IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sohal v. Singh,*
2017 BCSC 734

Date: 20170504
Docket: M132238
Registry: Vancouver

Between:

Amarjit Kaur Sohal

Plaintiff

And

Kulwinder Singh

Defendant

Before: The Honourable Mr. Justice Skolrood

Reasons for Judgment

Counsel for the Plaintiff:	F.R. Sierecki M.D. Gillespie
Counsel for the Defendant:	H.D. Neumann
Place and Date of Trial:	Vancouver, B.C. April 10-13, 18-19, 2017
Place and Date of Judgment:	Vancouver, B.C. May 4, 2017

Introduction

[1] The plaintiff claims damages for injuries sustained in a motor vehicle accident that occurred on November 26, 2011 in New Westminster, B.C. Liability for the accident has been admitted.

[2] While the defendant acknowledges that the plaintiff was injured in the accident, he disputes the extent of her injuries and the quantum of damages claimed.

Background

Plaintiff's Pre-Accident History and Condition

[3] The plaintiff was 47 years old at the time of the accident and 53 years old at the time of trial. She has been a widow since 2001 and has two children, a daughter currently 25 years old and a son currently 21 years old.

[4] The plaintiff lives in New Westminster and both of her children currently live with her while they attend university.

[5] Prior to the accident, the plaintiff led a busy life working at two jobs and caring for her home and her children. She described herself as healthy and happy, with lots of energy.

[6] In terms of social and recreational activities, she enjoyed spending time with her children at the park and at temple, where she would attend once per week.

[7] She said that she had no pre-existing health problems and she was able to handle the demands of her work as well as doing most of the work around her home, including laundry, cleaning and yard work.

[8] Her two jobs were working full-time as a cook at a restaurant called L'Artista in Burnaby and part-time as a dishwasher/kitchen helper at another restaurant known as Frankie G's Pub in New Westminster. She typically worked 40 plus hours

at L'Artista, Monday to Friday plus Saturday evenings, and 15-16 hours per week at Frankie G's, Monday to Wednesday after her shift at L'Artista finished.

[9] The plaintiff's daughter Sandeep described her mother, prior to the accident, as energetic and hard working. When the plaintiff's husband died at an early age, the plaintiff was thrust into the role of mother and father. According to Sandeep, the plaintiff coped well working at her two jobs, caring for her children and doing the bulk of the work around the home.

[10] The plaintiff's income tax returns indicate that she earned the following employment income in the years leading up to and including 2011, the year of the accident:

2007 $38,852

2008 $41,276

2009 $44,488

2010 $39,948

2011 $41,823

[11] In each of these years, the bulk of her income was derived from her work at L'Artista. She began her part-time work at Frankie G's in late 2007 and her income from that position was typically between $6,500-$7,000 per year. She also reported a small amount of investment income each year which is earned from the proceeds of sale of her late husband's trucking business.

The Accident

[12] The accident occurred at about 6:30 a.m. on November 26, 2011. The plaintiff was returning home after taking her daughter to work. She was travelling on Howes Street in New Westminster in her Nissan Altima sedan. She entered an intersection on a green light when a vehicle driven by the defendant suddenly turned in front of her. The vehicles collided and the plaintiff's air bag deployed. Her vehicle was ultimately written-off.

[13] The plaintiff described the impact as feeling like she had been struck in the right knee by a hammer. It was subsequently determined that she had fractured her patella. She also felt immediate tightness in her neck and shoulders.

[14] The plaintiff said that she remained in her vehicle for a few minutes as she felt like she was in shock. When she got out of her vehicle, she could not put any weight on her right leg. Because her vehicle was no longer driveable, her brother-in-law came and picked her up and took her home. She was supposed to go to work that day but she was unable to do so.

Plaintiff's Post-Accident Condition

[15] The plaintiff said that she had considerable difficulty walking for some time after the accident due to the problems with her right knee and leg. She initially used crutches and was prescribed a brace.

[16] Shortly after the accident, she commenced massage and physiotherapy treatments and engaged in a program of active rehabilitation. Her list of special damages indicates numerous treatments between November 2011 and June 2013. According to the plaintiff, she also did exercises at home and at the gym, as prescribed by her therapists. These included riding a stationary bike, stretching, weights and work with a roller. She took out a gym membership in March 2013 which she renewed for three months in August 2013.

