

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harper v. Mezo*,
2024 BCSC 874

Date: 20240522
Docket: M190069
Registry: Victoria

Between:

Marion Harper

Plaintiff

And:

Zoltan Mezo

Defendant

Before: The Honourable Madam Justice J. A. Power

Reasons for Judgment

Counsel for the Plaintiff:

M.J.C. Smith

Counsel for the Defendant:

M. J. Walton

Place and Dates of Trial:

Victoria, B.C.
September 5 - 8, 2023
September 11 - 15, 2023
September 21 - 22, 2023

Place and Date of Judgment:

Victoria, B.C.
May 22, 2024

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INTRODUCTION

[1] This action relates to a high-speed single motor vehicle collision that occurred on the Sunshine Coast highway on May 9, 2017. The plaintiff alleges she suffered serious injuries and seeks an appropriate quantum of damages for those injuries.

[2] The plaintiff, Marion Leslie Harper, who was 71 at the time of trial, was a front seat passenger in a pick-up truck driven by the defendant, Zoltan Mezo, when Mr. Mezo fell asleep and drove off the highway at highway speed. Ms. Harper was in a personal relationship with Mr. Mezo at the time of the collision, but the parties have since broken up.

[3] Liability for the accident is admitted by the defendant. At issue is the extent of injuries caused by the accident. The defendant does not appear to dispute that the plaintiff suffered many serious physical injuries, including three vertebral fractures. The defendant does dispute whether or not the plaintiff suffered a concussion or mild traumatic brain injury and also takes issue with the quantum of the award that the plaintiff is seeking.

[4] The plaintiff is seeking damages in excess of \$800,000 for the accident. With respect to the various heads of damages, the cost of future care is the most contentious aspect of the award.

[5] The plaintiff called several lay witnesses who knew her well both pre- and post-accident. In my opinion, the plaintiff has established persuasively that the effects of the accident on all aspects of her life have been devastating.

[6] The defendant has suggested that the plaintiff is an unreliable historian and that her evidence should be viewed cautiously. While the defendant has disputed the extent of injury of the plaintiff, he has presented limited evidence to dispute the plaintiff's evidence. In my opinion, a doctor that the plaintiff attended at the request of the defendant, supports the plaintiff's claim. Further, I am satisfied that any memory issues raised in the plaintiff's evidence were primarily caused by the accident and the passage of time until trial.

[7] In considering the totality of the evidence in this case, I have kept in mind some fundamental principles including that the burden of proof is on the plaintiff on a balance of probabilities. I have also kept in mind that the credibility and reliability of a witness' testimony are not synonymous.

[8] This is one of those rare cases where the damages sought by the plaintiff are, in my opinion, in the appropriate range. With some modifications to certain aspects of her claim (for example I am not persuaded by the loss of capacity for wage loss claim), I am awarding damages close to the range that the plaintiff is asking for.

BACKGROUND

[9] I will briefly discuss the background to this matter before turning to a discussion of the heads of damages. I will then refer to additional aspects of the evidence as necessitated by my analysis.

Personal Background

[10] Ms. Harper was born on June 20, 1952 and was 71 years old at the time of trial. At the time of collision on May 9, 2017, Ms. Harper was 64 years old.

[11] Ms. Harper described herself professionally as a horticulturist; planning, designing and creating gardens. She worked as a horticulturist for over 10 years and has worked as a gardening consultant. At the time of the trial, Ms. Harper was volunteering at the Horticultural Centre of the Pacific. She was also a member of the Victoria Horticultural Society.

[12] In addition to her work as a horticulturist, Ms. Harper also worked at Telus for over 20 years. She stopped working at Telus in 2003, after having what she referred to as a transient ischemic attack ("TIA"), sometimes referred to as a mini-stroke. After this medical incident, she initially took long term disability and then eventually went on Canada Pension Plan disability around 2005. Ms. Harper was on long-term disability until she retired around 2012.

[13] At trial, Ms. Harper's sources of income were her Telus pension, Old Age Pension and Canada Pension.

[14] Notwithstanding Ms. Harper's early disability from full-time employment, all of the evidence suggests that prior to the collision she led a full and active life. In addition to her volunteer gardening and horticultural work, Ms. Harper worked extensively on her own garden. Her personal garden at her small house on Prior Street in Victoria was described in evidence as the best garden on the street. She also assisted the defendant Mr. Mezo develop and landscape his property in Sechelt, when he moved there from the Lower Mainland.

[15] Prior to the accident Ms. Harper was very active, enjoying many activities including walking and hiking on local Victoria trails such as Mt. Douglas Park. She was part of a walking group and attended Aqua Fit exercise classes two or three times a week.

[16] Ms. Harper was also highly engaged in her neighborhood and some of the witnesses she called at trial were neighbours who had known her for a considerable period of time. She was the one who often organized neighbourhood events and parties and was also described as an excellent cook.

[17] Prior to the accident, Ms. Harper volunteered as a trainer for the Canadian Guide Dogs for the Blind and trained between 15-17 Labrador Retrievers between 2012 and approximately 2016. She then switched to another organization that trained guide dogs for people with disabilities. All of these activities show the active and interesting life Ms. Harper led prior to the accident.

[18] With respect to her relationship with the defendant Mr. Mezo, Ms. Harper met Mr. Mezo in 2011. He was living in Surrey at the time, but eventually bought a property in Sechelt. Ms. Harper helped work on the Sechelt property, particularly with respect to the landscape, since it was very overgrown at the time Mr. Mezo purchased it. At the time of the collision, Ms. Harper was considering putting her house in Victoria on the market and moving to Sechelt to live with Mr. Mezo full time.

