IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ladret v. Stephens,* 2013 BCSC 1999

Date: 20131101
Docket: M112853
Registry: Vancouver

Between:

Heather Irene Ladret

Plaintiff

And

Corey D. Stephens and Natasha L. Grsic

Defendants

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:	Kevin Gourlay Jeffrey Nieuwenburg, Articled Student
Counsel for the Defendants:	Monica Klimo Lori H. Leung
Place and Date of Trial:	Vancouver, B.C. May 6-9, 2013
Place and Date of Judgment:	Vancouver, B.C. November 1, 2013

Introduction

[1] The plaintiff Heather Ladret's claim is for damages for personal injuries suffered in a motor vehicle accident on July 2, 2009 on Vancouver Island on the Island Highway when the defendant, Natasha Grsic, turned in front of the plaintiff's on-coming vehicle, resulting in a T-bone collision. The plaintiff was injured in the accident. Liability is admitted, and the issues at trial relate to the assessment of damages.

[2] The central issues are the amount of non-pecuniary damages, loss of earning capacity, loss of housekeeping capacity, and cost of future care. The parties have agreed on the amount of past wage loss and special damages. Although the plaintiff advanced a claim for loss of social assistance benefits, her counsel acknowledged in argument that the majority decision of the Court of Appeal in *Morrison v. Pankratz*, [1995] B.C.J. No. 281 (C.A.), and the decision of the Supreme Court of Canada in *M.B. v. British Columbia*, 2003 SCC 53, are against her on that claim. The defendants argue that the plaintiff has failed to mitigate her damages by following treatment recommendations of professionals. The plaintiff denies that the defendants have established that she acted unreasonably or that any possible treatment or therapy recommended to her would have reduced her loss.

[3] I will set out the plaintiff's background prior to the accident, and then review the plaintiff's alleged injuries and the lay and medical evidence in that regard. Then I will address the award of non-pecuniary damages, the loss of economic earning capacity, the loss of housekeeper capacity, and the claim for cost of future care. Finally, I will deal with the issue of mitigation.

[4] A central theme in this case is whether the plaintiff's claim for soft tissue injuries that have persisted beyond their anticipated healing period is a case of chronic pain, as her counsel asserts, or is a case, as the defendants' counsel asserts, that is based largely on the plaintiff's self-reporting and should be viewed with skepticism.

Background

[5] Heather Ladret is now a 31 year old single mother of three children. The accident occurred near Nanaimo, where Ms. Ladret grew up. As a child, she was active and enjoyed horseback riding, as well as swimming, hiking, and playing in the family barn. She was not a good student and left high school at age 19 having completed grade 9 or 10. At that time, she continued to reside with her parents on Vancouver Island.

[6] In 2004, she moved in with her cousin in New Westminster and worked at the S.P.C.A. thrift shop in Vancouver. Later that year, she began working at the IGA grocery store in New Westminster, and has worked as a cashier and in the bakery department for that company since then. In 2005, she met a man, D.D., and became pregnant. She was about four months pregnant when she and D.D. moved in together in New Westminster and she gave birth to her first child, a daughter, on November 1, 2005. She returned to work in November 2006, working 4:30 p.m. to 10:30 p.m. shifts. She would routinely work weekends. In 2007, her busiest year of work before the accident, she averaged 36 hours per week based on working 50 weeks for a total that year of 1,780.5 hours. She was on what was described as full-time part-time work and was guaranteed between 25-35 hours per week.

[7] She worked on this basis through 2008 when she became pregnant a second time. Tragically, this pregnancy ended with a stillbirth on November 8, 2008. Ms. Ladret moved back with her parents in Nanaimo after this loss, and began attending school at Vancouver Island University, formerly Malaspina College, where she upgraded her education, hoping to find work in the legal world.

[8] Eventually, she returned to work with IGA in New Westminster in May 2009. She commuted from Vancouver Island with her daughter J., who spent the weekend with D.D., while Ms. Ladret worked weekend shifts at the IGA.

[9] I find that, prior to the accident in July 2009, Ms. Ladret was a healthy and active young person.

[10] The motor vehicle accident occurred on July 2, 2009.

[11] Subsequent to the accident, Ms. Ladret had two more children – a boy, born in March 2010, and another boy, born in December 2011. All three of her children currently reside with her.

The Accident

[12] The motor vehicle accident occurred on July 2, 2009 when Ms. Ladret's pickup struck the defendants' vehicle, which turned in front of her. Her daughter was in a car seat in the pickup. Damage to both vehicles was significant. The defendants' truck spun around and the defendant driver's fiancé, sitting in the back seat, was knocked unconscious.

The Injuries

[13] The plaintiff's airbag deployed, and Ms. Ladret suffered injuries. Her complaints to her family doctor, Dr. Van Der Goes, included neck and shoulder pain, "pins and needles" in her left hand, pain in her left pinky finger, arm pain with elbow extension, bilateral knee pain, and pain in her face and nose from the airbag. She also suffered hip pain from the accident. Her doctor recorded that she was suffering spasms in her left lower back.

[14] Ms. Ladret remained off work until August 2009. Most of her injuries healed in the normal course, such as the facial bruising and pain to her right knee, her shoulder injury (which now only rarely bothers her), and the tingling sensation in her left pinky finger.

[15] According to Ms. Ladret, however, her mid-thoracic back pain has now persisted for almost four years.

[16] The plaintiff says that her main injury – the back pain – has become chronic and debilitating. She says that her attempts to compensate for back pain by shrugging her shoulders have aggravated the scalene muscles of her neck and cause cervicogenic headaches.

[17] Ms. Ladret says that presently her back pain is her main injury. She describes her pain as a stabbing pain in the back, and that her back feels tight like a bruise. She also describes it like being punched in the back. She says that the pain is around the bra-line and is pain that she feels all the time. She says it hurts more when she is carrying or doing things, or lifting her arms, and when she lays down she describes it as annoying. She says that it gets a little better but then gets worse. She says her back is irritated or aggravated when she shrugs her shoulders. She testified that there is no time when she is pain free. In terms of persisting problems, she says it is painful when she does dishes, folds laundry, or pushes the stroller – things involving lifting her arms or "doing stuff in front of her". She says that to cope she has to rest, or her back goes into spasm. In terms of the activities with her children, she says that her back becomes painful but she cannot avoid those activities.