[17] Apart from a number of additional active rehabilitation sessions in the fall of 2013, she has not had further formal treatments since mid-2013, but she continues to stretch and exercise at home.

[18] The plaintiff said that the treatments provided some temporary relief but did not improve her condition.

[19] Currently, she says she still experiences regular pain in her right knee, hip and leg as well as stress and tightness in her shoulders and back. She finds working

difficult because she has to stand for extended periods of time and there is also a lot of bending and lifting.

[20] She says she cannot walk as much as she did prior to the accident due to her right leg problems. When she does walk, she favours her right leg which puts additional strain on her left leg and causes pain.

[21] The plaintiff complains of being sad often as a result of not being able to do much of what she could do before the accident. She says she has less energy than she did before and she has anxiety about driving, although this has improved somewhat. She also has difficulty driving for any length of time due to the pain in her right leg.

[22] She finds household chores like cleaning and gardening difficult, so her daughter does much of that now.

[23] Socially and recreationally, she is less active. She no longer goes to temple regularly and does fewer things with her children.

[24] Sandeep Sohal said that she and her brother do more around the house now, for example they do their own laundry because the plaintiff has difficulty going up and down the stairs to the laundry room. She described the plaintiff since the accident as fatigued, often sad and more closed off.

[25] Mr. Shingara Grewal is a relative and former neighbor of the plaintiff. He testified that since the accident, the plaintiff often complains of pain in her leg and her mood is negative in that she expresses concern about what will happen to her in the future. He said that he no longer sees the plaintiff doing work around her yard as she did prior to the accident, although he acknowledged that his family moved in 2015 so he has had fewer opportunities to observe her more recently.

[26] With respect to work, the plaintiff was away entirely up until May 2012 when she returned to L’Artista part-time, working four to five hours a day. Since December

2012, she has been back working full-time at L'Artista. She says she works 40-42 hours per week and has not missed any shifts since returning.

[27] She says she finds the work difficult because of the prolonged standing and because she has trouble bending and lifting. However, she continues to work because she needs money for her children's education, for their potential weddings and to help them finance their own homes. She does not believe that she can continue with this work for much longer, but she has taken no steps to pursue alternative work. She does not know what other type of work she could do given her physical problems and lack of experience and training. For example, she said that she doesn't know how to use a computer.

[28] Christina Murrini is the former owner of L'Artista and the plaintiff's former employer. She spoke very highly of the plaintiff as an employee. According to Ms. Murrini, once the plaintiff returned to work full-time after the accident, she worked as hard as ever without complaint, although Ms. Murrini did observe the plaintiff hanging on to the sink and bending her leg once in a while.

[29] The plaintiff did not return to work at Frankie G's after the accident. She said that she could not handle doing two jobs given her condition. She said she spoke to the chef at Frankie G's who told her to take time to get better. In cross-examination, she acknowledged that Frankie G's was badly damaged in a fire in April 2016 and has not re-opened.

[30] Mr. Calvin Basran is the manager of Frankie G's. He testified that following the accident, he heard from the plaintiff's sister, who worked at the pub, that the plaintiff had been injured. He never heard directly from the plaintiff and has had no subsequent interactions with her. He described her as a good employee who never missed work.

[31] The plaintiff's employment income in the years following the accident, as reported on her income tax returns, was as follows:

2012 $15,825

2013 $35,404

2014 $37,825

2015 $47,943

[32] While she has not yet filed her 2016 income tax return, the plaintiff produced her 2016 T4 which showed employment income of $38,736. The plaintiff said that the spike in income in 2015 was attributable to a pay out of vacation time following a change in ownership of the business.

[33] The plaintiff acknowledged that she continues to receive a share of tips from L'Artista which is not reflected in her income tax returns. She also receives rental income from suites in her house which she also has not declared.

Medical Evidence

[34] The plaintiff called two treating physicians to give evidence. Dr. Darius Viskontas is an orthopaedic surgeon who first saw the plaintiff on December 16, 2011 on referral from Royal Columbian Hospital. At that time, he diagnosed her with a fractured right patella, based on x-rays that had been done, and he prescribed her a brace. Thereafter, Dr. Viskontas continued to see the plaintiff periodically up until May 2013. Over that period of time, her patellar fracture healed well but she continued to complain of pain in the knee and leg.