The Accident

[19] The motor vehicle accident occurred on May 9, 2017 around 6:00 p.m. in the evening. The parties earlier that day had gone for a drive and had a picnic-type lunch. Mr. Mezo did some fishing and Ms. Harper did some sketching.

[20] Ms. Harper has little recollection of the accident itself, so the evidence about how the collision happened comes from read-ins of the defendant's examination for discovery evidence. Mr. Mezo did testify briefly at trial, but on other issues.

[21] Immediately prior to the accident, the defendant was driving his 2015 Toyota Tundra four-door pick-up truck. Ms. Harper was in the front passenger seat and both parties were wearing their seat belts. Mr. Mezo was driving downhill and travelling at the speed limit of 80 km/h just prior to the accident. Ms. Harper was talking to her brother on her cell phone at the time. Mr. Mezo fell asleep while he was driving and woke up to the air bags deploying. The vehicle had travelled six to seven feet down into a ditch from the highway. The truck sustained significant damage to the front passenger side.

[22] Mr. Mezo was able to get Ms. Harper out of the passenger side door and help her walk to the side of the road where she lay down. Ms. Harper does not recall this.

[23] Ms. Harper's limited recall of the events prior to the accident includes that she was reaching to put her phone in her bag. She recalled thinking that the truck was on fire. She then recalled lying on the gravel at the side of the road. She recalled hearing a baby crying, but the defendant does not recall a baby being at the scene.

[24] Ms. Harper has very limited recall of the events that followed. She was first taken to the hospital at Sechelt and then transferred to Vancouver General Hospital by helicopter. She spent 10 days at the Vancouver General Hospital and then was transported to her home in Victoria by ambulance. Prior to her discharge from Vancouver General Hospital, Ms. Harper was fitted with a Jewett back brace rather than undergoing spinal surgery. She wore that brace for several months after the accident.

[25] Ms. Harper suffered significant injuries in the accident including three vertebral fractures, injuries to the sternum, soft tissues injuries and chronic pain. As I have said, the issue of whether Ms. Harper suffered a concussion, or mild traumatic brain injury is one of the issues in dispute with respect to the extent of injuries suffered.

Condition Post-Accident

[26] There is no question that the impact of the accident on Ms. Harper's life was significant. For the first few weeks and months following her discharge from hospital she had to be assisted by her extensive network of friends and neighbours. The assistance ranged from delivering food and helping with household tasks, to personal care such as assistance going to the bathroom.

[27] In her evidence, Ms. Harper described that for the first several months post-accident she was "limited with everything, everything hurt and everything was difficult". She could not cook and relied on assistance from her friends and neighbours for meals and when she was able to drive again she purchased ready-made meals.

[28] Ms. Harper was active with respect to her own rehabilitation and "pushed" herself in order to assist with her recovery. Some of her usual activities such as housework and gardening were "out of the question", but when she was able, she walked, went to the pool and went to the gym.

[29] For the balance of 2017, Ms. Harper described herself as "in a lot of pain", the vast majority of which was in her mid to left back, but also included her upper and lower back, arm, leg and shin.

[30] Approximately seven months after the accident, Ms. Harper travelled to Puerto Vallarta for a short holiday. She testified that she found the flight very difficult and she took medication in order to be able to endure it. She was able to walk when she was there, but was not able to snorkel or do any of the other usual activities. A short excursion on a bus was very painful. She described herself as "lazy" on the

holiday, but it is clear that was because of her ongoing recovery, since all of the evidence establishes that Ms. Harper is by nature a very active woman.

[31] Ms. Harper's relationship with Mr. Mezo ended around March 2018. She described coming to the opinion that Mr. Mezo's adult children did not want her in the family, and that they viewed the relationship with her as taking him away from his role as their patriarch.

[32] In terms of her recovery, Ms. Harper described that by the end of 2019 to early 2020, many of her symptoms remained the same, including significant back pain, leg pain, arm numbness, shooting pains and spasms. As a result, Ms. Harper described the onset of the Covid pandemic as "almost welcome", since it allowed her to rest.

[33] Ms. Harper took up yoga to assist with her pain management. She described a typical day now which includes a lot of rest breaks and doing activities like cooking in "increments". For example, if she goes for a walk, she lies down afterwards to rest. On a day with a yoga class, she does not cook. Ms. Harper testified that pain drives her day and she plans her activities according to her level of pain.

[34] Ms. Harper also described having ongoing memory issues and has a hard time remembering even close friends' names. She has various strategies to assist with day-to-day functioning, including handwritten notes and a Google calendar. The memory difficulties were evident at various points in her evidence, and all of the evidence establishes that those difficulties were real. It is clear that the process of testifying in court was very taxing for Ms. Harper.

[35] In summary, since the accident, Ms. Harper has lived in chronic pain with ongoing issues including memory deficits. She has had to give up gardening almost completely, and now plans her days around her pain management. Her leisure activities are modified and ongoing dizziness and balance issues mean that her walking is limited and much more challenging than before.

[36] She is dependent on friends for assistance with household chores and cooking. She cannot walk guide dogs anymore and has a much smaller dog since she cannot handle a larger one.

EVIDENCE OF LAY WITNESSES

[37] The plaintiff called three lay witnesses who have known her for several years both before and after the accident: Meika Johnston, Pam Nicholls, and Kathy Gillis. She also called one witness, Rosemary Sleight, who was a neighbour she first met in the summer of 2017 after the accident.

