which she prioritised.

[48] The plaintiff testified at trial that the reason she did not attend counselling sooner was because she “... didn't believe in it,” and that she was “old school”. However, the plaintiff further testified that, prior to the Accident, she asked Dr. Kason for a referral to a counsellor and confirmed that he would not have referred her to

same without her probing. When posed with this contradiction to her on cross-examination, she became agitated and dismissive.

[49] The defendant submits the plaintiff's evidence regarding how long it takes for her to recover from recent attempts at social outings is not reliable, despite the uncontroverted corroborative evidence of her spouse and her friend.

[50] In essence, the defendant submits the plaintiff underreports her pre-Accident state and overreports her post-Accident condition.

[51] The plaintiff testified over the course of three days. Her displayed energy levels, which declined by the end of the day and significantly by the last day were consistent with her own testimony and that of her spouse and friend. There is no evidence that it is fundamentally inconsistent with the plaintiff's testimony.

[52] I find the plaintiff to be generally credible. The discreet issues raised by the defendant do not rise to the level of the plaintiff being generally unreliable and not credible. To be clear, this does not mean I agree with the entirety of the plaintiff's claims.

Injuries

[53] The plaintiff claims she sustained various soft tissue injuries to her neck and shoulder girdle, lower back, and right wrist as a result of the Accident.

[54] She further claims she sustained post-traumatic headaches and developed various cognitive difficulties including poor memory, concentration, word finding difficulties, and balance issues. She submits these symptoms had multiple causes including whiplash, chronic pain, headaches, psychological problems, and maybe or maybe not a MTBI.

[55] With regard to psychological injuries, the plaintiff submits she suffered from PTSD and an exacerbation of her anxiety and depression symptoms.

Dr. Raphael Chow – Physiatrist

[56] The plaintiff's witness, Dr. Raphael Chow, was qualified as an expert in physiatry. He assessed the plaintiff after an in-person examination on June 9, 2022.

[57] Dr. Chow diagnosed the plaintiff with the following conditions from the Accident:

a) Post-traumatic headaches;

b) Soft-tissue injury-cervico-thoracic spine;

c) Myofascial pain syndrome;

d) Soft tissue injury to the lumbar spine;

e) Rotator cuff syndrome; and

f) Concussion and post-concussion symptoms.

[58] At the date of the assessment, the plaintiff reported that her back pain ranges typically from a severity level of three to four out of ten.

[59] Noting there was no diagnosis of concussion made at the hospital after the Accident, Dr. Chow testified that concussion does not "own" the types of symptoms the plaintiff had (i.e., the symptoms experienced by the plaintiff could have been a result of another injury or illness) and if it were not concussion then it could be late whiplash syndrome. He also stated the treatment modalities would not differ.

[60] Dr. Chow noted that the plaintiff's pre-existing anxiety and depression may be a confounding factor for her concussion presentation. He opined that the plaintiff's psychological, cognitive and sleep issues likely have multifactorial causes which include concussion and pre-existing anxiety and depression.

[61] With regard to her physical injuries, Dr. Chow said there was a possibility of improvement, a possibility she would stay the same, and a possibility she would get worse.

[62] Dr. Chow opined the prognosis for recovery was poor.

[63] It is his opinion that it is unlikely the plaintiff will be able to return to gainful employment.

Dr. Donald Cameron – Neurologist

[64] The plaintiff's witness, Dr. Donald Cameron, was qualified as an expert in neurology. He examined the plaintiff in person on June 8, 2022.

[65] He diagnosed the plaintiff with the following conditions:

a) Post-traumatic musculoskeletal or cervicogenic headaches with intermixed post-traumatic common migraine headaches; and

b) Cognitive problems likely caused by chronic pain, post-traumatic headaches, and the psychological problems that have been present following the Accident.

[66] Dr. Cameron noted different accounts provided by the plaintiff of the Accident and her symptoms to her treatment providers. She reported to him that she had full recall of the events of the Accident and she had recalled essentially all of the events after the Accident and at the scene of the Accident. The occupational therapy records from 2020 document that she reported that she did not have a clear memory of her assessment at Vancouver General Hospital. He opined that memory does not get worse over time as a result of concussion, and the natural history of symptoms from a concussion is that they improve over a period of approximately two years and do not deteriorate.

[67] The plaintiff reported stuttering following the Accident. She told Dr. Cameron that this has not improved since the Accident. This relates to the plaintiff's symptom of not being able to find her words at times. She reported not being able to watch hockey games on television shortly after the Accident due to too much action, but she was able to watch at the time of the assessment.

[68] Dr. Cameron's opinion was that the plaintiff's stuttering does not have a neurological basis and is more likely to be psychological in nature.

[69] Dr. Cameron attributed the plaintiff's reported difficulty with reading and word-finding to her pain, post-traumatic headaches, and the exacerbation of her pre-existing symptoms of anxiety and depression which were present prior to this accident. He confirmed at trial that in his opinion her pain and psychological state are causing what she perceives to be concussion-related symptoms.