Ms. Ladret's Treatment Since the Accident

[18] Following the accident, Ms. Ladret attended physiotherapy. She attended twelve sessions between July 2009 and October 2009.

[19] For a period in August and September, she was attending part-time classes at Vancouver Island University where she worked hard and achieved some good grades. She became pregnant again in mid-2009, but by November or December fell ill to a kidney infection which complicated her pregnancy. Ultimately she took early maternity leave. In 2010 she went on medical and maternity leave. In March 2010, she gave birth to her second child. She also attended a physiotherapy session that month.

[20] The last visit of the year relating to her injuries in the car accident was a visit with Dr. Klein at a walk-in clinic on June 25, 2010. Her family doctor, Dr. Van Der Goes, had retired. The plaintiff did not seek medical attention again until April 2011, something which the defendants say is significant.

[21] After her son's birth, the plaintiff complained that her back hurt all the time and she was having trouble breast feeding. Her reason for not attending a doctor for

medical treatment for her back was because she was in an abusive relationship with her son's father, and as she put at trial, "everything revolved around him".

[22] Her maternity leave ended in April 2011.

[23] On April 27, 2011, she went to a new family physician, Dr. Naiker. Dr. Naiker noted that the plaintiff described having intermittent pain and numbness in her right scapular region. On May 13, 2011 Dr. Naiker recommended an MRI, but it was determined at the May 24 visit that Ms. Ladret was eight weeks pregnant, and an MRI was not appropriate.

[24] The plaintiff says she continued to suffer ongoing thoracic pain. She attended physiotherapy in May and June 2011 and was referred by Dr. Naiker to Dr. Dawson, a physiatrist, due to her ongoing thoracic pain. By October 2011, then seven months pregnant, her back problems continued. On cross-examination, Dr. Naiker testified that in her opinion, the plaintiff's pregnancy was not the cause of her symptoms but, rather, that that her pregnancy was aggravating her symptoms. In October 2011, the plaintiff attended Dr. Dawson's office for assessment of her thoracic or mid-back bra-line area pain.

[25] On December 17, 2011 Ms. Ladret's third child, another son, was born and she remained on maternity leave for all of 2012. During the period of March to December 2012, she attended seven physiotherapy sessions. She saw Dr. Naiker on May 2, 2012. This was her last visit to her family doctor prior to a visit on October 3, 2011, which she attended in conjunction with a requested medical legal report.

[26] In February 2013, after her maternity leave was completed, the plaintiff commenced a graduated return to her work at IGA. She attempted to do this in the weeks of February and March of 2013 by working twelve hours a week, or four hour days, three days per week.

[27] On March 18, 2013 she went on stress leave from work because of an alleged assault by her former common-law spouse.

[28] Presently, she is on social assistance. She receives $1,069 per month: a housing allowance of $694 and monthly support of $375.59. She lives in a three-storey town house in New Westminster with her three active children. When she attempted to return to work, she had assistance from a neighbour who she paid to babysit, Lynn Mandrusiak, and Ms. Ladret's parents, who both live on Vancouver Island. Her parents testified that they would like to help more but their ability to come over from Vancouver Island is limited by their employment and the distance, although it appears Ms. Ladret's mother is more flexible than her father in their respective schedules.

Medical and Lay Evidence Relevant to the Plaintiff's Condition

[29] The plaintiff testified at trial, as did her parents and Ms. Mandrusiak. The plaintiff also called Dr. Naiker, her family doctor, and Mr. Corcoran, an occupational therapist.

[30] The parties each called expert physiatrists, Dr. Koo and Dr. Reebye.

[31] Although many of the plaintiff's symptoms have resolved, she continues to complain about the mid-back pain that she describes as ever-present and debilitating. The medical evidence is consistent in that if the pain persists for longer than two years, assuming that report is genuine, it is likely to be chronic. The defendants' counsel, however, says that the plaintiff's evidence that the pain persists as she asserts does not stand up to careful scrutiny.

1. Lay Evidence

[32] First let me comment on the plaintiff's evidence. She gave her evidence in a straightforward manner and I found that she did not embellish it. Her description of her injuries was not shown to be inconsistent over time. She frankly acknowledged the injuries that healed quickly, but was consistent in her description of the nature of the thoracic pain that she says is the most troublesome. The only inconsistency, in my view, was when she said she complained to Dr. Naiker of thoracic back pain but Dr. Naiker's notes indicated a complaint of lumbar pain. Ms. Ladret's evidence

appeared plausible that Dr. Naiker was mistaken in her note, and I accept that evidence.

[33] The plaintiff called three witnesses to testify to their observations of Ms. Ladret: her parents Al and Linda Ladret, and Ms. Mandrusiak. Her parents each acknowledged their desire to help their daughter. Nevertheless, I found them both straightforward and credible. Linda Ladret, who saw her daughter after the accident and regularly thereafter, testified that her daughter had a major flare-up a few months ago around Christmas 2012 that left her disabled. She and the plaintiff attributed the flare-up to over-exertion with the holiday decorations. Al Ladret testified that his daughter has difficulty with basic household chores and he believed her pain has become worse over the past year. Linda Ladret said she observed her daughter continuing to struggle with the pain in doing basic household activities such as cooking, putting the children into strollers, and vacuuming.

[34] Ms. Mandrusiak, who has several children and grandchildren, met Ms. Ladret in February 2013 and subsequently came to babysit when Ms. Ladret attempted to return to work. She testified that Ms. Ladret worked from 10:00 a.m. to 2:00 p.m. on Monday, Wednesday, and Saturday. She left home for her shift before 9:00 a.m. and returned around 3:00 p.m. Ms. Mandrusiak said that when Ms. Ladret returned home at the end of her shift, Ms. Ladret appeared to be sore and in discomfort.

2. Medical Evidence

[35] In her April 19, 2012 report, Dr. Naiker diagnosed mechanical dysfunction, mid-thoracic myofascial-like symptoms, and cervicogenic headaches (which according to the patient occurred after the motor vehicle accident). She noted the symptoms were probably aggravated by Ms. Ladret’s pregnancy at the time. In terms of prognosis, Dr. Naiker said it was unknown and noted that it was difficult to ascertain whether the myofascial-like symptoms will be chronic. She felt that external stimuli like holding, carrying, and lifting a baby could likely aggravate the symptoms and cause flare-ups.