[38] All of the witnesses confirm that Ms. Harper is a stoic individual who has worked hard on her recovery, but has lingering deficits since the accident that are obvious and concerning.

[39] For example, Pam Nicholls testified that Ms. Harper is no longer able to host large groups and organize large parties as she did before. She also testified that Ms. Harper walks slower and appears unstable on her feet at times.

[40] Meika Johnston is a close friend and neighbour who knew Ms. Harper well before the accident. She described Ms. Harper as a “community fixture” and a “community builder”, who introduced Ms. Johnston to others in the neighbourhood. Ms. Harper would often help Ms. Johnston by babysitting her two young daughters. Ms. Johnston testified about the pain and cognitive struggles she has observed Ms. Harper endure. Ms. Johnston also testified about the emotional and psychological impacts she has observed since the accident. She described Ms. Harper as needing a lot of assistance. She observed Ms. Harper become weepy, depressed and “a different person”, which “was hard to see”. Overall, Ms. Johnston described Ms. Harper as much more vulnerable than she was before.

[41] Ms. Gillis testified that the main activity she has continued with Ms. Harper since the accident is walking. She testified that the walking is slower and the walking is limited to manicured routes or trails that were wheelchair accessible.

[42] Ms. Sleigh, who has only known Ms. Harper since the accident, similarly noted that Ms. Harper can only walk on relatively flat or uniform paths. She has noticed that Ms. Harper has physical difficulties that prevent her working in the garden.

THE MEDICAL EVIDENCE

[43] I will only highlight some of the medical evidence in order to give some context to Ms. Harper’s injuries and prognosis.

Dr. Dina Popovic

[44] Dr. Popovic is an orthopedic surgeon.

[45] The plaintiff called Dr. Popovic as a fact witness even though the defendant requested the independent examination by Dr. Popovic.

[46] Notably, in her notes under Physical Exam, Dr. Popovic writes:

Ms. Harper comes on time and is casually dressed to the interview. She appears sincere. She is unable to sit comfortably for the duration of the interview, moving from her chair to leaning over the examination table to lying down. She answers questions to the best of her ability. She does seem to forget what was asked of her. She is tearful throughout many parts of the interview.

[47] Dr. Popovic’s notes confirm pain response to palpation of the spine between T4 and T11. She noted a similar response when palpating the left trapezius muscles. She also noted discomfort on palpation adjacent to L-4 – one of the other sites of spinal fracture.

[48] The plaintiff seeks an adverse inference for the failure of the defendant to produce an expert report from Dr. Popovic. The decision to draw an adverse inference or not is a discretionary one, considering factors outlined in the case law, including whether “absent sufficient explanation, the evidence of the person who could have been, but was not, called would have been superior to other similar evidence”: *Ponych v. Klose*, 2023 BCSC 1504 at para. 40. Here, there is no reason to believe Dr. Popovic’s evidence is superior to the other ample medical evidence

available, and I am not inclined to use my discretion to draw an adverse inference. Having said that, even if I were to draw an adverse inference, it would not have made any difference to my analysis because I am of the view that the plaintiff's medical evidence overall is convincing.

Dr. Ann Van der Linden

[49] Dr. Van der Linden was Ms. Harper's primary care physician. Dr. Van der Linden was Ms. Harper's general practitioner for 28 years and treated her before and after the accident. Dr. Van der Linden was qualified at trial as an expert general practitioner.

[50] Dr. Van der Linden's report is dated May 1, 2023, and she closed her practice and retired on June 30, 2023. At the time of trial, Ms. Harper was without a general practitioner and that was causing her some anxiety.

[51] In her report, under pre-accident condition (p. 4) Dr. Van der Linden writes:

1. Prior to the MVI of May 9, 2017, Ms. Harper lived independently in her own home. In general, she was in good health for a woman of her age.
2. Had the MVI not occurred, it is more likely than not that Ms. Harper would have led a normal life for a woman of her years and not be functionally limited by pre-existing medical conditions. The symptoms of vertigo that occurred following a TIA in 2003 resolved within several years of the incident as did short term memory issues and were not causing her any difficulties. She managed all of her ADL's [activities of daily living] without difficulty. She was able to perform all light and heavy household chores as well as gardening and yard maintenance without assistance. She had an active social life and enjoyed time with friends, travelling, training and walking her dog and exercising.

[52] Further in her report, Dr. Van der Linden says the following:

Diagnosis

7. The following injuries were suffered by Ms. Harper as a result of the MVI

3 vertebral fractures (T12 burst fracture, T11 spinous process fracture, L4 endplate fracture)

Soft tissue injuries to her sternum

Chronic pain syndrome with myofascial pain in her left shoulder, neck, back

Left abdominal wall injury
Right leg and knee injury
Insomnia
Anxiety and depression
Concussion
Post concussion syndrome with persistent cognitive limitations
Exacerbation of vertigo and dizziness
Headache

Causation

8. It is my opinion that it is more likely than not that the subject MVI caused or contributed to the injuries suffered by Ms. Harper.

Exacerbation:

9. The MVI caused a severe exacerbation of vertigo in the immediate days following the accident when Ms. Harper was in Vancouver General Hospital. She continued to experience episodes of vertigo over the following 3 years however the occurrences have become progressively much less frequent and severe. They are not permanent and now occur only rarely.