[70] In relation to the plaintiff's falling episodes, Dr. Cameron concludes that none of the falls she described would have caused her to meet the criteria to warrant a diagnosis of concussion. They are more likely to be episodes of syncope, or fainting. Dr. Cameron testified that dizziness as reported by the plaintiff was common in whiplash cases without a concussion and that vestibular therapy would be recommended, even without a diagnosis of concussion.

[71] As for the plaintiff's reports that she remained in bed for two years because of the Accident, Dr. Cameron opined this was more consistent with a decrease in motivation due to depression than it was to a traumatic brain injury, as in his opinion this behaviour is not typical of brain injured individuals.

[72] He found that the plaintiff exhibited insufficient evidence of concussion symptoms at the time of the Accident to warrant a diagnosis of concussion or other brain injury.

[73] The plaintiff reported using Advil and Tylenol for her headache pain. The Tylenol does not cause consistent relief, but the Advil does help. The plaintiff also described her upper back pain as having resolved prior to Dr. Cameron's assessment.

Dr. Dorothy Reddy – Psychiatrist

[74] The plaintiff's witness, Dr. Dorothy Reddy, was qualified as an expert in psychiatry. She examined the plaintiff virtually by video teleconference on May 30, 2022.

[75] Dr. Reddy opined the plaintiff suffered the following symptoms as a result of the Accident:

a) PTSD;

b) Major depressive disorder likely exacerbated by the Accident;

c) Generalized anxiety disorder exacerbated by the Accident;

d) Neurocognitive disorder due to traumatic brain injury;

e) Sleep apnea;

f) Panic disorder; and

g) Attention deficit disorder.

[76] The plaintiff reported that her back pain had resolved and that her neck pain had improved since the Accident.

[77] Dr. Reddy considered the plaintiff's reporting of significant trauma: being sexually assaulted as a teenager, experiencing physical abuse during childhood, and being involved in two armed robberies while working in retail, including one robbery where a knife was held to her pregnant belly. She suffered from post-partum depression after the birth of her first child and was treated for her symptoms for eight years. She also suffered from depression experienced with the development of her younger son developing an illness in 2012 and her older son developing a serious illness a couple of weeks later. After the Accident the plaintiff began to self-mutilate herself, stopping in early 2022.

[78] Dr. Reddy concluded that it was difficult to assess how much of the psychological symptoms are influenced by her previous trauma and prior episodes of anxiety and depression. However, she did note that the plaintiff was functioning well at work prior to having children and as a homemaker after she had children and prior to the Accident.

[79] Dr. Reddy opined that previous trauma was not a major contributor to her current PTSD symptoms and if there were some symptoms remaining prior to the Accident, then the Accident exacerbated those symptoms. Further, the plaintiff has major depression disorder and generalised anxiety disorder. Her depression and anxiety symptoms prior to the Accident were stable. Dr. Reddy opines that the Accident exacerbated the plaintiff's depression and anxiety. This puts her at a higher risk for suicide.

[80] Dr. Reddy states the plaintiff's prognosis is poor.

Dr. Meera Gupta – Neurologist

[81] The defendant's witness, Dr. Meera Gupta, was qualified as an expert in neurology. She examined the plaintiff in person on June 27, 2022.

[82] Dr. Gupta opined the plaintiff sustained post-traumatic headaches secondary to whiplash caused by the Accident. The headaches began with a migraine quality, but currently have more of a moderate to severe mixed phenotype. Dr. Gupta further noted that a pre-existing history of experiencing migraines may have predisposed her to post-traumatic headache.

[83] Regarding the issue of an MTBI, she opined that the plaintiff may have sustained one but more than likely did not. If she did, then the MTBI would only be responsible for a small percentage of her ongoing symptoms which are multifactorial.

[84] Dr. Gupta noted that stuttering is not a neurological problem with acquired onset in adults, and rather, is typically felt to be in the realm of a psychological issue.

Dr. Gupta did not notice any abnormalities with speech or language throughout her assessment. The plaintiff reported to Dr. Gupta that her stuttering has improved.

[85] Dr. Gupta found the plaintiff's various falls were suggestive of a fainting or syncopal episode rather than a seizure or epilepsy condition, and concluded it was unrelated to the Accident.

[86] Dr. Gupta deferred on the extent to which the plaintiff sustained physical and psychological injuries to experts in those areas.

Causation

[87] There is no dispute from the experts that the plaintiff sustained the following injuries as a result of the Accident:

a) Post-traumatic headaches;

b) Soft-tissue injury-cervico-thoracic spine;

c) Myofascial pain syndrome;

d) Soft tissue injury to the lumbar spine;

e) Rotator cuff syndrome;

f) PTSD;

g) Major depressive disorder likely exacerbated by the Accident;

h) Generalized anxiety disorder exacerbated by the Accident;

i) Panic disorder; and

j) Attention deficit disorder.

[88] On the evidence before me, I see no reason to differ from those opinions.

[89] With regard to a MTBI, the two neurologists opine that it is not likely the plaintiff suffered an MBTI from the Accident. The physiatrist and the psychiatrist opine that she likely did sustain an MTBI. No expert denies the symptoms the plaintiff reports, including headaches, dizziness, concentration problems, memory problems, and word finding difficulties.