[36] Dr. David Koo is a physiatrist and was called to give expert opinion evidence on the independent medical examination he conducted of the plaintiff on May 28, 2012. Dr. David Koo's opinion was that Ms. Ladret suffers from a chronic soft tissue injury.

[37] Dr. Reebye was called by the defendant. He testified that although his report said the most likely diagnosis to consider in this case is that of mild-to-moderate soft tissue injuries in various areas including the plaintiff's face, neck, back, and right knee, he agreed that when pain persists for more than two years it will in all likelihood be permanent.

[38] Dr. Koo provides medical legal reports somewhat evenly between the plaintiff and the defendants. Dr. Koo interviewed the plaintiff for about 1.5 hours and did a 40 minute physical examination. He provided this summary of his physical examination:

> Her physical examination revealed reduced neck range of motion, particularly with forward flexion and she reported lateral neck pain with end flexion and left rotation, with pain arising from the neck muscles (scalene and trapezius muscles). Palpatory examination confirmed myofascial trigger points present within the neck (scalene, trapezius) and posterior shoulder (infraspinatus, rhomboid) muscles bilaterally. There was also midline tenderness present from T3 to T9 right quadratus lumborum, and the gluteus medius and piriformis muscles of both hips. Her pain was aggravated with end range of motion during cervical flexion and left rotation; scapular retraction or depression; end range hip internal rotation; and resisted hip abduction or external rotation.
>
> These examination findings were consistent with chronic musculoligamentous injuries and myofascial pain, arising from incomplete resolution of her initial soft tissue injuries.
>
> In my opinion, but for the accident in question, I can identify no other reasonable clinical cause for her post-accident reports of pain and stiffness, and physical examination findings of chronic soft tissue injures with myofascial pain and musculoligamentous pain arising from her neck, posterior shoulders, mid-back or hips, and subsequent activity limitations as described.

[39] He concluded that she had suffered the following injuries in the motor vehicle accident of July 2, 2009:

1. Airbag deployment with facial bruising (resolved).

> 2. Soft tissue injuries to the knees and shins (resolved).
> 3. Soft tissue injury to the left pinky finger with tingling - possible ulnar nerve neuropraxia (resolved).
> 4. Whiplash injury with chronic mechanical midback pain and myofascial pain involving the neck (scalene and trapezius) and posterior shoulder (infraspinatus and rhomboid) muscles bilaterally.
> 5. Musculoligamentous injury to the pelvic girdle including right quadratus lumborum and bilateral gluteus medius and piriformis.
> 6. Cervicogenic headaches arising from no. 4.

[40] In his opinion, Ms. Ladret suffers from chronic pain. He expressed his conclusion this way:

> In my opinion, the ongoing persistence of pain in her neck, shoulders, mid-back and hips with associated headaches more than two years post-injury suggests that her chronic soft tissue injuries are likely to be persistent and a full resolution is unlikely.
>
> Her post-accident headaches are likely cervicogenic i.e. related to tension and irritation of structures in her neck and shoulders, and are not migrainous in nature. The prognosis related to her headaches is likely poor as it is dependent on her ability to recover from her injuries to her neck, shoulders and midback.

[41] In his opinion, she was likely to experience activity-limiting pain. He put it as follows:

> She is more cautious with her neck rotations and must avoid quick movements to avoid neck pain. If her neck is irritated, she is more likely to have a headache. Prolonged neck flexion in a chin-down position, such as working on countertop heights or studying at a desk, will likely increase her neck pain, and her cooking and studying tolerance is likely reduced.
>
> Her shoulder and midback pain limit her ability to carry, lift or reach. She is likely to have reduced ability to remain in one position for prolonged periods in either a standing or sitting position, and frequent rest breaks, changes in position and stretching may help increase her tolerance to prolonged immobility. Attempts to return to her previous vocational responsibilities even with limited hours have resulted in increased pain due to the prolonged standing at a till, lifting grocery bags, and scanning grocery items on a constant basis. Her non-work abilities such as pushing a stroller, chop vegetables, type at a keyboard, or perform domestic activities such as vacuuming, sweeping or cleaning and yard work are also limited.
>
> ...
>
> In my opinion, heavier household chores such as gardening, vacuuming, washing floors or bathrooms, and prolonged bending or stopping would likely

> provoke her symptoms. Access to formal homemaking services will likely be useful in minimizing the likelihood of her symptoms flaring unnecessarily.

[42] He was cross-examined extensively about further treatments that he and others recommended, which the plaintiff had not yet taken, but he said that these were only palliative or supportive, and not curative. He stated at page 11 of his report:

> She would likely benefit from ongoing physiotherapy oversight of a self-directed exercise program, emphasizing stretching, gradual strengthening, and increasing her endurance to activities as her symptoms permit. The goals of such treatment would be to help limit and potentially improve restricted range of motion and muscle weakness from pain inhibition and disuse, but may or may not improve her underlying pain levels.

[43] I found Dr. Koo to be a good witness. His opinion supports the plaintiff's counsel's argument that Ms. Ladret likely has chronic back pain that could be relieved to some degree through some of the treatments that were recommended. He defined chronic pain based on a timeframe longer than three months. While Dr. Koo recognized that the accuracy of a patient's reporting is important, there is an aspect of objective assessment underlying his opinion, such as myofascial trigger points, as well as the tension on testing range of motion. Based on Dr. Koo's evidence, I do not think that her hip pain relates to childbirth but is, as explained by Dr. Koo, in a different area of the hip. Ms. Ladret's evidence in that respect was credible.

[44] Dr. Koo agreed in a very general sense that stressors in her life could impede her recovery, but in his opinion he did not place much weight on that and described the treatments that have not been explored as palliative but not curative. Nevertheless, he recommended an MRI scan which might possibly show a spontaneous disc herniation, something he described as rare. His main point was that her problems are physical, the lifestyle issues are only a modest factor, and even with all the proposed treatments it was his opinion that she will not fully recover.