10. It is more likely than not Ms. Harper sustained a mild traumatic brain injury or concussion as a result of the MVI.

[53] Under Prognosis at p. 6, Dr. Van der Linden says the following:

13. Given the severity of Ms. Harper's injuries, the length of time that her symptoms have persisted and the ease with which pain and fatigue are exacerbated by activities, I believe Ms. Harper's prognosis for further recovery is guarded.

I do not expect that Ms. Harper will experience any further improvement in her post-concussion symptoms as they have been quite stable for the past several years.

I do not expect Ms. Harper's chronic pain will improve.

Dr. Caroline Quartly

[54] Dr. Quartly was qualified as an expert in Physical Medicine and Rehabilitation. Dr. Quartly's expert report is dated June 1, 2023 and was admitted as Exhibit 23.

[55] Dr. Quartly's report is detailed and I will not set out her opinion in detail. Dr. Quartly opines that multiple injuries were caused by the accident, including multiple spinal fractures.

[56] Dr. Quartly opines that Ms. Harper suffers from chronic pain and chronic pain syndrome.

[57] In answer to a question about prognosis, Dr. Quartly says the following:

Ms. Harper has reached maximal medical recovery from her spinal fractures. Without a change in management strategy and without further investigation of other limiting pathology there is a probability that her mechanical symptoms will continue to progress, and her functional capacity become more compromised.

[58] Dr. Quartly defers to neurology and psychiatry regarding any persisting concussion symptoms.

[59] In answer to the question, "... do you expect her chronic pain to improve, and if so to what extent?" Dr. Quartly writes:

1. The chronic mechanical pin in the back has reached a maximum medical recovery but without a change in strategy is predicted to become more limiting over time.
2. Bearing in mind that the dominant arm symptoms have not been adequately investigated/diagnosed I can say they will not get better and without a change in strategy will likely become more disabling over time.

[60] In response to a question about level of disability, Dr. Quartly writes:

Ms. Harper has permanent partial disability as a result of her spinal injuries. I do not believe she has stabilized but without a change in treatment strategy and investigation will become insidiously more symptomatic and functionally limited.

[61] She writes further:

I expect her current level of disability to insidiously worsen unless she has a change in treatment strategy and unless she has further investigation and a change in management of her left upper trunk/shoulder girdle pathology.

Dr. Donald Cameron

[62] Dr. Donald Cameron is a neurologist who was qualified to give an expert opinion in neurology. Dr. Cameron's expert opinion is dated May 29, 2023 and was admitted as Exhibit 20.

[63] In his report, Dr. Cameron opines that Ms. Harper does fulfill the criteria to make a diagnosis of a mild traumatic brain injury (concussion) at the time of accident on May 9, 2017. He opines that Ms. Harper has developed symptoms of post-traumatic brain injury syndrome with headaches, dizziness, decreased balance, decreased mental energy, anxiety, disturbed sleep, decreased memory, decreased attention, decreased multi-tasking, and post-traumatic headaches. He also notes that Ms. Harper has suffered intermittent vertigo symptoms, which increased following the accident and have more recently improved.

[64] Dr. Cameron also confirmed the meningiomas identified on the post-accident CT scans cannot be in any way causative of the plaintiff's cognitive difficulties. This opinion is shared by Dr. Van der Linden and Dr. Quartly.

Dr. Corrie Grabowski

[65] Dr. Grabowski's report dated May 29, 2019 was admitted at trial as Exhibit 24. In her diagnosis, Dr. Grabowski stated the following:

1. T12 burst fracture, T11 spinous process fracture, L4 endplate fracture.
2. Exacerbation of pre-existing vertigo
3. Post-traumatic headache.
4. Soft tissue injury to the left shoulder

[66] She also states under recommendation at line 428 "Regarding her concussion, I considered referring her to Tall Tree Integrated Health. However her concussion symptoms seem to be getting much better and her pain issues are the most pressing at this time."

Dr. Catherine Paramonoff

[67] Dr. Paramonoff was the only expert called by the defendant. She is an expert in Physical Medicine and Rehabilitation. Dr. Paramonoff's report is dated June 12, 2023 and admitted as Exhibit 26.

[68] The plaintiff argues that Dr. Paramonoff's long-term prognosis for Ms. Harper is even worse than her own experts and in many respects that is true.

[69] In her report Dr. Paramonoff states:

It is my opinion that there is a risk for degenerative changes over time adjacent to the areas of the spinal fractures, particularly around the T12 level, and likely to a lesser extent at L-4 with the risk of degenerative changes becoming symptomatic over the longer term.

[70] Dr. Paramonoff states that Ms. Harper is “unlikely to have sustained a significant concussion from the motor vehicle accident (i.e. if there was indeed a loss of consciousness). Ms. Harper may have sustained a mild concussion...” Ultimately, Dr. Paramonoff notes she would defer to neuropsychological testing for assessment of any cognitive deficits, beyond those distracting effects.

[71] Under prognosis, Dr. Paramonoff states the following:

It is my opinion that Ms. Harper will likely have a prolonged course of recovery, given the cumulative effect of mechanical and soft tissue injuries, likely contribution from unmasking of pre-existing degenerative changes at the spine, post-MVA muscle imbalance/deconditioning, some underlying hypermobility and significant confounding facts.

[72] After some recommendations with respect to the near to medium term, Dr. Paramonoff states:

Over the longer-term, there is a risk of worsening pain at the lower back with advancing degenerative changes (including that Ms. Harper is noted to have osteopenia {decreased bone density}, which further increases the risk.) Referral to a Spine Surgeon or interventional Radiologist would be reasonable if this occurs in the future for consideration of interventional management (likely largely for the T12 compression fracture) for pain management. I will ultimately defer to Spine Surgery regarding future surgery in this regard.