[35] In his expert report dated July 21, 2015, Dr. Viskontas provides a diagnosis of right knee patellar fracture and right knee patellofemoral pain, which is pain emanating from the knee joint where the patella and femur (thigh bone) come together. He also diagnosed related atrophy of the right quadriceps muscles. Given the length of time that she has experienced the pain, he expects that it will continue into the future resulting in a permanent partial disability.

[36] The plaintiff's family physician, Dr. Gurdeep Parhar, also testified. Before the accident, he saw the plaintiff infrequently. After the accident, he did not see her personally until September 2016, although prior to that time she was seen by other physicians in Dr. Parhar's clinic. He has continued to see the plaintiff since that time.

[37] Dr. Parhar diagnosed the following injuries sustained by the plaintiff in the accident:

a) right patellar fracture;

b) right knee contusion;

c) musculoligamentous injuries of the right hip;

d) musculoligamentous injuries to the cervical, thoracic and lumbar spine;

e) muscle tension headaches;

f) depressed mood with sadness, decreased appetite and mood swings;

g) anxiety with specific phobias of being in a motor vehicle, driving, approaching intersections and approaching other vehicles; and

h) sleep disturbance with difficulty falling asleep and remaining asleep.

[38] As of January 25, 2015, the date of his expert report, Dr. Parhar was of the view that the plaintiff's right knee pain had become chronic and is likely permanent. He said that her musculoligamentous injuries to her right hip, cervical spine and lumbar spine had likely plateaued and would continue to cause her problems into the future. He also suggested a poor prognosis for her depressed mood and sadness.

Additional Expert Evidence

[39] Darren Benning is an economist retained by the plaintiff who provided multipliers for the purpose of calculating future income losses and the cost of future care for the plaintiff. I will deal with his evidence in more detail when considering those heads of damage.

[40] Natalia Allende is an occupational therapist who prepared a report dated November 6, 2015 estimating the plaintiff's future care needs. I will address her evidence when dealing with the plaintiff's cost of future care claim.

Findings of Fact on the Plaintiff's Condition

[41] The evidence establishes that the plaintiff suffered a fracture of the right patella as a result of the accident, and while the fracture healed well within a number of months, I am satisfied that the plaintiff continues to experience patellofemoral pain which is likely to continue for the foreseeable future. It is clear that her right knee/leg pain is the most significant ongoing issue for her.

[42] The evidence is less compelling with respect to her soft tissue injuries, although I accept her evidence that she continues to experience some discomfort and stiffness in her neck, shoulders and back and related tension headaches. I also accept that she generally has less energy than she did before due to her injuries and associated sleep problems.

[43] As noted above, Dr. Parhar has diagnosed her as suffering from depressed mood and sadness and the plaintiff testified that she feels sad about the things that she can no longer do. However, she has neither sought nor been prescribed any treatments for psychological problems and I find that these issues are only minimally limiting for her.

[44] In terms of the impacts of her injuries, I am satisfied that while she has returned to work full-time at L'Artista, the work is more difficult for her, primarily due to her right knee/leg pain. I also accept that she is generally less active and social since the accident, although the evidence suggested that she was not terribly active prior to the accident due in large measure to how much she worked.

[45] I will say a brief word here about mitigation. The defendant submits that the plaintiff failed to mitigate her damages in that she has not pursued any formal treatment for her injuries since 2013.

[46] The duty to mitigate is described in the following well-known passage from *Chiu v. Chiu*, 2002 BCCA 618:

> [57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him

> by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in ***Janiak v. Ippolito***, [1985] 1 S.C.R. 146.

[47] Apart from a general allegation that the plaintiff did not pursue treatment, the defendant did not identify specific treatments that the plaintiff unreasonably failed or refused to follow, nor was there evidence of how her damages would have been reduced had she acted more reasonably. In the circumstances, the defendant has not established a failure to mitigate on the part of the plaintiff.