Subsequent Falls

[90] There is no evidence of significant, ongoing aggravation of the plaintiff's injuries as a result of any of the falls subsequent to the Accident. The plaintiff testified that any injuries sustained in these falls were temporary aggravations of her underlying injuries.

[91] If the subsequent falls were not caused by the Accident, there is insufficient evidence to suggest that any one of the falls were tortious. Any injury caused by any of the falls appears to be indivisible, whether time limited or not.

The Plaintiffs Pre-existing Health Issues

[92] The plaintiff has two pre-existing conditions that should be taken into account when assessing her general damages, these being the plaintiff's pre-existing depression and anxiety, including her agoraphobic tendencies.

[93] The authorities are clear that the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition if the plaintiff would have experienced them regardless of the Accident: *Athey v. Leonati,* [1996] 3 S.C.R. 458 at para. 35, 1996 CanLII 183.

[94] A "measurable risk" or "a real or substantial possibility and not mere speculation" is required in order to find that the pre-existing condition would have manifested in the future regardless of the defendant's negligence is required. The measurable risk need not be proven on a balance of probabilities, but given weight according to the probability of its occurrence: *Athey* at paras. 27 and 35.

[95] The defendant is only required to return the injured plaintiff to the original position that she would have been in "but for" the accident. There is no requirement to return the plaintiff to a better position than her original position: *Athey* at para. 35; *Vintila v. Kirkwood*, 2016 BCSC 930 at para. 33.

[96] The court must take into consideration the risk established by the evidence that the pre-existing condition would have detrimentally affected the plaintiff in the future in any event: *Jokhadar v. Dehkhodaei*, 2010 BCSC 1643 at para. 109.

[97] Because the risk of the plaintiff having an exacerbation of her depression and anxiety absent the Accident is a hypothetical event, the court must consider the probability of the risk occurring and adjust the award accordingly, as opposed to applying a balance of probabilities.

[98] The defendant submits that the plaintiff's pre-existing anxiety and depression would have caused her to be anxious and depressed to the present day and in the future regardless of the Accident.

Damages

Non-Pecuniary Damages

[99] *Stapley v. Hejslet*, 2006 BCCA 34 outlines the purpose of and considerations for assessing non-pecuniary damages. At para. 46 the Court of Appeal sets out an "inexhaustive list of common factors" to be considered, being the:

(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;
(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 …).

Pain, Suffering, Loss of Enjoyment and Loss of Amenities

[100] The plaintiff refers me to non-pecuniary awards of $350,000 (inclusive of housekeeping capacity loss and loss of the prospect of having children) in *Grabovac v. Fazio*, 2021 BCSC 2362; $210,000 in *Plett v. Davis*, 2022 BCSC 789; $210,000 in *Choi v. Ottahal*, 2022 BCSC 237; $220,000 in *Mellesmoen v. Cullen*, 2022 BCSC 1985; $215,000 in *Kim v. Basi*, 2022 BCSC 1793; and $200,000 in *Wright v. Admiraal*, 2022 BCSC 742.

[101] The plaintiff submits whether or not a MTBI was incurred, the evidence shows the plaintiff suffers from chronic pain, chronic headaches, psychological injuries that are disabling, and cognitive issues that continue to affect her.

[102] For a period of about two and a half years, the plaintiff went through a severe bout of depression in which she was totally disabled. She cut herself, had suicidal ideation which was voiced with enough concern that her spouse called the police twice. During this period the plaintiff testified she spent most of her time in her bedroom.

[103] The plaintiff submits that although she has improved from her low point, she is left with significant ongoing impairments. Her weekly routine now consists of going to four or five treatments every week, including counselling, kinesiology, physiotherapy, vestibular therapy and massage therapy. The plaintiff also focusses on getting some exercise daily. She has only returned to some of the lighter housekeeping duties, with her spouse doing the majority of the work. The plaintiff has not returned to the level of care she used to provide her snakes, of which she now only has 40 instead of 70.

[104] The evidence shows the plaintiff has the ability to engage in one-off events, such as going to a concert, or going on her spouse’s boat. However, the plaintiff and her spouse testified that these activities are followed by days or even weeks of

significant impairment. If the plaintiff does not limit her activity level she is also prone to anxiety attacks or panic attacks.

[105] The plaintiff submits $250,000 is an appropriate non-pecuniary award on the basis that the period of severe depression for 2.5 years after the Accident is more significant than that experienced by the plaintiffs in *Kim* or *Choi*.

[106] The defendant refers me to the non-pecuniary awards of $80,000 in *Chaudhry v. Henville*, 2021 BCSC 2318; and $100,000 in *Forder v. Linde*, 2014 BCSC 1600.

[107] The defendant accepts that the Accident contributed to the severity and longevity of the plaintiff's pre-existing conditions. The defendant further submits that the plaintiff's Accident-related injuries temporarily impacted her ability to participate in her hobbies, namely snake keeping. As such, the defendant submits that an award of $75,000 is reasonable under this head of damage.

[108] The plaintiff was a high functioning homemaker at the time of the Accident. She was fully engaged with her youngest son's schooling and activities. She spent significant time caring for her large number of snakes. The plaintiff took great pride in supporting her son's development and enjoyed her growing collection of snakes. She is not able to function at her past levels.