[73] As I have said, I have only highlighted aspects of the medical evidence in order to give context to this decision on causation of injuries and damages.

CREDIBILITY AND RELIABILITY

[74] In *Girvan v. McGlue*, 2023 BCSC 902, Madam Justice Hughes provides a helpful summary of the distinction between these two evidentiary concepts:

[25] Credibility and reliability are separate but related concepts. Credibility pertains to a witness’ veracity, while reliability has to do with the accuracy of

their testimony: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *Equustek Solutions Inc. v. Jack*, 2020 BCSC 793 at para. 109, citing *R. v. H.C.*, 2009 ONCA 56 at para. 41. Significant frailties in a witness' evidence—such as inconsistencies between their testimony and contemporaneous documentation or inconsistencies and contradictory explanations of key issues—may affect both credibility and reliability: see e.g. *Chao Yin Canada Group Inc. v. Xenova Property Development Ltd.*, 2021 BCSC 1445 at paras. 53–55, appeal to CA dismissed as abandoned, 2023 BCCA 39.

[75] The defendant does not take issue with Ms. Harper's credibility, however the defendant does raise issues with respect to Ms. Harper's reliability.

[76] Having had the opportunity to observe Ms. Harper give evidence for close to four days, I have no hesitation in finding that Ms. Harper was a credible witness. She was straightforward and direct in her responses and appeared to make sincere effort to answer the questions asked completely and honestly. There is no question that sitting in court and giving evidence was difficult for Ms. Harper. Ms. Harper had to regularly shift positions, and had to take breaks on occasion. Throughout her testimony there were glimpses of Ms. Harper's strong, humorous and interesting personality which was spoken about by some of the lay witnesses. However, it was also clear that Ms. Harper was in physical pain at times, and had difficulty with her recollection despite her best efforts.

[77] The plaintiff concedes that Ms. Harper did have difficulty recalling dates and detail, but attributes those difficulties to her significant memory issues caused by the accident. I accept that submission. When Ms. Harper was taken to a document or reminded of an inconsistency in her evidence, she readily conceded it.

[78] I do not find any credibility issues for Ms. Harper raised by Mr. Mezo's evidence. For example, whether or not the couple stopped their work day at 4:00 p.m. as suggested by Mr. Mezo, or whether they worked beyond that is, in my opinion, a minor matter that does not affect Ms. Harper's overall credibility. In a similar way, whether or not Ms. Harper assisted with snow clearing on the property, it is clear that she provided a great deal of assistance on the property overall. Mr. Mezo also helped Ms. Harper on her property. What this evidence establishes is

that both parties were hard workers. In many respects, Mr. Mezo's evidence corroborated what Ms. Harper said.

CAUSATION

[79] The legal test for causation is the “but for” test. In the decision of *Duncan v. Hanson*, 2021 BCSC 937, Justice G. C. Weatherill summarizes the legal test for causation in a personal injury context as follows:

[117] The legal test for causation is the “but-for” test: the plaintiff must prove on a balance of probabilities that, but for the defendant's negligence, she would not have suffered her injuries. The defendant's negligence must have been a necessary cause of the injury. This test was summarized and affirmed by the Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32 at paras. 8–10; *Ediger v. Johnston*, 2013 SCC 18 at paras. 28–29; and *Resurfsice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[118] The classic statement of the law of causation was given by Justice Sopinka in *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311 at 328: “... causation need not be determined by scientific precision ...” It is a practical question of fact that can often be answered by ordinary common sense. The plaintiff needs to establish only a “substantial connection between the injury and the defendant's conduct” in order to establish causation: *Snell* at 327. A substantial connection is something beyond the de minimus range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9–11.

[119] Where the plaintiff has a pre-existing condition that was active or was likely to become active, the defendant is liable only to the extent that the accident caused an aggravation to the existing condition: *Filsinger v. ICBC*, 2009 BCSC 232 at para. 26.

[80] In *Athey v. Leonati*, 1996 CanLII 183 (SCC), (1996) 3 S.C.R. 458 at 467, the Supreme Court of Canada recognized at para. 17 that:

It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a “fire ignited in a wastepaper basket is ... caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth”. As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[Emphasis in original]

[81] In this case, the defendant points to Ms. Harper's medical history, particularly the fact that Ms. Harper had a TIA many years ago as well as intermittent episodes of dizziness and vertigo that were present before the accident.

[82] In my opinion, all of the evidence establishes that Ms. Harper was not significantly limited by these episodes and that they have been aggravated by the motor vehicle accident. The evidence of the lay witnesses describing the differences they noted in Ms. Harper after the accident was particularly persuasive.

[83] With respect to the issue of the concussion or mild traumatic brain injury, I accept the evidence of Dr. Cameron, that Ms. Harper suffered a concussion and post-concussion syndrome as a result of the accident. Dr. Cameron's evidence was clear that in his opinion the cognitive issues present for Ms. Harper were not related to her meningiomas. The evidence of Dr. Cameron is supported by Dr. Van der Linden and in my opinion is not seriously challenged by any of the experts.

[84] All of the medical evidence surrounding lingering cognitive and memory issues is also supported by the observations of the lay witnesses that knew Ms. Harper well pre- and post-accident. In my opinion, the lay evidence alone is sufficient to satisfy me that these lingering issues are probably caused by the accident.