[45] The defendants say that I should view Dr. Koo's evidence with caution. They suggest that he refused to accept common-sense propositions by suggesting the plaintiff would never be cured of her ailments even though she had yet to be treated maximally, including obtaining an MRI for the purposes of investigation. The defendants say Dr. Koo conceded that psychosocial stressors may in a general sense impact a person's experience of soft tissue injuries, but later explained that he did not acknowledge that in his written opinion because it constituted a "little relative contributing factor". The defendants' counsel points out that the other experts, Robert Corcoran (the occupational therapist), Dr. Naiker, and Dr. Reebye agreed that psychosocial stressors might be inhibitors to the plaintiff's recovery.

[46] Ms. Klimo, counsel for the defendants, suggests that Dr. Koo became combative in cross-examination and that he was offended when pressed to accept that a patient's reporting on pain is to a large extent subjective and not readily measurable. Although the defendants' counsel says Dr. Koo pointed out that myofascial trigger points were "highly objective" and they were noted on his examination of the plaintiff, she says that he did not make a note of what, where, and how those points occurred, citing the compressed time frame in which to examine the plaintiff. This, the defendants say, should affect the weight I give to Dr. Koo's evidence.

[47] Overall, however, I found Dr. Koo to be a good witness. I listened to the recording of his testimony again given the defendants' argument that he had crossed the line from being an expert to being an advocate. Although he gave his opinions forcefully, I find that he did not cross the line. In my assessment, he appeared to be an impartial expert witness.

[48] The defendants called Dr. Reebye.

[49] Dr. Reebye's opinion was stated this way:

> The most likely diagnosis to consider in this case is that of mild-to-moderate soft tissue injuries in various areas that she experienced symptoms initially, including her face, her neck, her back and her right knee.

[50] In terms of whether her symptoms were caused by the accident and why they continue, he said:

> In my opinion, initial injuries were a direct result of injuries sustained by Ms. Ladret in the motor vehicle accident.
>
> Prolongation of symptoms are more likely caused by other factors, including her urinary tract infections, kidney stones, pregnancies, emotional and psychosocial factors.

[51] Dr. Reebye testified that there are no physical complications that prevented Ms. Ladret from returning to work subsequent to her maternity leave.

[52] Mr. Gourlay, counsel for the plaintiff, challenges Dr. Reebye's opinion that the plaintiff's symptoms will improve once stressors are resolved, and in any case he argues that opinion does not mean she will be pain-free, only that her symptoms will improve. Mr. Gourlay says Dr. Reebye's opinion must be read in conjunction with his evidence on cross-examination that pain that persists beyond two years will likely be permanent. Mr. Gourlay says that Dr. Reebye's opinion should be given less weight than Dr. Koo's because Dr. Koo's is supported by Robert Corcoran, the occupational therapist, and the opinion of Dr. Naiker. Mr. Corcoran did an assessment of Ms. Ladret on January 11, 2013 and a home assessment a few days later.

[53] Mr. Gourlay says that I should approach Dr. Reebye's opinion with caution. Mr. Gourlay also submits that given Dr. Reebye's evidence that he has testified in more than 75 trials, it is difficult to accept that he had never been asked for drafts of his reports, which were requested by Mr. Gourlay, and that Dr. Reebye believed it acceptable to destroy them. As the defendants' counsel argues in connection with Dr. Koo, Mr. Gourlay argues that Dr. Reebye refused to accept common-sense propositions put to him, such as whether palpable tightness of the left trapezius muscle was consistent with the symptoms of back pain of which the plaintiff complained. I do not reject Dr. Reebye's opinion on the basis suggested by counsel. I find the common ground between the physiatrists is essentially that if I accept that the pain persisted for more than 2 years, as I do, it is likely to be chronic.

[54] Mr. Corcoran was qualified to give an opinion on the plaintiff's future care and her functional capacity. He opined that she had reduced tolerance for stationary standing, repetitive and sustained stooping with forward reaching, and lifting or carrying activity exceeding sedentary strength levels. He acknowledged that he relied on the honesty of the plaintiff for his report. He thought she was capable of returning to her pre-accident occupation on a part-time basis provided she addressed her deconditioned status and obtained education about chronic pain management. She cannot, in his view, return to bakery work due to the risk of flare-up. He opined she was best suited to light strength capacity work with minimal exposure to sustained low level posturing or vertical reaching activities.

[55] Overall, given all the evidence, I accept the plaintiff's evidence of persistent, significant back pain. If the plaintiff's evidence is credible, as I find it is, Dr. Reebye's opinion is that pain that persists for the length of time the plaintiff has reported is likely to indicate chronic pain. I also think that Dr. Koo's prognosis is accurate that Ms. Ladret's soft tissue injury pain will continue and that a full resolution is unlikely.

[56] The defendants point to the fact the plaintiff, now four years after the accident, is doing worse, when she had been apparently functioning better in the period of time shortly after the accident while she attended school. However, I think it is apparent that Ms. Ladret suffers more from her injuries, which were caused by the accident, when she faces stressors of life, such as the burden of raising three active children, work, and dealing with an abusive situation, than she might have done when she was at school and receiving more regular support from her family.

[57] However, I think the defendants must take the plaintiff the way they find her and if a plaintiff has a busy and stressful life that results in the injuries from her accident being more painful, that is simply part of the plaintiff's make up.

[58] As some of the psychosocial issues and other factors resolve themselves, I find it is likely that her symptoms will improve, but will, I expect, still persist.

Non-Pecuniary Damages

[59] The plaintiff's counsel submits that an appropriate award for non-pecuniary damages is in the range of $85,000-$100,000. He claims $100,000 as reasonable compensation for what are likely, in his submission, to be chronic injuries to a 31 year-old plaintiff that limit her ability to work, maintain her home, and be a mother to her children.

[60] The defendants submit that an award is more appropriately in the range of $30,000-$40,000.

[61] In *Stapley v. Hejslet*, 2006 BCCA 34, Kirkpatrick J.A. set out a list of factors that may be considered when determining an award for non-pecuniary damages. She said, at para. 46:

> The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163, 2005 BCCA 54).

[62] The plaintiff relies on certain authorities: *Grigor v. Johal*, 2008 BCSC 1823; *Gosselin v. Neal*, 2010 BCSC 456; *Neumann v. Eskoy*, 2010 BCSC 1275; and *Schnare v. Roberts*, 2009 BCSC 397.