Damages

Non-Pecuniary Damages

[48] Non-pecuniary damages are awarded to compensate an injured person for pain, suffering, loss of enjoyment of life and loss of amenities. The principles governing the assessment of such damages are well known and have been discussed in numerous cases: see *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*] at para. 46.

[49] Awards of non-pecuniary damages in other cases provide a useful guide to the court, however the specific circumstances of each individual plaintiff must be considered as any award of damages is intended to compensate that individual for the pain and suffering experienced by that person: see *Trites v. Penner*, 2010 BCSC 882 at para. 189. Moreover, the compensation award must be fair and reasonable to both parties: see *Miller v. Lawlor*, 2012 BCSC 387 at para. 109 citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[50] The plaintiff submits that an award of $90,000 in non-pecuniary damages is appropriate. She cites the following cases in support:

a) *Majchhrzak v. Avery*, 2013 BCSC 1626;

b) *Bradshaw v. Matwick*, 2009 BCSC 564;

c) *Gold v. Joe*, 2008 BCSC 865;

d) *Downey v. Brousseau*, 2007 BCSC 149; and

e) *MacLean v. Budget-Rent-A-Car of Edmonton Ltd. et al*, 2006 BCSC 1344.

[51] The defendant submits that an award in the range of $55,000-65,000 is more reasonable. These figures reflect a 20% reduction for the plaintiff's alleged failure to mitigate, a position that I have rejected. The defendant cites the following cases:

a) *Shore v. Bierens*, 2005 BCSC 259;

b) *Daitol v. Chan*, 2012 BCSC 209;

c) *Rindero v. Nicholson*, 2009 BCSC 1018;

d) *Polson v. C. Keay Investments Ltd.*, 2008 BCSC 908.

[52] In my view, the plaintiff's injuries and ongoing complaints, as well as the impacts on her, most closely align with the facts of the authorities that she relies on rather than those advanced by the defendant. Considering those authorities and the principles emanating from *Stapley*, I find that a reasonable award of non-pecuniary damages is $80,000.

Past Wage Loss

[53] The plaintiff was off work entirely following the accident until she returned to L'Artista on a gradual, part-time basis in May 2012. She continued on that basis up until approximately December 2012. The plaintiff submits that even when she returned to full-time in December 2012, she was not working true full-time hours when compared to her past work history. Consequently, she claims for additional lost hours through until March 2013. However, the evidence of Ms. Murrini, the owner of L'Artista at the time, was that restaurant hours fluctuate and that the plaintiff's somewhat reduced hours may have been due to how busy the restaurant was. I therefore find that a claim for past loss from L'Artista extending beyond December 2012 has not been established.

[54] The plaintiff has provided calculations based on her historical average hours worked compared to her actual earnings reported for the periods of time in which she was away from work, then working part-time. While this is one possible methodology, I approach the issue somewhat differently.

[55] From the date of the accident to the end of 2011, the plaintiff missed five weeks of work. Using the plaintiff's average hours at L'Artista of 42 per week, which I accept, results in a loss of $3,360 ($5 x $42 x $16). During that period, she also missed 65 hours of work at Frankie G's, based on 15 hours per week, which amounts to $675 ($5 x $15 x $9). That results in a past loss from the date of the accident to the end of 2011 of $4,035.

[56] For 2012, given the fluctuating nature of her hours at L'Artista, I think a fair approach is to average her total employment earnings for the three years preceding 2011, the years prior to the accident, and then compare that figure to her actual 2012 earnings. Her average annual employment earnings from her two jobs in the years 2008-2010 was $41,904. Her reported employment income in 2012 was $15,825, a difference of $26,079 (rounded to $26,000). In my view, that is a fair reflection of her income loss in 2012 resulting from the accident.

[57] From the beginning of 2013 onward, leaving aside the first few months in which the plaintiff may have been working slightly fewer hours at L'Artista, the balance of her past income loss claim is based on the fact that she did not return to work at Frankie G's. The plaintiff submits that given her work history, there is no doubt that she would have continued to work there but for the accident. She submits further that when Frankie G's closed due to the fire in April 2016, she would have found alternate part-time work within a couple of months. Thus, the plaintiff claims for income lost from her second part-time job right up to the date of trial.