[85] The case for the defendant seemed to consist of raising questions about Ms. Harper's medical history, including her previous TIA, her early disability CPP pension and the intermittent episodes of dizziness. As I have said, the medical evidence and lay evidence satisfy me that those pre-existing issues were not limiting Ms. Harper in any way, pre-accident.

[86] As a result I am satisfied on the balance of probabilities that the plaintiff sustained the following injuries, detailed by Dr. Van der Linden, and supported by the other experts, which were caused or contributed to as a result of the accident:

3 vertebral fractures (T12 burst fracture, T11 spinous process fracture, L4 endplate fracture)
Soft tissue injuries to her sternum
Chronic pain syndrome with myofascial pain in her left shoulder, neck, back
Left abdominal wall injury
Right leg and knee injury
Insomnia
Anxiety and depression
Concussion
Post concussion syndrome with persistent cognitive limitations
Exacerbation of vertigo and dizziness
Headache

DAMAGES

Non-Pecuniary Damages

[87] The purpose of an award for non-pecuniary damages was set out by the Supreme Court of Canada in *Lindal v. Lindal*, 1981 CanLII 35 (SCC), [1981] 2 S.C.R. 629, including that an individual's loss is key to the assessment and that it is impossible to develop a tariff since each award will vary to meet the individual circumstances of the individual case. The purpose of the award is to act "as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible, the pain and suffering the plaintiff has endured and will have to endure in the future": *ter Neuzen v. Korn*, 1995 CanLII 72 (SCC), [1995] 3 S.C.R. 674 at para 106.

[88] The broad framework for the assessment of non-pecuniary damages has been set out by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to S.C.C. refused 2006 CanLII 35804:

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

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

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

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

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

[47] As has been noted in the caselaw, the ability to work is relevant to non-pecuniary damages because it may impact a person's enjoyment of life.

[89] The plaintiff has set out a number of cases in argument that support her contention that appropriate damages under this head are in the range of \$240,000 to \$250,000.

[90] The defendant argues that the non-pecuniary damage award should be “north” of \$150,000.

[91] Here each party has pointed to cases which they say support their respective positions. Overall I have found the plaintiff’s authorities more persuasive. For example, in *Fryer v. Nakusp* 2022 BCSC 497, the 69 year-old plaintiff was awarded \$265,000 for general damages four years post-MVA. In *Mellesmoen v. Cullen*, 2022 BCSC 1985, the 58 year-old plaintiff was awarded \$220,000 for general damages, although there, the Court had concerns about the plaintiff’s credibility.

[92] I have already made it clear in this judgment that I am satisfied that the impact of the accident on all aspects of Ms. Harper’s life was devastating. I find Ms. Harper to be a stoic individual who has remained good humoured notwithstanding the significant challenges she has faced as a result of the accident. Although Ms. Harper has suffered from anxiety and depression, she has remained committed to her own rehabilitation and has been diligent in following the recommendations of the medical professionals. Ms. Harper has been practical and

pragmatic in modifying her daily activities in order to cope with her continuing limitations.

[93] It is enough to say that Ms. Harper's back was fractured in three places and that she was airlifted from Sechelt to Vancouver General and then remained in hospital for 10 days post-accident to give a sense of the seriousness and impact of this accident on Ms. Harper's life. The continuing effects of this accident are noted in Ms. Harper's evidence and in the testimony of the lay witnesses. Ms. Harper previously was a highly functioning woman who was able to pursue many interesting activities that are now limited. She is now highly reliant on friends. Notwithstanding her limitations, she continues to approach life with optimism and is determined to remain living in her own home.

[94] Overall, I am satisfied that the plaintiff's range is an appropriate one. Accordingly, I award \$250,000 for non-pecuniary damages.

Past and Future Loss of Earning Capacity

[95] The plaintiff claims a modest amount of \$2,000 to \$4,000 per year which she claims she expected to obtain from horticultural consulting. She testified that she would have charged \$50 per hour from horticultural walk arounds and \$100 per hour for larger garden plans.

[96] Although the claim is a modest one (\$4,000 per year x 6.33) for past loss of income (\$25,320), and \$24,400 as future loss of income to the age of 80, I am not persuaded by this aspect of Ms. Harper's claim.

[97] As our Court of Appeal has discussed in *Rab v. Prescott*, 2021 BCCA 345 at para. 47, the task before me in considering the evidence under this head of damage is a three-step process. The first step is whether the evidence discloses a potential future event that could lead to a loss of capacity. The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If a real and substantial possibility exists, the third step

is to assess the value of that possible future loss which must include assessing the relative likelihood of that possibility occurring.

[98] I am satisfied that the evidence does disclose a potential future event that could lead to a loss of capacity. Ms. Harper is suffering significant injuries as a result of the accident which have affected all aspects of her life including her ability to earn income.

[99] The plaintiff argues that the fact that historically, Ms. Harper did not earn this income does not negate the claim. However, I find Ms. Harper's own evidence on this claim at trial is equivocal. When she was asked about her future plans in direct evidence, she seemed to downplay what she might have earned in the future.

[100] Further, Ms. Harper has been retired since around 2012 and has not taken any steps to earn income from horticultural consulting when she was capable of doing so. Instead, Ms. Harper admirably contributed to her community by volunteering with gardening organizations, and in other ways such as her work with guide dogs. In my opinion it is more likely that she would have continued to contribute in that manner.

[101] In my opinion, Ms. Harper's claim fails under the second aspect of the *Rab* test: the evidence does not establish that there is a real and substantial possibility that a future event will cause a pecuniary loss. Accordingly, I am not persuaded I should award even a modest amount under this head of damage.

