IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tommy v. 7-Eleven Canada, Inc.,*
2024 BCSC 1558

Date: 20240904
Docket: S203407
Registry: Vancouver

Between:

Crystal Leanne Tommy

Plaintiff

And

7-Eleven Canada, Inc. and ABC Property Management Company

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:	T.F. Dennis F. Balandari
Counsel for the Defendant 7-Eleven Canada, Inc.:	M. Stainsby
Place and Date of Trial:	Vancouver, B.C. July 8–12, 2024
Place and Date of Judgment:	Vancouver, B.C. September 4, 2024

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I. INTRODUCTION

[1] On the early morning of May 2, 2018, Crystal Tommy, the plaintiff, was on her way to work and stopped for a morning coffee at a 7-Eleven located in Smithers, BC. As she exited the premises, she tripped on a pot hole in the 7-Eleven parking lot and broke her ankle in three places. She suffered an ankle fracture involving a distal fibula fracture, lateral talar dome osteochondral injury, and an anterior distal tibia small bony fragment fracture. Ms. Tommy has suffered a number of complications since and has brought this claim in negligence for damages.

[2] Following the accident, Ms. Tommy was largely immobile with the cast, and then an air boot. She missed several months from work while utilizing crutches and a wheelchair. By December 25, 2018, she was walking with mobility impairment and a limp. The plaintiff says as a result of these impairments, she fell down some stairs injuring her back. She continues to experience persistent pain, stiffness and swelling in her left ankle, hips and lower back as well as difficulties with her mental health and sleep. Following the accident, the plaintiff says she gained a substantial amount of weight creating further complications.

[3] In 2021, Ms. Tommy was unfortunately involved in a car accident where she sustained abdominal injuries which led to a hernia for which she underwent surgery in 2023. This created healing problems in conjunction with surgery dealing with an ovarian cyst requiring yet another surgery.

[4] Ultimately, in late 2022, Ms. Tommy stopped working and has been struggling with health issues, poverty and deteriorating mental health. Ms. Tommy's walking tolerance is minimal with her ankle swelling up and causing pain, amongst other issues.

[5] The plaintiff is not claiming damages as a result of the surgical events, but rather is claiming future damages for a time after the expected healing of the ongoing surgical issues, which is some time in the Spring of 2026.

[6] The defendants deny liability for the accident which occurred in the 7-Eleven parking lot. The defendants maintain that the plaintiff is not able to establish the 2018 “incident” or the December 2018 fall and resulting injuries were caused by or contributed to by 7-Eleven or the plaintiff’s initial ankle injury. In addition, if the plaintiff can establish liability, the defendants dispute each head of damage claimed.

II. ISSUES

[7] The issues in this matter are:

1. Is the defendant guilty of general negligence under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337 [*OLA*], which imposes a duty of care on the Premises/Occupier as per s. 3(1)-(2)?

2. What is the nature, extent, and duration of the injuries Ms. Tommy suffered in the accident or accidents?

3. What is the legal causation of Ms. Tommy’s injuries following the accident?

4. What is the appropriate award, if any, for non-pecuniary damages for pain and suffering?

5. What amount, if any, should be ordered for future loss of earning capacity?

6. What amount, if any, should be ordered for past and future housekeeping capacity?

7. What amount, if any, should be ordered for future loss of earning capacity?

8. What amount, if any, should be ordered for past loss of earning capacity?

9. What amount, if any, should be ordered for special damages?

III. BACKGROUND

[8] Ms. Tommy was born in 1987 in Vancouver, British Columbia. As a child she moved to Witset First Nation, formerly known as Moricetown, located in the Wet'suwet'en Nation in the Northwest of British Columbia. She resides currently in Smithers, BC.

[9] Ms. Tommy graduated from high school in 2006. Shortly thereafter she began working at Woodmere Nursery Ltd. in Telkwa Highroad, Smithers, British Columbia. Ms. Tommy's work was physically demanding, including lifting, planting and organizing 20 to 50 pounds of seedling trees for reforestation projects. Despite this, Ms. Tommy loved her work as it involved working with people she considered her friends. It was a very important part of her life.

[10] Ms. Tommy also spent time active in the outdoors, enjoying walks in her village and in the surrounding countryside. This included walking on trails down to the rivers or lakes in her area.

[11] Ms. Tommy was active and she and her boyfriend had a happy fulfilling life.

[12] This description of her life was corroborated by her boyfriend, sister and mother. Each described her as outgoing with a funny sense of humour. They described her ability to be constantly working and engaging in the necessary chores at home.

IV. THE ACCIDENT

[13] On the date of the accident, Ms. Tommy and four co-workers were driving to work at Woodmere Nursery. As it was summer, Ms. Tommy was picked up at either 5:45 or 6:00 am as the drive took approximately 45 minutes to get from her home to the Woodmere Nursey. The defendants noted Ms. Tommy initially testified she was picked up at 7:00 am. I will deal with this later in my analysis.

[14] One of the co-workers wished to stop for coffee so the vehicle stopped at the 7-Eleven. All but the driver of the vehicle entered the 7-Eleven premises to purchase

coffee and/or lunch. Ms. Tommy made a quick purchase of coffee and a sandwich. Shortly after she left the premises to walk back to the car, she tripped and twisted her ankle in a pothole. Her co-workers, who were already in the vehicle, immediately rushed to her assistance. Ms. Tommy said she was in a lot of pain as a result of this fall.

[15] Ms. Tommy wished to proceed to work and was initially reluctant to go to hospital as her co-workers suggested. However, her co-workers persuaded her to go the Bulkley Valley Hospital. They dropped her at the emergency department of the hospital early that morning, before they continued their drive to Woodmere Nursery. Ms. Tommy said she continued to be in a lot of pain and waited for some time for a doctor to attend to her injuries. Ultimately after x-rays, the doctor advised Ms. Tommy that she had fractured her ankle in three places and her foot was placed in a cast. Her mother picked her up from the hospital and brought her home where she was living with her boyfriend.

[16] Ms. Tommy indicated she asked one of her co-workers to take a picture of the pothole as they returned from work that day. Ms. Tommy's evidence was that four pictures were taken by her co-worker; two on the day of the accident, and another two the next day after the pothole had been filled in.

[17] After the accident, Ms. Tommy continued to experience pain and had great difficulty getting around. She initially tried to use crutches, but was unsuccessful. Ms. Tommy’s mother ultimately found a wheel chair that she could use while she was recuperating. Ms. Tommy continued to be in pain, and was largely immobile. She could not do much, including any of the chores she had previously done, as she had been told to continually elevate her ankle. If she did not follow this advice and attempted to do anything around the house, Ms. Tommy found her ankle swelled and she would require further rest.

[18] After some time, Ms. Tommy was able to use an air boot which lasted for some weeks. During her convalescence, however, Ms. Tommy developed

complications with an ingrown toe nail. As a result, she attended the emergency room at the hospital, where a doctor performed a small surgery on her toe.

[19] In the months following the accident, Ms. Tommy was unable to return to her normal activity. She required a significant amount of assistance with her daily living. Ms. Tommy's mother helped with groceries and taking her to medical appointments. She could not walk and stayed home or in the car while her mother or boyfriend shopped for groceries. Her boyfriend took over many of the household chores and assisted Ms. Tommy with her personal care. Her sister and cousins helped her take care of her two large dogs, which early on she could not bring outside herself.