[109] The plaintiff's pre-existing psychological issues of post-partum depression and anxiety and depression arising from her children's illnesses were exacerbated as a result of the Accident. They have been exacerbated to the point that the plaintiff cannot function at her prior level.

[110] The circumstances in *Forder* are similar to those of the plaintiff. The plaintiff's pre-existing depression and anxiety are somewhat more severe than Ms. Forder's. However, the plaintiff was functioning well before the Accident and her psychological symptoms post-Accident were much more severe than her prior symptoms for a significant period. I find that there is a low probability that the plaintiff would have experienced future bouts of anxiety and depression despite the Accident.

[111] Taking into consideration all of these factors, I find that an award of $120,000 for non-pecuniary damages is appropriate.

Past and Future Loss of Earning Capacity

[112] As I set out in *Corness v. Ng*, 2022 BCSC 334:

> [103] "Both past and future income loss are properly considered on the basis of loss of income earning capacity": *Hinagpis v. Adaza III*, 2019 BCSC 880 at para. 133, citing *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19.
>
> [104] The general legal framework focuses on putting the plaintiff in the position (post-accident but both pre-trial and post-trial) they would have been in but for the injuries caused by the defendant's negligence. However, there is a different standard of proof applicable to past facts versus past and future hypothetical events. The Court in *Gao v. Dietrich*, 2018 BCCA 372 at para. 34 held:
>
> > [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

[113] The "Grauer Trilogy" of cases (*Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421) describes the proper approach to assessing damages for loss of earning capacity. The plaintiff refers me to the Court of Appeal's subsequent application of the Grauer Trilogy in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 where they set out a clear "3-step" approach based on the trilogy:

> First Step
>
> [11] With respect to the first step, I note two considerations as outlined in *Rab* at paras. 29–30. First, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, including those in which a plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. The plaintiff has clearly lost capacity and income. However, in these situations, it will still be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, such as potential positive or negative contingencies.

In less obvious cases, the second set, the first and second steps of the analysis take on increased importance.

[12] Second, with respect to the second set of cases, that is, situations in which there has been no clear loss of income at the time of trial, the *Brown* factors, as outlined in *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.), come into play. The *Brown* factors are, according to *Rab*, considerations that:

> [36] … are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
>
> [37] If there has been a loss of the capital asset, the question then becomes whether there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[13] For ease of reference, the *Brown* considerations set out at para. 8 of that decision include whether:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[14] Recall, however, that a plaintiff is not entitled to an award for a loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Rab; Perren v. Lalari*, 2010 BCCA 140. That is, even if the plaintiff makes out one or more of the *Brown* factors, and thus demonstrates a loss of earning capacity, this does not necessarily mean they have made out a real and substantial possibility this diminished earning capacity would lead to a loss of income in their particular circumstances. This is where the second step comes in.

Second Step

[15] The reference to paras. 93–95 of *Dornan v. Silva*, 2021 BCCA 228, in para. 47 of *Rab*, above, regards the standard of proof at this stage: a real and substantial possibility. This standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

Third Step

[16] As touched upon above, depending on the circumstances, the third and final step—valuation—may involve either the "earnings approach" or the "capital asset approach": *Perren* at para. 32. The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial,

> that is, the first set of cases described above. Often, this occurs when a plaintiff has an established work history and a clear career trajectory.
>
> [17] Where there has been no loss of income at the time of trial, as here, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset: *Brown* at para. 9. Furthermore, the capital asset approach is particularly helpful when a plaintiff has yet to establish a settled career path, as it allays the risk of under compensation by creating a more holistic picture of a plaintiff's potential future.

Has the plaintiff suffered a reduced capital asset?

[114] The plaintiff was an active mother and homemaker before the Accident. She was productive with regard to acquiring snakes, caring for them, learning about them, and planning to breed them.

[115] Although she had not worked since 2003 or 2004, the plaintiff had earning capacity in the form of the ability to do productive labour in a manner competitive with ordinary working-aged adults. Her prior work history and pre-Accident functionality is consistent with the plaintiff having the capacity to re-enter the paid workforce.

[116] Dr. Chow says she is now unlikely to work in gainful employment. Dr. Reddy says her prognosis is guarded to poor, meaning she cannot work but there is a chance she may improve with treatment. However, her function is highly unlikely to improve. Dr. Cameron opines the plaintiff is chronically partially disabled.

[117] In the years immediately following the Accident, she was able to drive her youngest son to sports and various appointments, as well as take care of her snakes and other pets, but at a reduced capacity. The plaintiff retains residual capacity to work as a snake breeder. She stated at trial that snake care is not physically demanding. Her primary complaints are of her anxiety and depression.

[118] The plaintiff's functionality has decreased significantly since the Accident as described above. I find that the plaintiff has suffered a reduction in her earning capacity as a result of the Accident.

Will the plaintiff's reduced capital asset lead to a real and substantial possibility of wage loss?

[119] The plaintiff was not employed at the time of the Accident, nor had she been employed since the birth of her youngest child in 2004.

[120] The issue therefore is whether she retains ability to work and earn an income from all types of employment, including employment outside of a plaintiff's chosen field: *Matheos v. Scott*, 2019 BCSC 1738 at paras. 97–98.