[58] The defendant acknowledges a loss of income from that work up until the end of 2013. However, beyond that date, the plaintiff was receiving no more treatment for her injuries and thus the defendant submits that she clearly chose not to return to

the second job. The defendant points to the evidence of Mr. Basran that the plaintiff never contacted him or made inquiries about returning to work.

[59] I am satisfied on the evidence that but for the accident, the plaintiff would have continued to work part-time at Frankie G's up until the time it closed. I am also satisfied on the basis of her evidence and the evidence of Dr. Parhar that she was unable to return to Frankie G's after the accident due to the injuries she sustained. The plaintiff is clearly a hard worker and there is no reason to believe that she would not have returned if she was able to do so. I reject the defendant's position that after the accident the plaintiff was getting sufficient hours at L'Artista such that there was no need to return to Frankie G's. The evidence did not establish that to be the case.

[60] I do not accept however that the plaintiff would have found alternate part-time work after Frankie G's closed. The evidence was that she originally took that job because her sister worked at Frankie G's and because it was close to her house. She did not testify that she would have looked for alternate work nor did the evidence establish that similar opportunities were available. It is also not clear when and if Frankie G's will re-open, although Mr. Basran said it is his hope that it will in the near future.

[61] For these reasons, I find that the plaintiff has established a claim for lost income from Frankie G's, in addition to that set out above, for the years 2013, 2014 and 2015 up until April 2016, when Frankie G's closed.

[62] In the years 2009-2011, the plaintiff earned on average about $6,900 per year from Frankie G's (including a round up in 2011 to reflect the five weeks missed after the accident). For three years (2013-2015), this totals $20,700. Counsel for the plaintiff submitted that there were increases in the minimum wage over this period which would have resulted in increases to the plaintiff's earnings. This issue was not addressed in the evidence but only as part of counsel's closing submissions. For example, there was no evidence about how, if at all, the increases in minimum wage might have affected the hours available to the plaintiff. That said, it is fair to assume that the plaintiff would have benefited to some degree from the minimum wage

increase and accordingly, I will round up the wage loss claim for this period to $23,000.

[63] For the three months missed in early 2016, one quarter of the plaintiff's average annual earnings from Frankie G's equals $1,725. Again, rounding up to account for some benefit from the increase in the minimum wage, I award $1,900 for this period.

[64] The above figures do not include any amount for tips. The plaintiff testified that at L'Artista, she received cash tips that varied between $50-95 bi-weekly, depending on how busy the restaurant. Mr. Basran also testified that kitchen staff at Frankie G's shared tips based on the number of hours worked and that tips of $40 per week were not uncommon.

[65] The plaintiff did not declare any tips as income on her tax returns but that does not disentitle her from including tips in her past income loss claim, provided the court is satisfied that the plaintiff in fact would have earned tips but for the accident: *Wepruk v. McGarva and Butt*, 2006 BCCA 107 at paras. 18-19.

[66] The plaintiff submits that $5,000 is a reasonable amount to award for tips that were lost from both L'Artista and Frankie G's. In my view, the evidence about the tips that the plaintiff earned previously, and may have earned absent the accident, was vague and does not provide the court with any meaningful basis for assessing this alleged loss. I therefore decline to award an additional amount for lost tips.

[67] Based on the above, the plaintiff has established a gross past wage loss of approximately $55,000. The parties agree that this amount should be reduced by 20% to account for income tax. I therefore award the plaintiff $44,000.

Loss of Future Earning Capacity

[68] The Court of Appeal has discussed the principles governing future income loss claims in numerous cases. In *Morgan v. Galbraith*, 2013 BCCA 305, the court,

citing its earlier decision in *Perren v. Lalari*, 2010 BCCA 140, described the approach to be taken by the trial judge as follows at para. 53:

> … in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach… or the capital asset approach, …
>
> [Emphasis in original.]

[69] The earnings approach is generally appropriate where the plaintiff has some earnings history and where the court can reasonably estimate what his or her likely future earning capacity will be. This approach typically involves an assessment of the plaintiff's estimated annual income loss multiplied by the remaining years of work and then discounted to reflect current value, or alternatively, awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [*Gilbert*]. While there is a more mathematical component to this approach, the assessment of damages is still a matter of judgment, not mere calculation.