[20] After her air boot was removed, Ms. Tommy was able to walk, but the swelling of her ankle continued. Indeed, her mother and boyfriend used the same term; Ms. Tommy's ankle "ballooned" when she would do too much or walk too much. She developed a limp due to the ankle injury. Both this and the ballooning of the ankle appears to be have continued until today.

[21] Ms. Tommy missed several months from work but ultimately returned to work at the nursery late in 2018, because, she said, she had no income. Her ankle continued to swell at work. Ms. Tommy had to use a make shift stool to sit down for her work, when previously she would stand all day for her tasks.

[22] Ms. Tommy then experienced another fall in December 25, 2018. After celebrating Christmas dinner at her mother's and on her way home, she slipped going down the outside stairs and hit her back on the corner of the porch. She could not breathe and her mother called an ambulance There was fresh snow but when asked why she fell, Ms. Tommy testified as she still limped from her earlier injury, and her hips had become painful which made it difficult to walk. This had started in the two to three months after her ankle injury impacting her mobility and she did not have trouble with these stairs in the past.

[23] Ms. Tommy then suffered an unfortunate motor vehicle accident in 2021. Ms. Tommy says she has gained a lot of weight since the ankle injury due to her

initial immobility and inability to resume her previous activities, and now has a large stomach. As she was driving one of her dogs to the vet, the vehicle slipped on black ice. She lost control and the car went forcefully into the ditch. Her stomach hit the steering wheel leading to a hernia. This required an operation in 2023. In addition, she had another surgery in 2023 to deal with an ovarian cyst, all of which created healing complications.

[24] By late 2022, Ms. Tommy had stopped working as she has been struggling with these health issues. Her mental health had deteriorated and she is presently suffering from poverty.

[25] Ms. Tommy continues to experience a limp, pain in her ankle and mobility issues. This, she says, has now resulted in pain in her hips and lower back. She testified that she is at most able to walk only a block. She is sad and depressed as she is unable to do her previous activities and unable to work at the nursery where she effectively had all her social connections with her friends.

[26] Ms. Tommy referenced her weight gain as a result of her inactivity. She indicates she has gained close to 100 lbs since the initial accident. Her mother and sister agreed with this assessment, yet her boyfriend indicated he did not like to talk about another person's weight. While he later agreed with the defendants in cross that she might have gained 15 lbs, in view of his clear position above, I am unable to put much weight on this. The exact amount of weight gain is difficult to asses from the evidence, but suffice it to say that Ms. Tommy is not tall and weighs well over 300 lbs. Whether an increase in weight can be attributed to the accident, that in and of itself is very likely given Ms. Tommy's challenges during the healing process. Weightbearing and immobility created by a limp continue to be factor in Ms. Tommy's life.

[27] All witnesses corroborated Ms. Tommy's change from a happy person to one who is sad and depressed. Her sister says she now seems to just shut herself in her room in her father's house, and references her pain or makes excuses to not go out when she is invited to do so.

V. ANALYSIS

1. Legal Framework

[28] There is no dispute that 7-Eleven is an occupier under the *OLA*, and owes a duty of care to Ms. Tommy. As set out in that Act:

> 3(1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.
>
> (2) The duty of care referred to in subsection (1) applies in relation to the
>
> (a) condition of the premises,
>
> (b) activities on the premises, or
>
> (c) conduct of third parties on the premises.
>
> (3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
>
> (a) create a danger with intent to do harm to the person or damage to the person's property, or
>
> (b) act with reckless disregard to the safety of the person or the integrity of the person's property.
>
> (3.1) A person who is trespassing on premises while committing, or with the intention of committing, a criminal act is deemed to have willingly assumed all risks and the occupier of those premises is subject only to the duty of care set out in subsection (3).
>
> (3.2) A person who enters any of the categories of premises described in subsection (3.3) is deemed to have willingly assumed all risks and the occupier of those premises is subject only to the duty of care set out in subsection (3) if
>
> (a) the person who enters is trespassing, or
>
> (b) the entry is for the purpose of a recreational activity and
>
> (i) the occupier receives no payment or other consideration for the entry or activity of the person, other than a payment or other consideration from a government or government agency or a non-profit recreational club or association, and
>
> (ii) the occupier is not providing the person with living accommodation on those premises.
>
> (3.3) The categories of premises referred to in subsection (3.2) are as follows:
>
> (a) premises that the occupier uses primarily for agricultural purposes;
>
> (b) rural premises that are

> (i) used for forestry or range purposes,
>
> (ii) vacant or undeveloped premises,
>
> (iii) forested or wilderness premises, or
>
> (iv) private roads reasonably marked as private roads;
>
> (c) recreational trails reasonably marked as recreational trails;
>
> (d) utility rights of way and corridors excluding structures located on them.
>
> (4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on the person because of an enactment or rule of law imposing special standards of care on particular classes of person.

[29] The plaintiff submits that she has established a prima facie breach of the *OLA* by the evidence of the pothole along with her evidence that the pothole caused her to trip and fall and become injured. In addition, Ms. Tommy put in evidence a photo of the pothole taken the next day by her friend and colleague which had been repaired.

[30] After establishing a prima facie breach of the *OLA*, the defendant may rebut this evidence by showing there was a reasonable system of inspection and maintenance in place; and evidence that the system was being followed at the time of the accident (*Harrison v. Loblaws, Inc. (Real Canadian Superstore)*, 2018 BCSC 575 at para. 47). The Court of Appeal in *Atkins v. Jim Pattison Industries Ltd*., 146 BCAC 83, 1998 CanLII 6503 at para. 6, made clear however that "[i]t is not enough to demonstrate that there is a plan in existence. The defendants must call some evidence to show that it was being followed".

2. Is the defendant guilty of general negligence under the Occupiers Liability Act, R.S.B.C. 1996, c. 337 [*OLA*], which imposes a duty of care on the Premises/Occupier as per s. 3(1)-(2)?

[31] The defendants say first that liability has not been established as the plaintiff's version of events could not have happened the way she described. The defendants say based on the plaintiff's own version of events, the passenger van was parked on top of the pothole described and photographed in the evidence. None of the plaintiff's colleagues provided any statements regarding the fall and none were

called to provide evidence in this trial. The defendants say, as in *Gujral v. Meat and Bread Sandwich Company*, 2022 BCSC 917, the plaintiff provided no evidence of the depth of the depression of the pothole or other necessary details to create a causal link and no other witnesses corroborated her testimony.

[32] The defendants say even if the plaintiff fell as she described, the photographic evidence shows a very small depression in the ground and that the property was reasonably safe for use. The standard of reasonableness does not require perfection and 7-Eleven had a reasonable system in place to ensure safety standards at the property. This included its safety course, and the expectation that employees were undertaking a monthly site walk, adhering to best practices, and completing daily task assignments.

[33] As set out most recently in *Chin v. 0880984 B.C. Ltd.*, 2023 BCSC 297 at para. 16, citing both *Mainardi v. Shannon*, 2005 BCSC 644 at para. 21; and *Robinson v. 1390709 Alberta Ltd.*, 2016 BCSC 2459, aff'd 2017 BCCA 175: "[t]he plaintiff bears the onus of proving on a balance of probabilities that the occupier breached his or her duty of care" and "[a] presumption of negligence is not created by the fact the plaintiff was injured. The plaintiff must establish that some act or failure to act on the part of the occupier resulted in his or her injury".