[121] The plaintiff confirmed on cross-examination that she wished to wait until her youngest son graduated high school before entering the job force once more. However, on redirect, she clarified what she meant by "high school" and that she originally wished to return to work once her youngest son transitioned from elementary school to high school. This conflicts with her prior statement to Dr. Reddy that she wished to wait until her youngest son graduated high school before returning to the workforce. Given her intensive involvement in her son's activities, it is more likely that prior to the Accident the plaintiff would have continued to focus her time on her son while in school.

[122] The plaintiff testified to her plans to start a business breeding snakes. She acknowledges, however, that even if she did embark on this business venture, she would not have been successful. I accept that this activity would be something she would likely have started prior to her son's graduation since she was already spending extensive time caring for her numerous snakes. She does not claim a real possibility of wage loss from such a business. I further find it is likely that she would have reached the point of giving up on this avenue of earning an income by the time her son graduated, which was June 2022.

[123] The plaintiff's "backup plan" was to return to work with the Liquor Distribution Branch, a job she held for at least 10 years prior to her second son being born. The plaintiff testified that she loved the job when she had it.

[124] She had a third non-specific plan to “do something”. This was confirmed by her spouse. He expected her to bring money into the household.

[125] The plaintiff submits that she would have returned to work at a BC Liquor Store working similar hours to that in the past: an average of 23 hours per week and earning a comparable wage now at $27.63 per hour. Alternatively, she would be employed in a position paying up to that amount. The plaintiff testified that she would work full day shifts Monday to Friday if offered. She was clear that she would not have permanently remained out of the workforce.

[126] Both parties agree that without a recent pre-Accident earnings history, the plaintiff’s loss of earnings fall under the “capital asset” approach, which is a more holistic approach.

[127] On the one hand, the plaintiff may have worked full time and past the age of 65. On the other hand, she may have worked less than 23 hours a week or stopped employment prior to age 65.

[128] The plaintiff submits when the various possibilities are taken into account, both positive and negative, her without-Accident earning capacity balances out to a part-time worker earning $21 per hour and working 23 hours per week until she is 65.

[129] If she started working in 2019, the plaintiff submits her without-Accident pre-trial earning capacity is $96,600 ($21 per hour x 23 hours per week x 50 working weeks per year x 4 years). They further submit her with-Accident pre-trial earning capacity is $0. Therefore, they seek an assessment of past loss of earning capacity of $96,600. Further, her without-Accident future earning capacity is $263,416.13 ($24,150 per year x 10.9075 – CIVJI present value table for 12 years).

[130] The defendant agrees that there was no evidence to substantiate any net income from snake breeding. They submit an award of $35,000 is appropriate for losses associated with the delay in obtaining part-time, entry-level employment as a

cashier or other retail clerk, as the plaintiff had engaged in this type of work before she exited the workforce.

[131] Despite the plaintiff's experience with depression and anxiety being under control pre-Accident, she was at a higher risk of future bouts of depression which may have impacted her earnings capacity. This may have been only for short periods of time. This is a real and substantial possibility.

[132] I find that the plaintiff does retain a level of earning capacity. On the whole, I find the evidence shows that the plaintiff's injuries will not likely improve very much from her current state. Employment in an entry level position is a likely option for the plaintiff, but at a part-time level given her reduced tolerance levels. She will have to compete with healthy counterparts in the open job market, however, she does have a strong, if not recent, history of employment with a large retail employer.

[133] I do not agree with the plaintiff that $96,600 is appropriate for the plaintiff's past loss of earning capacity. In particular, I do not agree with the plaintiff's conclusion that $96,600 pre-trial earning capacity assessment (without the Accident) is appropriate. I agree that the plaintiff's pre-trial earning capacity (with the Accident) is $0. As I found above, the plaintiff would likely have entered the workforce after her son's graduation in June 2022. This trial began in January 2023. Therefore, I find that the plaintiff's past loss of earning capacity is assessed at $24,000.

[134] The plaintiff's position takes into consideration that she may not have entered into the workplace at all, or that she may have returned at a full-time level. I find that it is not very likely that the plaintiff would have entered the workforce at a full-time level, and that there is some likelihood that she would not have worked as many hours in a week as proposed. Further, the plaintiff has a prior history of depression and anxiety which I find created a low possibility of negative impact on her without-Accident future earning capacity. The plaintiff is also pre-disposed to more severe injury due to the exacerbation of her depression and anxiety from the Accident.

[135] As I have stated, the plaintiff retains a residual earning capacity, but I find that is limited. On a holistic basis, I assess the plaintiff's past loss of earning capacity at $24,000 and her future loss of earnings capacity at $200,000.

Loss of housekeeping capacity

[136] In *Steinlauf v. Deol*, 2021 BCSC 1118, aff'd 2022 BCCA 96, Justice Basran set out the legal test for loss of homemaking capacity as follows:

> [222] The principles applicable to the loss of homemaking capacity are:
>
> - Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
> - A plaintiff who has suffered an injury that would make a reasonable person in his circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
> - Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
> - As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
> - Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.
>
> See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; and *Kim v. Lin*, 2018 BCCA 77 [*Lin*] at paras. 28–34.