Past Loss of Housekeeping Capacity

[102] Ms. Harper seeks an award of \$25,000 for lost of housekeeping capacity. Counsel for Ms. Harper relied on *Mellesmoen* again for this point and *Plett v. Davis*, 2022 BCSC 789.

[103] In *Mellesmoen*, the plaintiff was assessed as suffering chronic pain and cognitive difficulties arising from an MTBI and sought a separate award for past and

future loss of housekeeping capacity for \$35,000 and \$90,000 respectively. The Court awarded the plaintiff \$25,000 for past loss of housekeeping capacity.

[104] In *Plett*, the plaintiff suffered soft-tissue injuries to her neck, shoulder, arm, and back, and that suffered from chronic pain as a result. The Court awarded the plaintiff \$25,000 for past loss of housekeeping capacity.

[105] Our Court of Appeal in *Kim v. Lin*, 2018 BCCA 17 discussed where housekeeping services are appropriately awarded:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*Liu v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[106] In my opinion, Ms. Harper's claim under this head of damage is warranted. Previously, Ms. Harper took great pride in her home and garden. It was a home where many neighbourhood functions were celebrated.

[107] Ms. Bracken's report supports that while Ms. Harper continues to keep her home tidy, it is not clean and she requires assistance with respect to many cleaning functions. Accordingly, I find the claim to be a reasonable one and I award \$25,000 for past loss of housekeeping capacity.

Future Cost of Care

[108] In *Mellesmoen*, Justice McDonald set out the principles applicable to a determination of future cost of care:

[237] An injured party is entitled to be compensated for the cost of future care based on what is reasonably necessary to restore her to her pre-collision condition as far as is possible.

[238] In *Golkar-Karimabadi v. Bush*, 2021 BCSC 990 at paras. 107–108 [*Golkar*], Justice Adair sets out the legal principles applicable to assessing an award for cost of future care:

[107] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician’s assessment of pain, disability and recommended treatment, and the health care professional’s recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[108] In addition, while health and happiness are intertwined, the award is not intended to account for the cost of amenities which serve the sole function of making the plaintiff’s life more bearable or enjoyable: *Warick v. Diwell*, 2018 BCCA 53, at para. 24.

[239] In addition to Adair J.’s summary in *Golkar*, I would include the following points:

- a) services or treatments that provide solace but are unlikely to result in medical improvement of the plaintiff’s condition will be more properly compensated under general damages, rather than as a cost of future care expense: *Harrington v. Sangha*, 2011 BCSC 1035, para. 153;
- b) especially in situations involving injuries that are far from catastrophic, common sense should inform claims for cost of future care: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13; and
- c) it is a matter of prediction to assess future care costs, and in determining the present value of the future reasonable care needs of the plaintiff, the court must allow for contingencies: *Kim v. Baldonero*, 2022 BCSC 167 at para. 105 citing *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang v. Burns*, 2021 BCCA 478 at para. 58.

[109] Counsel for Ms. Harper gave comprehensive submissions regarding Ms. Harper’s cost of future care claims, drawing on expert reports that were prepared to assist these claims. Margherita Bracken is a registered occupational therapist who prepared a cost of future care assessment (Exhibit 19). Robert

Wickson is an economist who prepared a pecuniary loss report in order to assist the Court (Exhibit 25).

[110] The plaintiff's submissions divide the cost of future care claim into three parts: first, "Services, Therapies, Devices and Medications"; second, "Contingencies, Other Items, Medication and Equipment"; and third, "Future Care Costs of In-Home Care and/or Assisted Living". I will briefly canvas each of these parts before coming to my conclusion on assessment of damages.

Services, Therapies, Devices and Medications

[111] Counsel for Ms. Harper sets out that the services required in this part include "therapies, equipment, medications, house-keeping services, yard maintenance services, re-habilitation facility memberships", which are canvassed by Ms. Bracken in her report. The defense's expert, Dr. Paramonoff, is supportive of many of the future care items listed in Ms. Bracken's report, as are the plaintiff's experts.

Contingencies, Other Items, Medication and Equipment

[112] Ms. Bracken's report lists a series of further supported care needs that reflect Ms. Harper's future care needs, such as medications and equipment.

[113] Ms. Bracken's report is based in the evidence provided by expert witnesses in this case, including Dr. Van de Linden, Dr. Quartly and Dr. Cameron. Her recommendations, combined with rehabilitation services and equipment, will work toward providing Ms. Harper with the greatest amount of functional engagement and independence.

Future Care Costs of In-Home Care and/or Assisted Living

[114] Counsel for the plaintiff has provided five possible scenarios as real and substantial possibilities in this case. Before I set those out and discuss them further, I note that the future care costs of in-home care and/or assisted living is the biggest of these sub-claims and arguably the most contentious part of Ms. Harper's overall claim. The defendant, in highlighting the evidence around pre-existing conditions such as the TIA and intermittent dizziness, were in my opinion attempting to alert the

Court to contingencies that should be considered and that could limit Ms. Harper's claim.

[115] The claim under this head is based on the submission that Ms. Harper was a highly independent woman who would have remained living independently in her own home, for as long as possible and until she passed away, likely in her 90's given her maternal longevity. Ms. Harper's mother lived into her 90's and remained independent. Ms. Harper testified that prior to the accident, she planned to continue to live independently.