[34] While the court is not entitled to speculate in determining the cause of the plaintiff's fall and injury, a finding of negligence does not require direct evidence. Rather, the court "may reasonably draw an inference of causation based on all of the evidence, assessed through the application of logic and common sense. There is a difference between speculation and conjecture… and rational conclusions that flow logically and reasonably from the evidence"; *Barr v. The Owners, Strata Plan LMS 2286,* 2019 BCSC 917 at para. 30.

[35] In this case, while the defendant argued that the plaintiff provided no evidence of the depth of the depression or other necessary details to create a casual link, I agree as argued by the plaintiff that Ms. Tommy was clear in her evidence that she fell down after tripping and twisting her ankle in a pothole that she had not seen,

as she was on her way back to her colleague's vehicle after having purchased coffee and a sandwich from 7-Eleven. Ms. Tommy said that the pothole was really close to the door; not indicated by yellow paint and was the same color as the cement. She said she was wearing runners and had no difficulty walking.

[36] Ms. Tommy identified the pothole from the photo presented and indicated the photo had been taken by one of her co-workers on May 2, 2018. Ms. Tommy indicated she asked her co-worker who had been at the 7-Eleven with her that morning and had observed the fall, to take the photo for her later that day. Ms. Tommy was not cross-examined on the depth of the pothole, which I do not find in any event is necessary for a causal link. The fact is it was there and that Ms. Tommy tripped on it was established on the evidence.

[37] Ms. Tommy's testimony on her fall was not shaken on cross-examination. Ms. Tommy indicated that after the fall, her co-workers rushed to assist her and she was in pain. She initially wished to continue on to work but her co-workers persuaded her to go to the hospital. She disagreed when it was put to her that pothole was not where she fell and the van would have been parked on top of it. Ms. Tommy agreed that there were no other cars in the parking lot and the van had parked to the left of the front doors. There is no evidence whatsoever that the van was parked over the pothole and I find that to be conjecture. That factor was significant to the defendant's case and it simply has not been established.

[38] The defendant further sought to impugn the plaintiff's credibility by noting she changed her testimony to indicate she was likely picked up for work at 6 am instead of 7 am, as it was the Spring/Summer season. Ms. Tommy however had initially said in her testimony it may have been 6 am or 7 am; the sun hadn't come up yet so it was somewhat darkish. I do not find this initial uncertainty to adversely affect her credibility. She was clear later in her testimony that the hours of her workplace changed depending on the season due to heat concerns. As it was the Spring/Summer season, the workplace started earlier and it is more than likely she was picked up at 5:45 am or 6:00 am.

[39] Furthermore, there is no dispute the pothole was filled in after Ms. Tommy's fall as reflected in the photos presented to the court, taken later that day. 7-Eleven has no records of a maintenance request for this repair and the evidence points to the pothole being filled in by the local manager that day.

[40] Accordingly, I conclude on the balance of probabilities that the plaintiff fell as a result of tripping in the pothole in the parking lot close to the front doors as she exited the 7-Eleven. As noted by the plaintiff, there is no evidence Ms. Tommy was distracted, had obstructed vision or was looking at her phone or otherwise careless. Ms. Alison Daem, a 7-Eleven Asset Protection Supervisor, who testified on behalf of 7-Eleven, when shown a picture of the pothole, agreed that the pothole was a possible "opportunity," *i.e*., a risk or hazard such that corrective action through a maintenance request could be taken.

[41] As noted above, after establishing a prima facie breach of the *OLA*, the defendant may rebut the evidence by showing there was a reasonable system of inspection and maintenance in place (see *Atkins* at paras. 3–6; *Harrison* at para. 47l). Essentially, the question becomes: did the Defendant have a reasonable system in place or take steps to prevent such a fall? While the standard does not require perfection, it does require reasonableness. The defendant maintains the measures taken by 7-Eleven are aimed at eliminating hazards and reducing the risk of injury, and were in the circumstances reasonable. In this case, as noted above, the defendants say it discharged its duty through a mandated employee safety course, and the expectation that employees would undertake monthly site walks and the best practice completion of daily task assignments.

[42] As noted, Ms. Allison Daem, an asset protection specialist of 7-Eleven testified on behalf of the defendant on this matter. She has been in this position since 2022, reports to an asset protection manager and has responsibilities for the 300 stores in BC. From 2015 to 2021, she was a field consultant in the Lower Mainland and responsible for 7-Eleven stores in the Tri-city area.

[43] In 2018, Ms. Daem indicated she would have been a field consultant providing support to her assigned stores. At that time, her duties included regular store visits, coaching, and providing assistance to the stores. During her regular store visits she would review financials and look for “opportunities” to address. Opportunities included graffiti on the store or potential maintenance issues and she would “call out” or point these out for the store to address. This would also include maintenance issues if these were evident, and/or identifying employees who had not taken the required safety course.

[44] Inside the store, Ms. Daem would address the food, overall structure and customer service. Ms. Daem indicated she would visit her stores once a week. While Ms. Daem outlined best practices in a field consultant role, she could not say if the field consultant responsible for the Smithers store in 2018 carried out these practices. She also acknowledged there were no policies but rather “asks” and “expectations”.

[45] Ms. Daem indicated that each employee is required to take an online safety course called “Working Safely” and successfully complete a final knowledge check questionnaire with a mark of 80 percent. There are five questions to be answered.

[46] The course included a section on “Slips, Trips & Falls: Exterior Hazards”. In 2018, an employee was required to complete this once. Ms. Daem agreed that is not reasonable. Indeed, that has now changed so that the employee safety training is required to be taken annually. If an employee has not done so, there would be an “ask”, but no deadline, unless it came to the field consultants’ attention for a second time. There is no hard copy for the coursework for an employee to reference the safety training, but they could take the course again.

[47] Ms. Daem indicated any employee could call the Maintenance Help Desk or the Store Operator or Store Manager if they observe a maintenance issue or hazard outside the store.

[48] With respect to the incident at issue, Ms. Daem identified a spreadsheet that indicated which employees in the Smithers store had taken the safety course. She also indicated in 2018, if there was a maintenance issue and an employee had called a maintenance line, a file would be started and shared with the appropriate maintenance provider. Maintenance is now performed in-house.

[49] If there is an "incident" at a store, an employee is to call a "hot-line" to give specifics of the case, which could lead to the notification of more senior management staff. Ms. Daem indicated that this would be another "ask". There was no policy in 2018 to established this but rather it was and continues to be an "ask" or "expectation".

[50] With respect to the matter at issue, Ms. Daem initially indicated the "hot-line" case notes reflected a repair by Robin Islan and a follow up by Glynis Hogan. It also says the reporting was delayed. There were no lot maintenance reports specific and prior to this incident. Ms. Daem could not say what would normally happen with respect to this situation in 2018. Later in her testimony, she indicated she could not say who would have made the repair. Ms. Daem agreed that if the manager and not maintenance made the repair, there would be no records reflecting that. There are no records or receipts for the repair made. Ms. Daem indicated there was no footage and no records of the safety walks or task assignments of the Smithers store from 2018.

[51] As set out earlier and noted in *Harrison*, the defendant must show it had a reasonable system of inspection and maintenance in place and that the system was being followed at the time of the accident. As per *Atkins*, "the defendants must call some evidence to show it was being followed".

[52] In this case, the defendants have provided evidence of a system that includes the employees taking a working safety course (which deals with hazards in the workplace), and "asks" employees to comply with expectations with respect to inspection of the workplace.