[63] The defendants rely on these authorities as support for damages in the range of $30,000-$40,000: *Cryderman v. Giesbrecht*, 2006 BCSC 798; *Golam v. Fortier*, 2005 BCSC 598; *Kailey v. Dhaliwal*, 2007 BCSC 759; *Lee v. Hawari*, 2009 BCSC 1904; *Manson v. Kalar*, 2011 BCSC 373; *Park v. Arthur*, 2007 BCSC 1365; and *Smith v. Wirachowsky*, 2009 BCSC 1434.

[64] The plaintiff, a young woman, has a soft tissue injury that now four years after the accident has resulted in chronic back pain. I find her description of the persistent pain in her back to be accurate. While she has been able to carry on and deal with her three children and attempt to return to work, her back pain has caused her to miss out on the pleasure that she would otherwise have in the task of raising her children. I think her injuries have had and will continue to have a significant effect on the quality of Ms. Ladret's life.

[65] In assessing the amount to be awarded and the severity of the plaintiff's injuries, I have in mind the extent to which the plaintiff went for treatment. The failure of a party to attend regularly at a doctor's office or follow medical advice may be an indication she is not as hurt as she asserts, but there are often other reasons for not going to the doctor and for not following advice to get MRIs or injection treatments – for example, other medical conditions such as pregnancy or a reluctance to participate in what a patient reasonably thinks is an invasive procedure. The defendants point to the failure of the plaintiff to attend a doctor for a lengthy period of time, but I think that was largely explained by the fact that the plaintiff was between doctors, has a somewhat stoic personality, and at the time was wrapped up in an abusive relationship which was consuming her time. Nevertheless the failure to attend upon a doctor when it would be reasonable to do so is a factor I do consider in assessing the extent of her pain.

[66] In my view, although the pain the plaintiff suffers from is chronic and will in all likelihood persist, the symptoms will become less severe as some of the stressors in her life resolve and her children grow older.

[67] I award general damages of $60,000.

Loss of Earning Capacity

[68] The principles governing an award of damages for loss of earning capacity are set out in the leading case of *Rosvold v. Dunlop*, 2001 BCCA 1. These principles were recently summarized in *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at para. 259 (appeal allowed in part but not on this point 2012 BCCA 239):

> The principles that govern the measurement of damages for loss of earning capacity were thoroughly discussed in *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158. The principles set out in that case can be summarized as follows:
>
> 1. the assessment of damages is not a precise mathematical calculation but a matter of judgment;
> 2. a plaintiff is entitled to be put in the position she would have been but for the accident;
> 3. an award for loss of earning capacity recognizes that the ability to earn income is an asset and the plaintiff deserves compensation if this asset has been taken away or impaired;
> 4. since these damages must often be based on a hypothetical, the standard of proof of a hypothetical is "real and substantial possibility" and not mere speculation;
> 5. the court must consider the real and substantial possibilities, and give weight to them according to the percentage chance they would have happened or will happen;
> 6. one starting approach to valuation may be to compare the likely future of the plaintiff had the accident not happened, and the likely future of the plaintiff after the accident has happened, and to consider the present value of the difference between the amounts earned under these two scenarios. (I note that in using the word "likely", the Court on this point was meaning what hypothetical was a real and substantial possibility);
> 7. however, the overall fairness and reasonableness of the award must be considered, taking into account all of the evidence.

[69] In *Perren v. Lalari*, 2010 BCCA 140, the Court of Appeal described at para. 32 what the plaintiff must satisfy and mentioned the different approaches that might be considered in assessing the loss of earning capacity:

> A plaintiff must <u>always</u> prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok,* or a capital asset approach,

> as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa.* But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.
>
> [Emphasis in original.]

[70] Recently, in *Morgan v. Galbraith*, 2013 BCCA 305, the Court of Appeal described at para. 53 the usual stages in the analysis that the trial judge must follow:

> As already noted, 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 (rejected by the trial judge here) or the capital asset approach, as described in *Brown* (the approach adopted by the trial judge) … The trial judge stated at para. 56:
>
>> *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), cited above, and cited elsewhere by our Courts many times, provides the approach to use for a person whose path is unclear. The plaintiff's injury is treated as the loss of an asset. Finch J., as he then was, listed the following as considerations in *Brown* for awarding loss of future income:
>>
>>> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
>>>
>>> 2. The plaintiff is less marketable or attractive as an employee to potential employers;
>>>
>>> 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>>>
>>> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> [Emphasis in original.]

[71] In accordance with the principles governing loss of earning capacity, the plaintiff says that she is entitled to an award for damages because she has proved that there is "a real and substantial possibility of a future event leading to an income loss". The plaintiff's position is that this assessment of damages should result in an award of $200,000.

[72] The plaintiff's submission is based on the fact that she is likely to have an ongoing disability related to employment as a cashier, in a bakery, or in employment involving heavier work. This is Dr. Koo's opinion. She submits that Dr. Koo's opinion is supported by Mr. Corcoran's opinion that her work in the bakery and as a cashier will be affected because of the activities those jobs entail.

[73] The plaintiff submits that the evidence shows there is much more than a real and substantial <u>possibility</u> of a future event leading to an income loss, given she has made repeated attempts to return to work but has been unsuccessful and that even when attempting to work twelve-hour weeks with four-hour shifts spaced apart she struggled mightily. She submits that her full-year potential earnings was demonstrated in 2007 when she earned $20,327 based on just over 1,780 hours, which at her now current pay rate of $15.09 would result in an income of $26,868. She says that she has repeatedly tried to work twelve hours per week but has been unsuccessful, and that if she was capable of working twelve hours per week – and the evidence indicates that she is not – that would nevertheless represent a reduced capacity of about two-thirds or a gross annual shortfall of $17,732. Based on the economic tables in evidence, the plaintiff says that given that she has 33 years to age 65, her lost capacity on a mathematical present value calculation would be just over $400,000 if her present reduced capacity was $17,732 per year, and her loss would have a present value of $222,919 if her lost capacity was presently $10,000 per year.

[74] The plaintiff argues that although she has attempted to upgrade her education, her attempts have been without success given her past record, and that her current type of employment is likely where she will attempt to work in the future.

[75] The defendants on the other hand submit that the plaintiff has not demonstrated a real and substantial possibility related to the accident that she will suffer a loss of income in the future.