[137] Where a plaintiff's claim for housekeeping is unsubstantiated by receipts for housekeeping services or evidence of unpaid housekeeping services provided by family members, a plaintiff's award for housekeeping should be included in an award for non-pecuniary damages: *Liu v. Bains*, 2016 BCCA 374 at paras. 21 and 25. The court must approach these awards with caution and any reduction will be dictated by the facts of the individual case. As set out in *Liu* at para. 29:

> [29] I appreciate that *Kroeker* and, more recently, *Westbroek*, urge caution in assessing awards for loss of housekeeping capacity. I do not, however, understand these decisions to endorse an award that provides less than full compensation for a proven loss. Nor do they mandate a routine reduction of two thirds if a trial award is successfully challenged. Any reduction will be dictated by the facts of the individual case.

[138] Despite the plaintiff's spouse testifying that he had to perform the majority of housekeeping duties following the Accident, he further testified that neither he nor the plaintiff contemplated hiring a housekeeper.

[139] The plaintiff was primarily responsible for her household prior to the Accident, which was a household that included 70 snakes, five cats, and two dogs.

[140] The plaintiff's husband testified he had to increase his duties around the house after the Accident, but that he has not been able to keep up with the deep-cleaning that the plaintiff used to do. He used to do 10% to20% of the housekeeping, primarily outdoor tasks and dealing with the garbage. He stated that for a period of time, approximately two to three years, he did 90% of the housekeeping. However, since the plaintiff started improving in 2020 this has reduced to 65% to 70%.

[141] In addition to his normal duties around the house, he does cooking, vacuuming, sweeping, dishes, window washing, grocery shopping, cleaning the bathroom, paying the bills, laundry, making the bed, and cleaning their son's room and taking him to some of his appointments.

[142] Given the number of animals in the house, vacuuming is a daily task.

[143] The plaintiff's spouse estimated that when the plaintiff was at her worst, he was doing three hours a day, seven days a week, of additional tasks. Currently, he still does all the extra tasks, but the plaintiff will contribute to some of them like vacuuming, washing the dishes and laundry. He estimated that he currently requires two hours a day to perform extra tasks. Even with his extra efforts, the deep cleaning which the plaintiff used to do does not get done.

[144] At a rate of $20 per hour, the plaintiff seeks an award of $98,280 for past loss and $145,663 for future loss of housekeeping capacity. This takes into consideration the CIVJI multiplier of 2% for future loss and a 30% contingency for the possibility that she does more housekeeping in the future, and the possibility she would have decreased her housekeeping prior to age 70 even if the Accident had not occurred. I would also include the likelihood of the youngest son's moving out of the home or

otherwise taking on more housekeeping duties in the normal course, as well as the possibility that the plaintiff would have decreased her interest in snakes and snake breeding which would greatly reduce the housekeeping tasks.

[145] The defendant submits the plaintiff's award for loss of housekeeping should be addressed in the award for non-pecuniary damages as she is entitled to a nominal award for same because her injuries have resolved to the point of allowing her to perform many of her pre-Accident housekeeping duties, I disagree.

[146] I assess the past loss of housekeeping capacity at 20 hours per week at the rate of $20 perhour for two years June 2017 to May 2019, for a total of $41,600. From June 2019 to January 2023, three and a half years, the loss would be 14 hours per week for a total of $50,960. Past loss of capacity would therefore be $92,560.

[147] The plaintiff's future loss of housekeeping capacity which the plaintiff calculates at $208,090 is more reasonably reduced by a 50% contingency, for a total of $104,045.

Cost of Future Care

[148] The plaintiff is entitled to be returned to the position she was in had the Accident not occurred. As I set out in *Corness*:

> [154] … The court must attempt to assure full compensation through the provision of adequate future care required as a result of the Accident. This award should be based on what is reasonably necessary to promote the plaintiff's mental and physical health, given the medical evidence: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 82-84, aff'd 49 B.C.L.R. (2d) 99 (C.A.); *Zhang v. Ghebreanenya*, 2015 BCSC 938 at para. 46.
>
> [155] Assessment of the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[149] Services that the plaintiff has not used, or sought out, in the past may not properly be the subject of an award of cost of future care, as it is unlikely that she or he will avail her or himself of such services in the future: *Sahota v. Ho*, 2013 BCSC 639 at para. 229.

[150] Since the Accident, the plaintiff attended the following treatment which she currently attends: 84 massage therapy sessions; 37 vestibular therapy sessions; 18 kinesiology sessions; 147 physiotherapy sessions; and 109 counselling sessions.

[151] The plaintiff engaged treatment inconsistently to date. She frequently ignored the recommendations of her family doctor, Dr. Kason, both before and after the Accident. She refused to attend counselling at various points since the Accident but now attends regularly.

[152] Dr. Chow opined that the plaintiff's recovery had plateaued and treatment is necessary to manage function and treat symptoms with a focus on psycho-cognitive sleep issues and pain and physical limitation issues. Dr. Chow recommended physiotherapy, including dry needling, manual therapy followed by exercise of the trigger point muscles as well as engaging in an exercise program. Her use of Zoloft, Clonazepam and Imovane should continue. As well cognitive behavioural therapy is recommended.