[53] The evidence is that while employees are now “asked” to undertake the course annually, at the time of the accident, this was not the case. An employee could be asked to take the online course, without consequence for non-compliance. Furthermore, the employee is only asked to answer five multiple choice questions as part of a “knowledge check” at the end of the course, which appears to be a somewhat limited method to ascertain whether an employee has some understanding of the safety issues in the workplace.

[54] While Ms. Daem testified as to her own practices when she was in the field consultant role, she could not say if the field consultant responsible for the Smithers store in May 2018 carried out these practices. She also indicated there were no policies but rather “asks” and “expectations” of staff members. While there is a spreadsheet indicating the employees at the time who had undertaken the working safety course, there is no evidence of any sort of regular inspections or inspection tasks that would either be an “ask” or “expectation” of the Smithers store at the time. The evidence is therefore fundamentally deficient on establishing whether (as said in *Harrison* at para. 47) the defendants in May 2018 “was following the system at the time of the accident”.

[55] Furthermore, it is not apparent that a reasonable system of inspection and maintenance was in place. Whether an employee has taken the safety course is documented but no documentation was produced to demonstrate a system of inspection and maintenance. Rather, these all appear to be “asks” or “expectations” without any evidence of actually occurring. As an example, I note in *Harrison*, a “sweep log” was referred to. This case is more akin to that of *Davis v. Kin’s Farm Market (Lynn Valley) Ltd.*, 2010 BCSC 677 at para. 37, where the identification of hazards was more by “the chance observation by employees on duty” with no supervision of an “observation system by logging inspection times or by any other means”. While the narration in the initial safety course does ask the employee to talk with the Store Operator, Store Manager or contact the Maintenance Help Desk, simply relying on the observation by employees as in *Davis*, without a documented system of routine inspection or other information to support the existence of a

routine system of inspection and any actions undertaken, does not fulfill the standard of reasonableness in the circumstances.

[56] Finally, the evidence establishes that employees do not have access to the working safety material unless they take the course again. There is no hard copy of instructions or ability to review the safety instructions as needed.

[57] In view of all the above, I conclude the defendant did not have a reasonable system of inspection and maintenance in place. Even if this system were considered reasonable, there is no evidence this system was being followed at the time of the accident in 2018. The defendant is, therefore, liable for causing Ms. Tommy's injuries and the resultant consequences of those injuries.

[58] I turn now to the question of damages.

VI. DAMAGES ANALYSIS

1. What is the nature, extent, and duration of the injuries Ms. Tommy suffered in the accident?

[59] Ms. Tommy is seeking damages for the ankle fracture itself, including persistent pain, stiffness, and swelling in her left ankle; hips, and lower back. She further seeks damages on the basis of that the initial accident materially contributed to a fall down icy stairs in December 2018, wherein, she injured her back. Finally, she notes her difficulties with mental health since the accident.

[60] Ms. Tommy must prove on a balance of probabilities that "but for" the negligence of the defendant leading to the accident, she would not have suffered the injuries she now complains of. As per *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 35, the Court must ascertain whether the accident is the cause of her current issues or whether there were pre-existing injuries and therefore "a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence." A plaintiff is only entitled to be restored to her original condition.

a. Expert Evidence

[61] Dr. Hooman Sadr, an orthopedic surgeon specializing in acute orthopedic trauma surgery, elective hip and knee arthroplasty and foot and ankle surgery testified in this matter. He provided a medical legal opinion dated April 9, 2024. He based his opinion on the history as provided by Ms. Tommy and on medical records, including medical imaging. With respect to the nature and extent of the injury and his diagnosis, he opined in his report that Ms. Tommy "had a fall and developed an ankle fracture that involved three parts of her ankle. One is the distal fibula fracture, the second was the lateral talar dome osteochondral injury and also an anterior distal tibia small bony fragment fracture, which was treated appropriately at the time".

[62] Dr. Sadr noted that Ms. Tommy "recovered from her fracture with some remaining pain, locking and stillness in her ankle". With respect to prognosis he concluded that Ms. Tommy "has plateaued in her recovery from this ankle fracture. She remains to have pain, stiffness and locking and swelling in her ankle, which is limiting her day-to-day activities and also her ability to go back to work she stopped working in 2022". He noted she used to be able to walk with no limitations around her property and was employed fulltime. She now has limitations in all of her activities, and her walking tolerance is limited to one block or less due to pain, stiffness and locking. He also noted that Ms. Tommy is at potential risk of developing ankle arthritis and progressive degenerative changes, given her higher BMI which "may require future interventions such as intra-articular injections, ankle fusion or replacement".

[63] Dr. Sadr recommend Ms. Tommy undergo cross-sectional imaging such as CT scan and MRI to assess potential complications such as ankle impingement. He recommended a variety of treatment options depending on those findings.

[64] In cross-examination, Dr. Sadr agreed the history he took was based on what Ms. Tommy told him but noted that he conducted a review of the medial records. When undertaking that review he focussed on information pertinent to the question

of the ankle injury. In his physical exam, however, he noticed the patient had some pain, difficulty with a calf lift on the injured ankle side and she had some limitation in her ankle movement. When questioned about Dr. Smith's report about Ms. Tommy, (an orthopedic surgeon Ms. Tommy consulted), Dr. Sadr noted Dr. Smith's report was made only two months after the injury and he would follow a patient for at least six months "to see if there is anything we are missing" and consider a further diagnosis and treatment as necessary. In this case as the healing of the injury had plateaued, Dr. Sadr was of the view the injury will not get better on its own and further imaging is necessary to consider treatment.

[65] Dr. Kelly Apostle testified for the defendant. After a review of the documentary material provided to her with respect to future disability, she opined with respect to Ms. Tommy's injury that "her fracture appears to have been relatively minor. Her last report states her ankle appears to be normal on x-ray. I, therefore, think her risk of future arthritis to be very minimal. Cross-sectional imaging would help in prognosticating that. If cross-section imaging at this stage is normal, I think her future risk of arthritis would be zero".

[66] The main point of contention appeared to be whether there was a future risk of degenerative arthritic condition in Ms. Tommy's ankle. Dr. Apostle was adamant there was "zero" risk of this as arthritis is associated with an injury to the cartilage and not the bone. In this case, Dr. Apostle indicated the medical imaging indicated injury to the bone.

[67] In cross-examination, Dr. Apostle agreed she did not see the patient; nor take a patient history which limited her ability to ask questions of the plaintiff – in particular what she was like before and an after the injury. Dr. Apostle also said a person's weight was not necessarily an issue when dealing with the healing of a broken bone, while it might be when dealing with a cartilage injury. I do not accept this as precluding the consideration of weight impacting Ms. Tommy's circumstances, as Dr. Apostle was not definitive nor could she be with respect to

Ms. Tommy as she had not taken a history; nor been a position to ask Ms. Tommy about her circumstances.

[68] Dr. Apostle said she would not normally provide an opinion on the likelihood of degenerative arthritis without assessing up to date imaging. In this case she did, so as she was asked to opine on the basis of the information provided, which only included imaging from 2018. I find this is somewhat troubling – although Dr. Apostle does indicate further imaging would help with her prognosis. With respect to her characterization of the injury as "very minor" or "fairly minor", she indicated this was an orthopedic characterization and did not reflect the subjective nature of the pain that may be suffered by the injured person. She agreed that this is best as described by the patient.