[76] The defendants disagree that the plaintiff's 2007 income tax return is a proper starting point for any analysis for loss of earning capacity, as it reflects an income at

a time when she was the mother of one child and had the regular assistance of her partner. The plaintiff is now a single mother of three and by her own evidence would only want to work 24 hours per week spread over three work shifts. The defendants say that the plaintiff was working full part-time hours of 25-35 hours per week when she earned her income in 2007.

[77] The defendants say the plaintiff continues to work for her long term employer, has worked for that employer since the accident, and the plaintiff is not interested in other jobs. Although her particular store will close this summer, she has the option to transfer to other stores in the IGA corporate chain and her tenure is secure. Moreover, she has interests in studying criminology or family law and would have pursued a course in this area in 2013, the defendants say, but for recent stressors in her personal life unrelated to the accident.

[78] The defendants challenge the plaintiff's assertion that the accident is the cause of her reduced work hours, as well as her account of repeated, unsuccessful attempts to return to work. First, the defendants say the plaintiff is now a mother of three children who wishes to discharge her responsibility for their care and only work part-time. Second, the defendants challenge the plaintiff's account that her failed attempts at returning to work were related to the accident.

[79] The periods mentioned as attempts to return were August 2009, April 2011, and most recently, February and March 2013.

[80] The defendants say that August 2009 was a period when the plaintiff was pregnant, attending school, and the failure to continue work was due to health issues unrelated to the accident.

[81] In April 2011 the defendants say that the plaintiff's inability to continue working was clouded with other factors, such as the conflict that she was having with her former partner.

[82] Most recently, the defendants say if the plaintiff's return to work was difficult, that had much to do with being out of condition to do the kind of work that she does at IGA.

[83] With respect to that attempt to return in spring of 2013, the position of the defendants is that this was the first time back without pregnancy complications and the failure to continue at work also related to the assault by the plaintiff's boyfriend. The defendants submit that all of these periods could not be described as failed attempts to return to work that are related to the accident, other than perhaps to the extent the accident caused some deconditioning that prevented her immediately working more part-time hours. It is their position that, as a mother of three, the plaintiff would not work in all likelihood until the children were in school in any event. The defendants say that the most that the plaintiff would presently want to work given the ages of her children would be, as she indicated, 24 hours a week.

[84] The defendants point out that the plaintiff, based on the report of Mr. Corcoran, is "capable of returning to her pre-disability occupation on a part-time basis" and that she is "best suited to return to her head cashier position; however, she is not well suited to return to her … bakery work".

[85] Overall the defendants' position is that the evidence does not show that the injuries have restricted her ability to work or that there is a real and substantial possibility that they will do so in the future. The defendants say that she is capable of working part-time hours, something the defendants say she had been doing in the period leading up to the accident. The defendants argue that there is no expert or lay evidence that she cannot work in her previous employment as a cashier.

[86] Alternatively, the defendants say that the plaintiff has only shown a modest amount of loss of capacity which could be assessed on the basis of working only 12 hours instead of 24 hours per week for 6 months while she became conditioned for work.

[87] The plaintiff has demonstrated that she will have chronic, ongoing back pain in her mid-back. I expect, based on the medical evidence that I accept, that the plaintiff will suffer chronic pain that will persist. I have included that pain and suffering in my assessment of non-pecuniary damages.

[88] I find that applying the test in *Rosvold v. Dunlop*, 2001 BCCA 1, and the considerations described in *Brown v. Golaiy*, [1985] B.C.J. No. 31 (C.A.), that there is a real and substantial possibility of future events leading to an income loss. On an ongoing basis, she will have reduced tolerance for standing, repetitive stooping, and lifting and carrying activity exceeding sedentary strength levels. I find that this loss of earning capacity is beyond mere speculation: see *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32.

[89] The question is the assessment of this loss of earning capacity.

[90] The plaintiff at the time of trial was on stress leave from work because of an assault. I have concluded that the plaintiff will return to work as a cashier and will attempt to work between 12 and 24 hours per week when the children are young, and then longer hours – approximately full time (that is, 36 hours per week or more) – as her children grow older.

[91] I find that on the evidence the likelihood of persistent back pain, although reducing in severity as her family grows and stressors disappear, will nevertheless continue to impact on her earning capacity in the future.

[92] Her more recent shortened hours when she attempted to return to work are only partially caused by her accident-related condition, although it has had an impact. Her attempts to return work were also derailed by other emotional and physical reasons that were not related to the accident.

[93] However, the number of hours she will be able to work on a weekly basis in jobs where she will likely stay such as her cashier position will be affected, given such jobs require lifting, reaching and stooping. I conclude that her ability to return to work and work 12 hours per week or more has been affected by her persistent

injuries in the accident. I find that her back pain will impact on her ability to work longer hours in the future, both when she tries to reach 24 hours a week when the children are young and when she tries to work full time in the longer term. I expect that she will not be able to work as many compensable hours as she would but for the accident.

[94] I recognize that there are jobs outside the cashier work that she has done, but I do not think it is likely that she will or would have been able to pursue a career in law or criminology to the extent that she hopes. Her inability to likely succeed in those more academic pursuits indicates that the impairment of her earning capacity by her back injury is not trivial.

[95] Overall, I find based on the considerations in *Brown v. Golaiy*, [1985] B.C.J. No. 31 (C.A.) that the plaintiff is less capable of earning income from all types of employment in the sense that she will have difficulty taking on more hours as she works up to her desired 24 hours per week and becomes conditioned, and she will eventually have difficulty working full time in jobs such as her cashier position that have requirements of reaching and lifting. Because of this disability, she is less attractive to future employers and less valuable to herself in a competitive labour market.

[96] Accordingly, I conclude, that the plaintiff's income earning capacity has been impaired by the defendant's negligence.

[97] Doing the best I can on the evidence, I assess her loss of future earning capacity at $12,000.

Loss of Social Assistant Benefits

[98] As I understood Mr. Gourlay's arguments, the authorities that I am bound by (*Morrison v. Pankratz* and *M.B. v. British Columbia*) support the defendants' position that the claim must be denied if the majority decision in *Morrison* is binding. I take that to be a concession that based on the current state of the law, this claim must be dismissed.

Loss of Housekeeping Capacity

[99] The plaintiff claims an award for loss of housekeeping capacity.