[153] Dr. Gupta recommends medication to treat the plaintiff's headaches.

[154] The plaintiff claims for costs associated with ongoing vestibular physiotherapy, physiotherapy, kinesiology, massage therapy, and counselling for a period of three years at her current level of usage, which takes into consideration the uncertainty of how much treatment the plaintiff will require in the future. She calculates that at $56,000 based on the current accident benefit from the *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83, Schedule 3.1 and s. 88(1.3).

[155] The defendant submits that the plaintiff would benefit from further physical exercise, counselling, and antidepressant use and that an award of $5,000 is reasonable.

[156] Kinesiology therapy was not specifically referenced in the recommendations. However, the plaintiff did testify that her kinesiology sessions, globally, have improved her symptoms. The plaintiff also testified she would continue with her current treatment, admitting to a late uptake in pursuing this type of therapy. Based

on her more extended history of therapy attendance, it is not likely that she will receive each treatment once a week as is suggested. I find it is more likely that she will attend treatments once every two weeks based on her history of therapy appointment attendance in the past.

[157] I award the amount of $28,000 for vestibular physiotherapy, physiotherapy, kinesiology, massage therapy and counselling for reasonable and necessary medical treatment of the plaintiff's injuries.

Special damages

[158] The plaintiff claims $3,258.05 in special damages, which include: $930.30 for massage, $70 for physiotherapy, and $2,257.75 in mileage.

[159] The defendant objects to payment of user fees paid by the plaintiff in receiving the treatments, which totals $1,000.30. The defendant provided no basis for their objection.

[160] There is no dispute the plaintiff made those payments in connection with the treatments. I award the total amount claimed, being $3,258.05.

Has the plaintiff failed to mitigate her damages?

[161] The defendants submit that any compensation awarded to the plaintiff should be discounted for her failure to mitigate her damages due to her failure to follow the recommendations of her family doctor by not attending massage therapy, physiotherapy, counselling, vestibular therapy, or kinesiology in the first two and half years after the accident.

[162] In *Job v. Van Blankers*, 2009 BCSC 230 at para. 107, the Court set out the duty of a plaintiff to mitigate losses:

> [107] The law imposes upon plaintiffs the duty to mitigate their losses. This includes taking reasonable steps to minimize any loss relating to injuries, so as to prevent plaintiffs from recovering for harm and loss caused by their own neglect. In *Graham v. Rogers*, 2001 BCCA 432, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 467, Madam Justice Rowles writing for a

majority of the Court of Appeal succinctly stated the principle of mitigation of damages in personal injury cases at para 35:

> Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue.

[163] In *Turner v. Coblenz,* 2008 BCSC 1801 at para. 101, a concise statement of the test for an allegation of failure to mitigate is set out:

> The defendant bears the onus of proving the essential elements of failure to mitigate, which are the following:
>
> (a) That a qualified medical expert recommended that a plaintiff undergo a particular form of treatment;
>
> (b) That the plaintiff failed or refused to take the recommended treatment although it was available to him or her; and
>
> (c) That the plaintiff's refusal or failure was unreasonable, in that if the plaintiff had taken the recommended treatment, there is some likelihood that he or she would have received substantial benefit from it, and the treatment would not expose the plaintiff to significant risk.
>
> See *Janiak v. Ippolito* [1985] 1 S.C.R. 146; *Chiu (guardian ad litum of) v. Chiu* 2002 BCCA 618 at paragraph 57; and *Middleton v. Morcke* 2007 BCSC 804 at paragraph 37.
>
> [Emphasis added.]

[164] The leading case regarding the law of mitigation is set out in *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144, in which the Court of Appeal held as follows at paras. 53–56:

a) The onus to prove failure to mitigate is on the defendant;

b) The test for mitigation is subjective/objective;

c) The test has two aspects:

i. First, the court must ask if a reasonable patient, having all the information at hand that the plaintiff possessed, out reasonably to have undergone the recommended treatment;

ii. Second, the court must consider the extent, if any, to which the plaintiff's damages would have been reduced. There must be some likelihood the plaintiff would have received substantial benefit from it.

[165] To aid in her recovery from her Accident-related injuries, as well as her pre-existing health conditions, Dr. Kason recommended the plaintiff attend physical therapy, cognitive behavioural therapy, take her psychiatric medications more regularly, take pain abortive medication for her headaches and other soft tissue injuries, and to exercise, stretch, and use heat on her soft tissue injuries.

[166] Dr. Kason testified that he was "frustrated" with the plaintiff because she was not following any of his treatment recommendations in the years following the Accident. In his contemporaneous notes regarding her visits to him after the Accident, Dr. Kason repeatedly noted that the plaintiff needed to actively participate in her recovery and attend recommended treatments if she expected to recover.

[167] Despite recommendations for treatment and ongoing symptoms that were reportedly severe, the plaintiff admitted she "did nothing" in relation to treatment in the two years following the Accident. She further testified that she began pushing herself and engaging in as many treatments as possible in the time leading up to trial.