[69] Dr. Sadr concluded with respect to the prognosis that Ms. Tommy's recovery has plateaued and she continues to have pain, stiffness and swelling in her ankle and continues to be limited in her daily activities.

[70] The plaintiff argues that Ms. Tommy's compensable injuries include injuries resulting from the fall she took on December 25, 2018. The plaintiff says Ms. Tommy had mobility impairment and was walking with a limp at the time arising from her ankle injury. She continues to experience persistent pain, stiffness, and swelling in her left ankle, hips and lower back, as well as difficulties with her mental health. While the plaintiff also says she gained 75-100 lbs since the accident due to her initial immobility and inability to return to her activities, the plaintiff does not claim for injuries resulting from a motor vehicle accident in 2021 which resulted in a hernia, and subsequent difficulties created by the resulting surgery.

2. What is the legal causation of Ms. Tommy's injuries following the accident?

[71] As noted, the plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the *de minimis* range: *Athey* at paras. 15, 17; *Farrant v. Laktin*,

2011 BCCA 336 at para. 9. A defendant cannot escape liability merely because other causal factors for which they are not responsible also helped produce the harm (*Athey* at para. 19). a plaintiff is not required to establish the defendant's negligence as the sole cause of his injuries. It is sufficient if the defendant's negligence was a cause of the harm: *Athey* at paras. 17, 19.

[72] Causation need not be determined with scientific precision: *Athey* at para. 16; *Zwinge v. Neylan*, 2017 BCSC 1861 at para. 44; *Clements v. Clements*, 2012 SCC 32 at para. 49. Causation is a practical question of fact that can best be answered by ordinary common-sense: *Athey* at para. 16.

[73] The test for causation asks "but for" the defendants' negligence, would the plaintiff have suffered the injury? This test recognizes that compensation for negligent conduct should only be made where a substantial connection is made between injury and the plaintiff's conduct: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23; *Zwinge* at para. 45.

[74] The plaintiff maintains the evidence establishes that the accident caused the plaintiff's current physical and psychological conditions. Causation is established where the plaintiff proves on the balance of probabilities that he defendant caused or contributed to the injury: *Snell v. Farrell,* 1990 2 S.C.R. 311. The defendants are, therefore, liable for causing her injuries and for the resultant consequences of those injuries.

[75] The defendant submits that to the extent the plaintiff is able to prove that 7-Eleven is liable for Ms. Tommy's ankle injury, that is the only injury that is compensable. The defendant strongly argue that the plaintiff has not established on the evidence that the 2018 fall down the stairs and any resulting injuries were caused by or contributed to by 7-Eleven, or the plaintiff's initial ankle injury. On this point in particular, the defendants say that there is no medical evidence substantiating a medical injury to the plaintiffs back, and that she simply slipped on ice.

[76] The plaintiff relies upon *Larwill v. Lanham*, 2003 BCCA 629, leave to appeal to SCC ref'd, [2004] S.C.C.A. No. 23, in which a plaintiff suffered a fall on icy stairs following a motor vehicle accident. The trial judge had found Mr. Larwill was experiencing weakness in his left leg and symptoms from a degenerative back condition aggravated by the accident at the time of the March 1997 fall. He concluded they were not the only reasons for his fall but they were "significant factors" along with the icy slippery condition at the mill (para. 7). He concluded that the fall was caused by the combination of the plaintiff's instability arising from the motor vehicle accident and the icy conditions at the mill. A contributing factor is material if it is outside the *de minimums* range as per *Bonnington Castings Ltd. v. Wardlaw*, 1956 1All ER 615 (H.L.). On appeal at para. 15, Justice Mackenzie upheld the finding that neither the instability nor the icy conditions were the sole cause, but were both significant causes.

[77] So too in this case. As argued by the plaintiff, Ms. Tommy suffered from a limp and continues to do so arising from the ankle injury. This is not an insignificant matter as the testimony establishes its currency and the fact the ankle continues to swell if Ms. Tommy undertakes too much. While that may not have been the case on December 25, 2018, there is no doubt Ms. Tommy had some mobility impairment as a result of the limp and this in conjunction with the snow conditions of the day, materially contributed to her fall.

[78] Ms. Tommy testified that she still had a limp at the time, and 2–3 months after the ankle injury, this had started to affect or "bug" her hips. They ached and were painful in her hip bone and this made it difficult to walk. She had not experienced this pain before the ankle injury. After her fall, she was in a lot of pain, and was taken to the hospital by ambulance where she was told she had fractured her lower vertebrae. In cross-examination, she agreed she slipped on the fresh snow on the stairs. She also said she was still limping around. I conclude therefore as reflected above that both these factors were the material cause of her fall down the stairs that day.

[79] While there is no medical evidence about the impact of this fall, I conclude Ms. Tommy suffered a back injury and pain as a result of this event. As the plaintiff submits, the fall is a non-tortious event for the *Athey* analysis. It contributed to the accident related injuries of limping and pain avoidance and as such is compensable by the defendant. This pain is to be considered in assessing non-pecuniary damages which I will turn to shortly.

[80] Ultimately, I conclude as reflected by both Dr. Sadr and Dr. Apostle, that Ms. Tommy sustained injuries to her ankle as a result of the May 2, 2018 fall including a distilled fibula fracture. Dr. Apostle agreed in cross-examination that a "minor injury" may give rise to severe pain and disability, and patients suffering problems with mobility often develop Post-Traumatic Stress Disorder or experience emotional difficulties. As confirmed by the medical evidence, Ms. Tommy's ankle recovery had plateaued. Dr. Apostle agreed that pain is subjective and is best described by the person experiencing it. A patient may compensate for their injury when trying to avid pain which can change musculature and increase the risk for falls. While Dr. Apostle was at pains to say this was very minor, she did not resile from that reality.

[81] In view of all the above, while there is some possibility of improvement depending on further medical imaging and possible treatment, as 6 years have gone by, Ms. Tommy's symptoms have remained consistent and her recovery has plateaued. I accept therefore that Ms. Tommy is rendered partially disabled and continues to be limited in her daily activities up until this time. She continues to experience mobility issues, pain as well as difficulties with her mental health as she attested to, and this was corroborated by her family members.

[82] On this latter point, I agree as stated by the Justice Brown (for the Court) in *Saadati v. Moorhead*, 2017 SCC 28 at para. 2 that "a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric illness". He continued at para. 37 that, to establish mental injury, claimants must show "that the disturbance suffered by the claimant is "serious and

prolonged and rise[s] above the ordinary annoyances, anxieties and fears" that come with living in civil society" (citing *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 9).

[83] In this case, I agree as argued by the plaintiff that the evidence establishes Ms. Tommy as happy, funny, outgoing and active before the accident. She is no longer so and is described by her family members as sad, depressed and most recently has been locking herself in her room. She is stressed and unhappy, largely due to her financial situation. This I conclude is serious and prolonged, arising above the ordinary anxieties, fears and annoyances and rises to the level of a legally compensable mental injury and I include it as part of my consideration of the heads of damages claimed.