[100] The plaintiff relies on *Kroeker v. Jansen*, [1995] B.C.J. No. 724 (C.A.), for the proposition that damages may be awarded for loss of housekeeping capacity even though the services are gratuitously provided by a family member.

[101] The plaintiff claims that the inability on her part to complete such tasks as a result of her pain indicates that $25,000 is a reasonable award.

[102] The defendants say that assistance rendered by the plaintiff's parents is not compensable and that a relatively minor adjustment of duties within a family will not justify a discrete assessment of damages. The defendants say that the plaintiff has always required her parents' helping hand and there is no evidence as to the market value of the provision of those household services that the plaintiff states that she cannot perform. The defendants say that, by the plaintiff's evidence, the claim amounts to an inability to weed the front yard, to fold laundry, and to place washed dishes into upper cupboards.

[103] This is invariably a difficult claim to assess.

[104] In S.M. Waddams, *The Law of Damages*, 5th ed (Toronto: Canada Law Book, 2012) at ¶3.810, the author notes:

> Difficulties arise in valuing the claim of a plaintiff prevented by injury from performing household work. It is generally accepted that such an injury causes a loss to the plaintiff personally, but it is not obvious how the loss should be valued. Some cases have awarded a global sum; others have measured the loss by the increased burden falling on other family members. A number of recent cases have adopted a "replacement cost" approach, awarding damages on the basis of the cost of hiring persons to perform the various services that the plaintiff can no longer perform personally. The principle has been applied to part-time as well as full-time household work.

[105] The plaintiff relies on a number of authorities, including the decision of the Court of Appeal in *Campbell v. Banman*, 2009 BCCA 484. There the plaintiff was a 48 year old woman with a common-law husband and two adult children. The trial judge accepted that the "plaintiff's ability to perform cooking and other housekeeping

work which involved lifting and repetitive actions engaging the left shoulder" was reduced and awarded an amount for past and future loss of housekeeping capacity: 2008 BCSC 626 at para. 87. The defendants appealed the award of damages for housekeeping capacity only. In dismissing the appeal, the court reviewed the jurisprudence on damages for housekeeping capacity at paras. 11 and 13, and in particular its decision in *Kroeker v. Jansen*:

> The award for loss of housekeeping capacity is made in the shade provided by *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652, 4 B.C.L.R. (3d) 178 (B.C. C.A.). In *Kroeker* this Court, in a majority decision authored by Mr. Justice Gibbs sitting on a five judge division, without characterizing the nature of the award as pecuniary or non-pecuniary, affirmed the availability of an award for loss of housekeeping capacity.
>
> …
>
> This Court addressed the issue of loss of housekeeping capacity again in *McTavish v. Mac Gillvray*, 2000 BCCA 164, 74 B.C.L.R. (3d) 281. In *McTavish* the trial judge, [1997] B.C.J. No. 1693, had awarded $20,000 for past loss of housekeeping capacity and $43,170 for future loss of housekeeping capacity, sums arrived at by reference to the cost of replacement services for 10 hours each week until age 60, at an hourly cost of $10 an hour. This Court dismissed the appeal, finding there was evidence family members replaced the housework Ms. McTavish formerly had performed, and she was not required to prove she would hire someone to perform the duties in order to fully compensated for the loss of her ability to perform the tasks herself. In the majority reasons for judgment I observed as to *Kroeker*:
>
> > … [t]his Court, in *Kroeker v. Jansen* (1995), 123 D.L.R. (4th) 652; (1995) 4 B.C.L.R. (3d) 178; [1995] 6 W.W.R. 5 (C.A.) recognized that damages for past and future loss of housekeeping capacity may be awarded by a trial judge, even though housekeeping services were gratuitously replaced by a family member. Further, it recognized that, depending on the facts, this compensation may be by pecuniary or non-pecuniary damages, and if non-pecuniary, that there was no reason these damages could not be segregated.

[106] In *O'Connell (Litigation guardian of) v. Yung*, 2012 BCCA 57 at para. 67, the Court of Appeal articulated the reason that loss of housekeeping capacity – as distinct from costs of future care – does not require proof that the plaintiff would hire someone to perform the duties she is unable to perform as a result of her injuries:

> As I understand the principle, it is the loss of a capacity — an asset — that is compensated. Accordingly, because the award reflects the loss of a personal

> capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required.

[107] More recently, in *Midgley v. Nguyen*, 2013 BCSC 693, Dardi J. reviewed the governing principles with respect to awarding damages for loss of housekeeping capacity at paras. 344-345:

> … [S]ince the award recognizes the impairment of housekeeping capacity, whether a plaintiff is likely to hire such assistance in the future, does not inform the analysis; *X. v. Y.* at para. 256; *O'Connell* at para. 67. Recovery may be allowed for both the future loss of the ability to perform household tasks as well as for the loss of such abilities prior to trial. The amount of compensation awarded must be commensurate with the plaintiff's loss: *Dykeman* at para. 29; *X. v. Y.* at para. 246.
>
> In assessing damages under this head, the authorities mandate that the court must carefully scrutinize the gratuitous services provided by the family member. A relatively minor adjustment of duties within a family will not justify a discrete assessment of damages: *Campbell v. Banman*, 2009 BCCA 484 at para. 19. In *Dykeman* at para. 29, Newbury J.A. cautioned that:
>
>> Instead, claims for gratuitous services must be carefully scrutinized, both with respect to the nature of the services – were they simply part of the usual 'give and take' between family members, or did they go 'above and beyond' that level? – and with respect to causation – were the services necessitated by the plaintiff's injuries or would they have been provided in any event? [Emphasis in original.]

[108] The evidence in support of the plaintiff's claim for loss of housekeeping capacity was not extensive. The plaintiff's father and mother live on Vancouver Island and come over and help her with her housekeeping and childcare. Her father pointed to her difficulty vacuuming, washing the floor, and doing chores involving lifting over her head. The plaintiff's babysitter, Ms. Mandrusiak has helped her with vacuuming and doing the laundry. Ms. Mandrusiak was paid $500 for the time that she worked. I accept the evidence of the plaintiff and her mother that Ms. Ladret is unable to maintain her home as cleanly as she likes and that is because she is unable to vacuum, sweep, and lift as she has habitually done in the past. I find that her parents help out more than they would but their ability to help is limited by their commitments where they live. I also recognize that part of the messiness in the

plaintiff's home is simply the process of living in tight quarters with three growing, active children and that there is a possibility that as the children grow older they will contribute by doing household chores.