[168] At trial, the plaintiff cited she did not attend treatment in the two years following the Accident because she was not able to afford treatment, as her family's financial capabilities went towards her younger son's recovery treatments.

[169] However, her spouse testified that he has a benefit plan that covers his family members, and confirmed that he, "... was not sure," as to whether his benefits package covered treatments such as physiotherapy and counselling for his children and spouse. Similarly, the plaintiff testified on cross-examination that she "[had] no idea" about whether her spouse's benefits could cover any of her treatment. I infer from this that she did not attempt to seek such coverage for her treatment because she did not intend to attend any treatment.

[170] Though the plaintiff testified that her family needed to take out a line of credit in 2017 to pay for her son's treatments related to the Accident, her spouse testified that he and the plaintiff took out the line of credit because someone at his work recommended he seek one before he and the plaintiff "... got too old," and would thus lose the ability to obtain one. During cross-examination, the plaintiff's spouse confirmed that he and the plaintiff had no other reason for taking out this line of credit.

[171] The plaintiff also testified that she did not seek treatment because she "did not know" she needed to, and that she "... can't self-diagnose" to determine what treatment would have been appropriate. However, Dr. Kason made multiple recommendations in the weeks following the Accident that the plaintiff exercise, stretch, take abortive pain medications for her headaches, attend cognitive behavioural therapy, and attend physical therapy.

[172] The plaintiff testified that, since attending her various treatments, including vestibular therapy, physiotherapy, registered massage therapy, counselling, and taking her psychiatric prescriptions on a more regular schedule, her Accident-related symptoms have improved, and she feels like she has "hope" once more. Her spouse confirmed that he and the plaintiff's relationship has improved over the last year, and he echoed the plaintiff's optimism about the couple's future.

[173] Dr. Kason testified that, in his recent appointments with the plaintiff, he observed her to be happier, in less pain, and be more agreeable. He further testified that he no longer "dreads" treating her since she began treating herself and seeing improvements in her condition.

[174] Only one expert testified as to the impact of the late treatment. Dr. Chow opined that it was possible that earlier treatment would place the plaintiff in a better position but it was unpredictable.

[175] The plaintiff refers me to *Wagner v. Newbery*, 2015 BCSC 894. There, the defence experts had opined if a plaintiff was more active it was possible that those

activities might have made her better. Justice Blok held that only a possibility of symptom improvement was not enough to meet the test in *Gregory.* More significantly, the plaintiff in that case was suffering from depression as a result of the accident.

[176] In dismissing the failure to mitigate argument, Justice Blok held:

> [232] There is, however, another problem with the defendants' mitigation argument because the circumstances suggest Ms. Wagner's lack of diligence may well be a part of her depressive symptoms. Certainly, the defendants have not shown that it is not a consequence of depression, and they have the burden of proof on this issue. A plaintiff cannot be found to have failed to mitigate damages where that failure stems from a condition that the defendants themselves have caused, at least in part.

[177] The plaintiff submits the period in which she was not treating her symptoms was the time she was at her worst. She was cutting herself. Her weight increased dramatically. She was suicidal. She spent most of her time in bed. Her doctor dreaded seeing her. She had very little energy reserves, and those reserves were used up caring for her son who was also injured in the Accident.

[178] I am placed in a difficult position in determining whether the defendant has established that the plaintiff failed to mitigate her damages. In this case, the plaintiff testified that her failure to obtain early post-Accident treatment as recommended by Dr. Kason was due to her focusing on her son's health, as well as an inability to pay for her own treatments. She did not herself testify that it was her own symptoms which were the main reason for her failure to obtain treatment. Her testimony and evidence as to why she chose not to follow Dr. Kason's recommendations is inconsistent.

[179] The evidence of Dr. Chow notes that earlier treatment could possibly, albeit unpredictably, have improved the plaintiff's position. However, Dr. Kason's evidence shows that when the plaintiff started the recommended treatments, she made significant improvements. The plaintiff herself testified to the positive effect of the treatments on her symptoms.

[180] Overall, based on all of the evidence and in light of the circumstances, I am satisfied, on a balance of probabilities, that timely treatment following the Accident would have resulted in an earlier reduction of the plaintiff's symptoms. Her failure to mitigate has extended the time period during which her symptoms reached their plateau. As such, I will allocate a reduction for failure to mitigate toward the non-pecuniary damages at 10%, past earning capacity and past loss of housekeeping capacity at 20%.

Conclusion

[181] In summary, I make the following orders for awards in accordance with the reasons above and with the appropriate reductions applied for the plaintiff's failure to mitigate her damages:

Non-pecuniary damages ($120,000 less 10%)	$108,000
Past loss of earning capacity ($24,000 less 20%)	$19,200
Future loss of earning capacity	$200,000
Past loss of housekeeping capacity ($95,260 less 20%)	$76,208
Future loss of housekeeping capacity	$104,045
Cost of future care	$28,000
Special damages	$3,258.05
Total	**$538,711.05**

[182] If the parties wish to make submissions on costs, they may do so provided they contact Trial Scheduling within 30 days of receiving this decision to schedule a costs hearing. Otherwise the plaintiff is entitled to her costs at Scale B.

"Wilkinson J."