3. What is the appropriate award, if any, for non-pecuniary damages for pain and suffering?

[84] The plaintiff seeks an award in the range of $225,000 in non-pecuniary damages, arguing that the loss of Ms. Tommy's previously active life and happy personality coupled with her compounded difficulties faced as an individual with pre-existing vulnerabilities arising from the continuum of intergenerational trauma as her father endured residential school should be taken into account. The court has recognized these in cases including *Campbell v. Van Den Broek,* 2013 BCSC 1754, where it noted the plaintiff in that case as a person who simply kept going despite her difficulties. In such a situation, the court must "recognize that for a person with serious limitations, a relatively small change may have significant practical consequences".

[85] In this case, the plaintiff says the injuries Ms. Tommy sustained have not only limited her physical capabilities but has also deeply impacted her emotional and psychological well being.

[86] The plaintiff cites a number of comparator cases including *J. J. v. Barton*, 2017 BCSC 1196: *Ahadi v. Valdez*, 2013 BCSC 714; *Hubbs v. Escueta,* 2013 BCSC 103; and *Verge v. Chan,* 2012 BCSC 876. The plaintiff also relies on *Valdez v.*

Neron, 2022 BCCA 301, that not only should the award be increased to reflect inflation but the BCCA has clearly noted that “awards for non- pecuniary damages have continued to increase over the years in addition to the inflationary component (at para. 58).

[87] In contrast, the defendants submit that an award in the range of $50,000 to $75,000 is appropriate given that Ms. Tommy can only attribute a slight limp to the accident and none of the additional issues identified by the cases such as surgery, screws, hardware, degenerative changes and moderate to marked arthritis and limited range of motion are experienced by Ms. Tommy. The defendants also say Ms. Tommy had a pre-existing back injury and slipping on her mother’s staircase did not lead to any lasting injury. She has been on the same back pain medication (gabapentin) since 2016 and had only very recently increased this as result of her surgery complications. In making their arguments, the defendants rely on the following cases: *Druet v. Sandman Hotels*, 2011 BCSC 232; *Choromanski v. Malaspina University College*, 2002 BCSC 771; *Ward v. Walker*, 2017 BCSC 484.

[88] The leading case on the assessment of non-pecuniary damages is *Stapley v. Hejslet*, 2006 BCCA 34, leave to appeal to SCC ref’d, [2006] S.C.C.A. No. 100. In that case, Justice Kirkpatrick at para. 46 outlined a number of factors to consider including age, nature of injury, severity and duration of pain, impairment of life, impairment of family and social relationships, and impairment of physical and mental abilities, amongst others. She also noted that the plaintiff’s stoicism should not penalize the plaintiff.

[89] Since the motor vehicle accident, Ms. Tommy’s activities have been significantly curtailed. She experiences pain in her ankle and has indicated pain in her hips and back. She now walks with a limp and experiences significant swelling of her ankle when as she says she does too much.

[90] She no longer goes for walks in the village or on the trails to the rivers and lakes that she previously enjoyed. She has difficulty with household chores as she cannot stand on her ankle for extended periods of time. She no longer goes out, is

depressed, unhappy and more recently has taken to locking herself in her room. She is no longer the happy outgoing active person she once was.

[91] I have found Ms. Tommy to be credible and she gave her testimony in a straightforward manner. Her description of her ankle pain and mobility limitations, along with the effect this has on her daily activities, was supported by the other witnesses. It is particularly troubling that she is presently very unhappy, such that she is now confining herself to her room. I accept her evidence of the depth of the changes that have affected her and note what some may consider a small limitation has had a real profound impact on her world and directly impacted that part of it that sustained her – her workplace with its social aspects and the activities she was able to do in her small village in Northern British Columbia.

[92] I also agree that the evidence establishes Ms. Tommy as a vulnerable individual as noted in *Campbell*. Ms. Tommy testified as to the difficulties experienced in her upbringing, including the realities of the adverse affect on her of her father's attendance at residential school. This impacted the family and ultimately led to its break up and the vulnerabilities experienced by Ms. Tommy who was in a "special class" in high school. As noted earlier in *Campbell*, the court must "recognize that for a person with serious limitations, a relatively small change may have significant practical consequences". There is no doubt the change in Ms. Tommy's life since her ankle injury has resulted in profound consequences to Ms. Tommy.

[93] Based on these findings, I prefer the cases cited by the plaintiff and award $175,000 in non-pecuniary damages. I note the defendants cited cases are not recent and do not include either the reality of inflation and also as the plaintiff has argued the increasing nature of non-pecuniary awards. I also decline to accede to the defendants' argument that her award should be reduced as the plaintiff did not experience a more serious injury. There is no doubt this has been serious based on her pre-existing vulnerabilities which are evident; these injuries have impacted on her in a profound way and I have taken this into account.

4. What amount, if any, should be ordered for cost of future care?

[94] The test to establish an award for future care is objective. For an award of future care, firstly, there must be medical justification for the claim, and, secondly, the claim must be reasonable: *Simmavong v. Haddock*, 2012 BCSC 473 at para. 126. As per *Chavez-Salinas v. Tower*, 2022 BCCA 43 at para. 83, it is not necessary that a physician testify to the medical necessity of each item of care. In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the Court noted that common sense should always inform awards for future care.

[95] In this case, Ms. Tommy testified she had used A5-35 cream, at a cost of approximately $15–$20 per week, and had just started a new CBD ointment that was much more effective. This latter treatment cost $65 per week.

[96] The defendant argues however that there is no medical evidence as to how long this treatment would be needed, and given the plaintiff's evidence that she has not attended any physiotherapy or other therapy for her injuries, any related costs would be speculative.

[97] I conclude it appropriate to grant an award to cover the costs of Ms. Tommy's CBD ointment as being medically justified based on Ms. Tommy's testimony of its effectiveness. As in *Aberdeen v. Zanatta*, 2008 BCCA 420, "the analysis of what is medically justified is not as narrow as what is medically necessary" at para. 43.

[98] In addition, Dr. Sadr has concluded that Ms. Tommy's recovery had plateaued. It is now six years since the accident and based on the medical conclusions reached by Dr. Sadr and indeed, Dr. Apostle, I conclude this is a reasonable expense. While I recognize the argument of the defendant, it is problematic when one considers the jurisprudence that makes clear only treatment recommended by a treating physician is pertinent to the question of what treatment the patient should undergoes (*Murphy v. Snippa,* 2024 BCCA 30 at para. 110).

[99] Ms. Tommy has experienced difficulties accessing treatment as she no longer has a family doctor. She has now resorted to the telehealth line in which as she

attested the doctors are only interested in her complications from surgery and she is unable to raise these other issues. Ms. Tommy should not be penalized because there may be less medical resources available as a result of living in rural British Columbia.

[100] As pointed out by the plaintiff, 2% is the amount to be used to calculate future losses other than future income loss as per the *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56; and the *Law and Equity Regulation,* B.C. Reg. 352/81.

[101] Ms. Tommy claims damages for future care up to age 80 due to the nature of her injuries and the opinion from Dr. Sadr that Ms. Tommy's recovery had plateaued.

[102] Ms. Tommy is presently 37 and would therefore require 43 years of care. Mr. Tommy calculates the annual cost at $50 per month or 600 per year for medications or ointments. I award $600 under this category of future care costs.

[103] In addition, the plaintiff seeks and additional $100 for mileage annually. There is insufficient evidence in this case to establish these expenses and I decline to grant that claim under this category.

[104] The annual future care costs extrapolated to age 80 are therefore $600 x 28.6616 (the multiplier for 43 years at 2%). That amount is $17,196.96 which I round down to $17,000.00

5. What amount, if any, should be ordered for the loss of housekeeping capacity?

[105] Ms. Tommy claims $172,00 for diminished future housekeeping capacity and $39,000.00 for past loss of housekeeping capacity.