[70] The capital asset approach, which is typically used in cases in which the plaintiff has no clear earnings history, involves consideration of a number of factors as discussed in cases like *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) and *Gilbert* at para. 233.

[71] While the plaintiff has returned to work full-time at L'Artista and, as I have found, was unlikely to return to her part-time work after the April 2016 fire at Frankie G's, I am satisfied that she has established a real and substantial possibility that her future earning capacity has been impaired.

[72] The medical evidence is uniform that she continues to suffer pain and weakness in her right leg and I accept her evidence that this causes her problems at work, given the need for prolonged standing. Her concern about her ability to continue in the same line of work into the future is genuine and well-founded. There is a real likelihood that her ongoing problems will result in future income loss, either

in the form of periodic missed shifts or retirement at an earlier date than she would otherwise have chosen.

[73] The parties agree that the capital asset approach fits best with the plaintiff's circumstances. The plaintiff submits that an award of $80,000 is reasonable, which approximates two years of her average total income from L'Artista and Frankie G's. The defendant submits that a fair award is the equivalent of one year's income from L'Artista, or $30,000-35,000.

[74] In my view, the equivalent of two years' earnings from L'Artista is reasonable compensation for the plaintiff's loss of future earning capacity. The evidence establishes that her earnings from L'Artista have consistently averaged just over $37,000 per year. I award the plaintiff $75,000 under this head.

Cost of Future Care

[75] The test for awarding damages for cost of future care has been discussed in numerous cases. The courts have consistently held that there must be a medical justification, based in the evidence, to support such an award: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78-79, 84, aff'd (1987), 49 B.C.L.R. (2d) 99 (BCCA); and *Courdin v. Meyers*, 2005 BCCA 91 at paras. 34-35.

[76] As noted, the plaintiff relies on the report of an occupational therapist, Natalia Allende, who has provided her opinion about the plaintiff's future care needs. In turn, Mr. Benning has provided current value estimates of the cost of those treatments and services to different ages.

[77] Mr. Benning confirmed in his testimony that he offers no opinion on the validity, appropriateness or duration of any of the care items; he is simply costing the recommendations made by Ms. Allende.

[78] Relying on the opinions of Ms. Allende and Mr. Benning, as well her physicians, the plaintiff seeks an award of just under $90,000, broken out as follows:

a) Pain self-management and activation program $11,027

b)	Psychology/counselling	$1,250
c)	Physiotherapy	$2,500
d)	Household management services	$45,000
e)	Seasonal cleaning	$5,000
f)	Lawn mowing	$15,000
g)	Over the counter medications	$400
h)	Gym pass	$7,500
i)	Postural supports	$1,695

[79] The defendant takes issue with a number of these items. With respect to a pain management program and physiotherapy, the defendant notes that the plaintiff has not pursued any treatment for her injuries since the fall of 2013 and, on her own evidence, she found the treatments of minimal assistance. The defendant submits further that the items relating to the plaintiff's household activities are highly speculative and subject to numerous contingencies like future downsizing and the normal retention of outside help due to aging. He also suggests that the fact that the plaintiff's children are now doing more around the house is due as much to the fact that they are older and more responsible as it is to the plaintiff's injuries and any disability.

[80] With respect to the various items claimed relating to household activities, in my view these are better addressed under the loss of housekeeping capacity heading that I deal with below.

[81] In terms of the other items claimed, I am not satisfied that any award for psychological counselling is warranted on the evidence. There has been no formal diagnosis of any psychological condition and no recommendation for any treatment.

[82] The pain management and activation program, physiotherapy and gym pass are all intended to address the plaintiff's ongoing physical complaints. Dr. Viskontas recommends a guided rehabilitation program for three to six months, following which

the plaintiff should be able to follow a self-directed program. While I acknowledge the defendant's point that the plaintiff has not pursued any physical treatments for over three years, I am satisfied that Dr. Viskontas's recommendation is reasonable. It is also consistent with Dr. Parhar's recommendation that she participate in a personal fitness program.

[83] Dr. Parhar also suggests that the plaintiff should have access to an appropriate gym and equipment, hence the plaintiff's claim for the cost of a gym pass. I accept that this is reasonable while the plaintiff participates in a fitness/rehab program and for a period of time thereafter, however the evidence does not support the cost of a gym pass until age 65 as claimed by the plaintiff.