[116] The scenarios set out in the plaintiff's submissions are as follows:

- **Scenario 1** is based on the difference between an absent accident trajectory in which the plaintiff remains in her home into her 90's, and instead as a result of accident-caused injuries and loss of function, has to move into assisted living at the age of 80. Estimated cost is \$637,000.
- **Scenario 2** is similar and based on the difference between an absent accident trajectory in which the plaintiff remains in her home into her 90's, and instead as a result of accident-caused injuries and loss of function, has to move into assisted living at the age of 80, but also reflects that between the ages of 75 and 80 the plaintiff will have ever increasing care-needs in her home before she transitions to assisted living. Estimated cost is \$851,651.
- **Scenario 3** is based on the difference between an absent-accident trajectory in which the plaintiff would have moved into assisted living at the age of 90, and instead as a result of accident-caused injuries and loss of function, has to move into assisted living at the age of 80. Her need to move into assisted living in this scenario has been accelerated by 10 years. Estimated cost is \$484,500.
- **Scenario 4** is based on the difference between an absent-accident trajectory in which the plaintiff would have moved into assisted living at the

age of 90, and instead as a result of accident-caused injuries and loss of function, has to move into assisted living at the age of 80, but like Scenario 2 also reflects that, between the ages of 75 and 80, the plaintiff will have ever increasing care-needs in her home before she transitions to assisted living. Estimated cost is \$701,451.

- **Scenario 5** is based on the difference between an absent-accident trajectory in which the plaintiff would have moved into assisted living at the age of 90, and instead as a result of accident-caused injuries and loss of function, has to move into assisted living at the age of 85 (a 5-year acceleration instead of a 10-year acceleration), but like Scenario 2 also reflects that between the ages of 80 and 85, the plaintiff will have ever increasing care-needs in her home before she transitions to assisted living. Estimated cost is \$414,751.

[117] Counsel for Ms. Harper submits that Scenario 2 is the least conservative, whereas Scenario 5 is the most conservative. Scenario 5 has several built-in assumptions that reflect both Ms. Harper's aspirations for her recovery as well as several probable outcomes as a result of her condition and need for care.

[118] Ms. Harper is seeking Scenario 5 as a reasonable assessment because, notwithstanding her current limitations, she remains a highly independent woman who wants to remain living in her own home. The reality is that Scenario 5 may not be the most probable. However, it is the scenario that the plaintiff is claiming. The caselaw makes it clear that injured parties should be encouraged to stay in their own home if they wish to do so. Keeping in mind that my task is to assess damages, and that there is no precise mathematical formulation, I am inclined to accede to Ms. Harper's claim. If I were to consider some of the other scenarios, I may then attach deductions for additional contingencies that could result in a similar assessment in any event. I have concluded that Ms. Harper's request of Scenario 5, although optimistic, is also fair and reasonable and I am acceding to it. Accordingly,

this scenario results in damages as follows: Future assisted living \$198,500 and Future in-home care \$217,000.

[119] I am also awarding the following items outlined in Ms. Bracken's report. I am satisfied they are medically necessary and are justified on the evidence:

Physiotherapy (\$16,000);

Equipment (\$4,600.00) - such as an anti-fatigue mat, grocery cart;

Medications (\$2,000);

Housekeeping services (\$17,000);

Yard maintenance (\$12,000);

Yoga membership and exercise pass (\$11,000);

Botox injections (\$13,000) - I have discounted this item by 50% because the evidence is not clear the extent to which Botox injections will assist Ms. Harper;

Occupational therapy and occupational therapy case manager (\$12,000);

Future equipment (\$14,000) - stairlift, shower seat, mobility scooter;

Future assisted living (\$198,500);

Future in-home care (\$217,000).

The total amount under this head is the sum of the above figures, which is \$517,100.

Special Damages

[120] Special damages are agreed to between the parties at \$7,729.57.

Failure to Mitigate

[121] The defence has pled the defence of mitigation in his response to civil claim. In *MacKinnon v. Swanson*, 2022 BCSC 182, Justice Kent set out the requirements for establishing a failure to mitigate:

[144] “Failure to mitigate loss” is a defence. It must first be alleged and particularized in the pleadings and then the defendant has the burden of proving on a balance of probabilities:

1. there were steps the plaintiff could have taken to mitigate;
2. the plaintiff acted unreasonably in failing to take steps; and
3. the extent to which the loss would have been avoided by taking those steps.

[122] As stated above, the onus of proof is on the defendant to prove. On the evidence, I am not satisfied that the defendant has established a failure to mitigate. Overall, as I have found, Ms. Harper has been very diligent about her recovery. While there were some recommendations that have not been fulfilled, Ms. Harper has to manage her energy as a result of the accident and I am satisfied any failure was attributable to that reason.

CONCLUSION

[123] In the result, I order:

Non-pecuniary damages		\$250,000.00
Past Loss of Housekeeping Capacity		\$ 25,000.00
Future Cost of Care		
Future Assisted Living	\$198,500	
Future In-Home Care	\$217,000	
Physiotherapy	\$ 16,000	
Equipment	\$ 4,600	

Medications	\$ 2,000	
Housekeeping Services	\$ 17,000	
Yard Maintenance	\$ 12,000	
Yoga Membership and Exercise Pass	\$ 11,000	
Botox Injections	\$ 13,000	
Occupational Therapy and Case Manager	\$ 12,000	
Future Equipment	\$ 14,000	\$517,100.00
Special Damages		\$ 7,729.57
TOTAL		\$799,829.57

"J. A. Power, J."

The Honourable Madam Justice J. A. Power