[106] The law regarding awards for loss of housekeeping capacity was recently reviewed in *McKee v. Hicks*, 2023 BCCA 109. After an extensive review of the jurisprudence Justice Marchand (as he then was) summarized the Court's conclusion and said at para. 112:

> To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[107] An award for loss of housekeeping capacity reflects the loss of a personal capacity and asset: *Suthakar v. Humble*, 2016 BCSC 155. The calculation of damages under this heading is for the loss of the *asset*.

[108] The plaintiff relies on the facts of the *Steinlauf v. Deol*, 2022 BCCA 96, which upheld a housekeeping award of $182,000 for loss of past and future homemaking capacity for a 29-year-old constable working full-time hours with some overtime the time of trial.

[109] The defendant however maintains that the evidence establishes that she can still complete her household work but will need breaks. Accordingly, any award for non-pecuniary damages will encapsulate the amount for housekeeping: *Kim v. Lin*, 2018 BCCA 77 at paras. 33–34. While the defendants concede that the plaintiff appears unable to shovel snow, they maintain that there is no evidence of the costs attributable to this.

[110] I conclude however that in this case, as clarified by *McKee*, Ms. Tommy's loss of housekeeping capacity is akin to the loss of an asset and not, as the defendants argue, that she only needs breaks. Ms. Tommy was bedridden for many weeks following the accident and has been mobility impaired since. Prior to the accident the evidence established that Ms. Tommy undertook a large variety of chores both inside and outside the house. Ms. Tommy undertook the regular household duties such as cooking, cleaning, washing up and laundry. In addition, she would assist with babysitting her young niece after she returned from work. In the winter, she would also shovel snow.

[111] The evidence established a significant change after the accident. Ms. Tommy needed assistance with all aspects of the household, both inside and out. Her neighbour helped her with her dogs, her mother helped her with grocery shopping and chores, and her boyfriend helped with many chores and assisted with her personal care.

[112] While Ms. Tommy has attempted to return to her household chores, her inability to walk around and stand for long periods of time has meant she is unable to do so. More recently, as the well that services her house has dried up, she has moved back in with her father as she is unable to carry the large water jugs that are now necessary for her household. Dr. Sadr has opined that Ms. Tommy "is unable to perform household tasks at the level she did before her ankle injury. Her recovery seems to have plateaued and I do not anticipate significant improvement in the near future". While, as argued by the defendant this was based on the history presented to Dr. Sadr by Ms. Tommy and Ms. Tommy did not have to deal with the water issue referenced by Dr. Sadr prior to the accident, I do not find this detracts from the present undisputed reality that Ms. Tommy faces today her inability to carry these large jugs of water required at present in the house she lives in with her boyfriend.

[113] I accept the quantification of the amount for housekeeping services set out by the plaintiff as reasonably being 5 hours per week at $25 per hour. While these are based on counsel's submissions and no expert reports were submitted, as commented upon in *Steinlauf v. Deol,* 2022 BCCA 96 at para 117 by the Justice Grauer "there was "no basis for suggesting that the rate of $20/hour used by the judge was unreasonable. If anything it seems to me to be a conservative estimate". I agree and accept that a reasonable estimate is $25.00 per hour.

[114] Accordingly, I accept the calculations provided by the plaintiff based on the multiplier set out in the *Law and Equity Act* that:

- Future house keeping capacity is $25/hr 5h/wk X 52 wk./yr. x 26.4406 = $171, 863.90;

- Past housekeeping capacity is $25/hr x 5h/wk. x 52 wk./yr. x 6 years = $39,000.00.

6. What is amount, if any, should be ordered for future loss of income earning capacity?

[115] In a trilogy of cases, our Court of Appeal has clarified the law relating to the assessment of future losses of earning capacity: see *Rab v. Prescott*, 2021 BCCA 345; *Lo v. Vos,* 2021 BCCA 421; and *Dornan v. Silva*, 2021 BCCA 228.

[116] More recently, in *Boucher v. Bemister*, 2023 BCCA 17 at para. 5, the following articulation of the process set out by these cases was conceded as correct:

> From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a *potential* future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). 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 such 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 the possibility occurring—see the discussion in *Dornan* at paras. 93–95.

[117] The plaintiff argues that Ms. Tommy's ongoing chronic symptoms and accident–related mood difficulties are the potential future events that could give rise to a loss of capacity. Dr. Sadr's opinion supports the notion that Ms. Tommy is not capable of undertaking her pre-accident full time employment, given that it involves standing for many hours per day and, per Ms. Tommy's evidence, regularly lifting 50 lb pallets. Dr. Sadr opines in his report, "I believe that Crystal is unable to perform her previous job duties due to persistent ankle pain and discomfort. Her recovery appears to have plateaued and I do not foresee any further improvement at this stage."

[118] The defendants argue that the plaintiff has provided insufficient evidence to make out her wage loss claim, both past losses and future wage loss/earning capacity. The plaintiff testified that after about three months, she returned to work full

time, and in 2019 she had her most productive year ever. She testified she has been unable to work because of an unrelated emergency surgery in March 2023 and the evidence is that resulting complications will likely prevent her from working until the Spring of 2026.

[119] With respect to the claim for future loss, the defendants submit that the evidence does not support the plaintiff's claim for loss of earning capacity in this matter. The defendants say with respect to the three-part approach for assessing loss of future earnings, while the evidence discloses a potential future event, i.e. the potential risk of arthritis, this potential is not expected as per Dr. Apostle's report. They contend there is no evidence to support the existence of a real and substantial possibility of a future event which will cause the plaintiff to suffer a pecuniary loss.

[120] Accordingly, with respect to the second step, the defendants argue that the evidence does not establish a real and substantial possibility that the future event will cause a pecuniary loss. The ankle has healed well and there is no risk for arthritis indicated in the present imaging. The plaintiff could have obtained further imaging but she did not, and neither expert witnesses have diagnosed Ms. Tommy with chronic pain. Even if the third step is engaged, the defendants say the evidence of both doctors was that the likelihood of this event occurring was very low or non-existent.

[121] I now turn to my analysis. With respect to the first step, I note, as per *Rab* at para. 47, the Court of Appeal has confirmed that a "chronic injury" can be sufficient to satisfy the first evidentiary step of the test. While the injuries to the plaintiff in *Rab* were predominantly physical in nature, this does not preclude chronic pain or psychological injuries from satisfying this test. In this case, the plaintiff has displayed symptoms of chronic pain for the last six years, as well as issues with mental health, and mobility issues associated with her ankle such that I am satisfied that the evidence discloses a potential future event that could lead to a loss of capacity. In addition, she has an ongoing limp and her ankle continues to painfully swell.

[122] I also agree that Ms. Tommy's stoic nature and desire to work, along with financial necessity that she do so, resulted in Ms. Tommy's return to work three months after the accident. However, her testimony was very clear that she could no longer do the job as she had previously done, as she required the use of a makeshift stool and assistance from her colleagues. As Dr. Sadr said, she has persistent ankle pain and discomfort and her recovery has plateaued.

[123] With respect to the second step regarding whether, on the evidence, there is "a real and substantial possibility" that the future event in question will lead to pecuniary loss. I note the standard of proof "is a lower threshold than a balance of possibilities, but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34.