[84] Neither doctor recommends ongoing physiotherapy, although Dr. Parhar suggests that the plaintiff might need occasional treatments if she experiences exacerbations of her pain.

[85] The plaintiff's claim for the cost of over the counter medications is supported by the evidence in that it is apparent that she uses such medications periodically to deal with her pain. I also accept the claim for postural supports.

[86] I find that an award of $12,000 in respect of these various future care items is reasonable.

Loss of Housekeeping Capacity

[87] It is well established that the impairment or loss of one's ability to do work within the home is compensable as a pecuniary loss: *McTavish v. MacGillivray et al.*, 2000 BCCA 164.

[88] In *Westbroek v. Brizuela*, 2014 BCCA 48 at paras. 77-79, the Court of Appeal recently reaffirmed the cautionary approach to damage awards under this head articulated by Mr. Justice Gibbs in *Kroeker v. Jansen*, [1995] 6 W.W.R. 5, leave to appeal ref'd [1995] S.C.C.A. No. 263, where he said at para. 29:

> There is much merit in the contention that the court ought to be cautious in approving what appears to be an addition to the heads of compensable injury

> lest it unleash a flood of excessive claims. But as the law has developed it would not be appropriate to deny to plaintiffs in this province a common law remedy available to plaintiffs in other provinces and in other common law jurisdictions. It will be the duty of trial judges and this Court to restrain awards for this type of claim to an amount of compensation commensurate with the loss. With respect to other heads of loss which are predicated upon the uncertain happening of future events measures have been devised to prevent the awards from being excessive. It would be reasonable to expect that a similar regime of reasonableness will develop in respect of the kind of claim at issue in this case.

[89] The plaintiff submits that prior to the accident, she was responsible for the majority of household tasks, including outdoor maintenance. Since the accident, she says she has been unable to do much of that work and her children, primarily her daughter, have taken on the responsibility. She submits that she will continue to be disabled from these tasks in the future.

[90] The plaintiff seeks an award of $25,000 for past loss of housekeeping capacity and an award of $65,000 for future loss, including general household services, seasonal cleaning and lawn mowing. The household services component is based on Ms. Allende's recommendation of three hours per week at a rate of $25.75 per hour. The seasonal cleaning component uses the same hourly rate and is based on 12 to 16 hours per year. Lawn mowing is calculated using 24 hours per year at a rate of $50-75 per hour.

[91] All of these items are premised on the notion that the plaintiff's ability to work around her house is significantly compromised and that she will continue to need all of these services until somewhere between age 65 and 70.

[92] I accept that the plaintiff's injuries interfere somewhat with her ability to work around her home to the same degree that she did previously, but I am not satisfied that an award of the magnitude claimed is warranted. For example, the plaintiff testified that she does not cut the lawn anymore because the lawn mower is too heavy. There was no evidence however of possible solutions other than having her children do it or hiring outside help, such as purchasing a lighter, self-propelling lawn mower. The plaintiff's claim also assumes that she will stay in the same home even

once her children move out. There is no allowance for the contingency that she will move into a smaller home in the future, which is also true for the claims for household services and seasonal cleaning.

[93] I am also not satisfied that the plaintiff is disabled to the degree claimed. It is notable that the plaintiff returned to work full-time by December 2012 and that she has never sought or required the use of outside help since the accident.

[94] In the circumstances, I find that an award of $40,000 is reasonable for past and future loss of housekeeping capacity.

Special Damages

[95] The parties have agreed to special damages in the amount of $1,431.79.

Conclusion

[96] In summary, the plaintiff is entitled to the following damages:

a)	Non-pecuniary	$80,000
b)	Past wage loss	$44,000
c)	Loss of future earning capacity	$75,000
d)	Cost of future care	$12,000
e)	Loss of housekeeping capacity	$40,000
f)	Special damages	$1,431.79
	Total:	$252,431.79

[97] If the parties cannot agree on costs, they may make arrangements to speak to the matter. Each party will provide a written submission, not to exceed ten pages double spaced, one week in advance of any further hearing into costs.

"Skolrood J."