[124] The plaintiff's evidence set out above satisfies the second step of the test as it establishes that Ms. Tommy can no longer do the heavy labour job to the extent that she had done previously since graduating from high school 14 years ago. I find that her ability to maintain physically demanding employment is currently limited and her condition will likely worsen due to her ankle injury with its resultant pain and mobility limitations, and her increased BMI. While she continued to do the job and was paid minimum wage, she testified she has been unable to find a sedentary job that will accommodate her limitations; she has only a high school education and noted that would affect her capacity to compete for the limited non-physical related employment in the area she lives in—North West British Columbia. There is therefore a real and substantial likelihood that potential future events, which include the possibility of arthritis, will give rise to a loss of capacity. While Dr. Apostle was of the view otherwise, this was based simply on a records review which included scans to date and Dr. Apostle agreed she would not otherwise opine on such a possibility without ordering up to date scans.

[125] The third step is to assess or value the future loss under either an earnings approach or a capital asset approach (*Perren v. Lalari*, 2010 BCCA 140 at para. 32). The earnings approach may be more useful when the loss is more easily

measurable; the capital asset approach will be more useful when the loss is not easily measurable, for example where the plaintiff has returned to their former employment, but has still established a loss of capacity (*Laley v. Anderson*, 2024 BCSC 1085 at para. 105). In this case, a capital asset approach is most appropriate.

[126] I first turn to consider Ms. Tommy's without accident work life. The plaintiff maintains that Ms. Tommy's future earning capacity without-accident is ascertainable on the evidence. The plaintiff worked at the Woodmere Nursery since graduating from high school. It has been her only main source of employment and she had no other career plans. As such, I conclude that she would have continued to work at Woodmere Nursery as long as possible. The plaintiff submits that by April 2026, when Ms. Tommy would have otherwise returned to work at Woodmere Nursery Ltd. or an equivalent minimum wage position, her earnings would be approximately $19.00 per hour. Assuming she would work 40 hours per week as she did prior to the accident, her annual income can be calculated at 19/hrs x 40 hrs/wk x 52 wks = $39,520 /yr in 2026.

[127] The present value multiplier calculable through s. 56 of the *Law and Equity Act*, and the *Law and Equity Regulation,* is 1.5 %. The plaintiff says that because she would likely retire at age 70 but for the accident, the period would be 70 - 39 = 31 years (starting in 2026) at 1.5 % which is 24.6461.

[128] While I largely agree with this premise, in particular, that she is a minimum wage worker, and therefore likely to work to age 70, I must take into account that Ms. Tommy was a seasonal worker. The evidence establishes that prior to the accident Ms. Tommy worked on average 39 weeks a year, rather than 52 weeks. As such, the more accurate calculation for Ms. Tommy's average annual income would be:

> 19/h x 40/wk x 39 wks = $29,640

[129] This number would then be multiplied by the 31-year multiplier as follows:

> $29,640 x 24.6461 = $730,510.40

[130] Now I will turn to consider Ms. Tommy's with accident work life. I agree that while Ms. Tommy will likely remain off work until April 2026 because of her hernia and surgery complications, she is motivated to return to work and had started to explore options; however, as noted, I do find that her ability to maintain physically demanding employment will be limited and her condition will likely worsen due to her ankle injury with its resultant pain and mobility limitations, and her increased BMI. Again, no evidence was led as to any positive contingencies that Ms. Tommy would attain a higher position or was pursuing alternative careers. It is further reasonable to conclude that Ms. Tommy, given her age, education, mental health, and physical limitations, is limited in her capacity to compete for non-physically demanding employment in North West British Columbia. The plaintiff argues that Ms. Tommy will likely need to retire by the age 50 and will lose out on 20 years of income.

[131] While it cannot be measured with scientific precision, I accept that trajectory. As referred to in *Grant v. Ditmarsia Holdings Ltd.*, 2020 BCSC 1705, the court recognizes the common-sense proposition that someone's ability to cope with chronic pain diminishes with age (see also *Shrieves v. Smith*, 2020 BCSC 710 at para. 87). The with-accident scenario would therefore be:

> Age 50 – 39 = 11yrs - The 11-year multiplier x $29,640.00 = 10.07 x $29,640 x .5 = $149,237.40

[132] Ms. Tommy's future income without accident capital asset of $730,510.40 less her with Accident Capital asset of $149,237.40 is $581,273.

[133] I agree that a total net contingency of 15 % should be taken into account. This includes the general negative contingency of 10% and 5% for the pre-existing conditions negative contingency.

[134] I do not agree with the defendants who argued for the extensive use of contingencies to the point of 40% based on such factors as labour contingencies and the possibility the plaintiff would improve with treatment.

[135] With respect to the former proposition, no evidence was led. With respect to the latter proposition, the defendants relied on an unsubstantiated comment by Dr. Apostle that there "were numerous physiotherapists to help treat the plaintiff's ankle". As noted, I found Ms. Tommy to be a credible witness and I am persuaded by her account as to her difficulties in accessing medical treatment in the Smithers area. As noted earlier, the Plaintiff should not be penalized for the systemic difficulties in accessing the healthcare system in North West British Columbia.

[136] The plaintiff's claim for diminished future earning capacity modified after contingencies is therefore 581,273 x .85 = $494, 082.05.

7. What amount, if any, should be ordered for past loss of earning capacity?

[137] The employment records submitted establish a past wage loss of $10,000. In 2017, Ms. Tommy worked 39 weeks of work; in 2018, Ms. Tommy worked 19 weeks of work; and in 2019, Ms. Tommy worked 39 weeks of work.

[138] Ms. Tommy then received CERB benefits in 2020 and suffered from complications arising from hernia and other surgery in 2021 and 2022. The plaintiff is not making a wage claim for these latter years. Accordingly, by 2019, Ms. Tommy had suffered a maximum of 20 weeks missed x 40 hrs x 12.50 – the minimum wage she received at the time. That amount is 10,000 in lost wages which is awarded for the claim of past wage loss.

8. Special Damages

[139] Special damages refer to compensation an injured person is entitled to recover form reasonable expenses incurred as a result of an accident (See *Sidhu v. Baturin*, 2022 BCSC 102). The defendants say the only evidence of special damages is $201. 33 which relate to the plaintiff's attendance at the IME with Dr. Sadr, I conclude this report was necessary and the plaintiff has established liability.

[140] The plaintiff however additionally claims $500.00 for Ms. Tommy's A5-35 at $15–$20 per week, CBD ointment and travelling to and from the hospital and doctor's offices.

[141] I conclude $500.00 is a reasonable sum for the above expenses, especially considering that Ms. Tommy has been using the A5-35 for at least five years and has only recently moved to the more expensive CBD ointment when she can afford it.

[142] In view of the result in this case, costs are awarded to the plaintiff.

[143] In addition, as requested, an order for the payment of the Minister's Certificate pursuant to s. 16 of the *Health Care Cost Recovery Act*, S.B.C. 2008, c. 27, in the amount of 3,010.52 is granted.

VII. CONCLUSION

[144] In summary, I have awarded the following amounts:

Non-pecuniary damages	$175,000.00
Future cost of care	$17,000.00
Past Loss of housekeeping	$39,000.00
Future Loss of housekeeping	$171,863.00
Future loss of income	$494,000.00
Past loss of income	$10,000.00
Special damages	$500.00
TOTAL	**$907,363.00**

"Burke J."