[109] I find that on the evidence, the plaintiff has proven a modest claim under this head of damage. I find her back pain and difficulty stooping and lifting reduces her ability to do the repetitive tasks of housekeeping.

[110] I reject the defendant's suggestion of a one-time award of $450, and while I appreciate that a relatively minor adjustment within a family does not justify an assessment under this head, I find that a compensable loss that will continue has been established and I award the plaintiff $2,500 for loss of housekeeping capacity.

Cost of Future Care

[111] The plaintiff also claims damages for cost of future care.

[112] The law was aptly summarized in a recent decision of Madam Justice Harris in *Peters v. Ortner,* 2013 BCSC 1861 at paras. 141-145:

> The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore him to his pre-accident condition in so far as that is possible. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Rozylo*, 2012 BCCA 351.
>
> The test for determining the appropriate award under the heading of cost of future care is an objective one based on the medical evidence. For an award of future care: there must be a medical justification for claims for cost of future care and the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63
>
> Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be or be able to be, rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung,* 2012 BCCA 57 at paras. 55, 60, 68-70.
>
> The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some

> cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.
>
> An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[113] The plaintiff relies principally on the report of Robert Corcoran, the occupational therapist, for the future care recommendations which are summarized at page 14 of his report.

[114] In the plaintiff's submission, the recommendation of a multi-disciplinary chronic pain management program and a one-time occupational therapist is a one-time cost of $17,030 and $1,260, respectively. The massage treatment has an annual cost of $1,080 and the recommendations for psychological counselling at two sessions per year, an annual community centre pass, and two physiotherapy sessions to oversee her self-directed exercise equal annual costs of $1,635. That with the cost of Ibuprofen totals $28,026 which has a present value of $65,255. Mr. Gourlay argues that taking contingencies into account, $40,000 is a reasonable award for all ongoing care costs, which together with the one-time costs of a multi-disciplinary chronic pain management program and an occupational therapist represents a total claim of $58,290.

[115] The defendants say that the costs of future care should reflect the reasonable or normal expectations of what the injured person will require: *Spehar (Guardian ad litem of) v. Beazley*, 2004 BCCA 290. The defendants say that the cost of future care estimated by Mr. Corcoran – which is essentially based on Dr. Koo's extensive recommendations – is unreasonable. The defendants submit that there is no medical opinion supporting a chronic pain management program (although Dr. Koo referred to it on cross-examination), that an MRI is recoverable under MSP, and that both an occupational therapy return to work service and ergonomic office equipment are unwarranted.

[116] The defendants say that a more appropriate award is in the range of $3,000-$5,000. Such an award would include an annual membership pass to a community complex ($436), physiotherapy oversight of a self-directed exercise program ($156), the equivalent of 15 further sessions of psychological counseling for one year ($350), childcare support for one year ($504), babysitter assistance to assist in the plaintiff's graduated return to work over a period of six weeks to three months as recommended by Dr. Reebye ($1,716), and some seasonal housekeeping as noted above which would result in a total of $3,612.00 or an award of between $3,000-$5,000.

[117] In assessing this claim, I do not think that a multi- disciplinary chronic pain program is reasonably necessary or would be incurred. However, I think that the costs for massage therapy, psychological counselling, an annual community centre pass, and physiotherapy are and will likely be required and incurred for a time longer than the defendants suggest. I also think that childcare support will be required for a couple of years until the children start attending school. I think that the ergonomic office equipment claims are reasonable and medically necessary.

[118] Taking into account all contingencies, I assess the award for future care at $8,000.

Failure to Mitigate

[119] The defendants assert that the plaintiff has failed to mitigate her damages. As I understood the argument of defence counsel, they say that the failure of the plaintiff to attend and receive possible treatment was not only a sign that the plaintiff was not as injured as she asserts, but that her failure to follow recommended treatment or possible procedures is in the circumstances a failure to mitigate her damages.

[120] The law on mitigation is described in the Supreme Court of Canada's decision in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, where the court said at para. 33, quoting from the Australian case of *Buczynski v. McDonald* (1971), 1 S.A.S.R. 569:

> The plaintiff is "bound to act not only in his own interests, but in the interests of the party who would have to pay damages, and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter" …. "If any part of his (the plaintiff's) damage was sustained by reason of his own negligent or unreasonable behaviour, the plaintiff will not be recouped as to that part." [Citations omitted.]

[121] The plaintiff, however, says that the burden of proof is on the defendants to show that she acted unreasonably, and also to show the extent she would have avoided her loss had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. The plaintiff says that the defendants have not discharged either burden.

[122] What specifically does the defendant rely on?

[123] First, the defendants point to the fact that an MRI was recommended by Dr. Koo in May 2012, and the plaintiff – despite not being pregnant in the last 17 months – has failed to undergo this procedure. As an aside, an MRI was previously recommended by Dr. Naiker in May 2011, but was cancelled because of the plaintiff's pregnancy and the possible effects of a MRI on the fetus.

[124] Second, the defendants point to the fact that Dr. Dawson, the physiatrist, alluded to steroid-like injections in the plaintiff's back in April 2012, and that if pain persisted she would be a candidate. The defendants say that Ms. Ladret's excuse of wanting to exhaust non-invasive options is not credible in light of the fact that she consented to an epidural to ease her pain during child birth.

[125] Third, the defendants point to the fact that between June 25, 2010 and April 27, 2011, the plaintiff did not attend a family physician's office nor walk-in clinics although she had been to walk-in clinics in the past.

[126] Some of the treatments suggested by the defendant such as an MRI and consideration to have a steroid injection are remedies or treatments that the plaintiff should reasonably consider, and should consider now. But where I find the failure to mitigate argument falls down is that the defendants have not demonstrated that, had the plaintiff undertaken these treatments, her condition would likely have improved. The burden on this issue is on the defendants, and they have also failed to establish

that the failure of the plaintiff to obtain medical treatment or pursue physiotherapy in the period June 25, 2010 to April 2011 would likely have improved her condition.

[127] Accordingly, as the defendants have not discharged the burden on them, I decline to make any reduction in damages based on a failure to mitigate.

Conclusion

[128] I award damages as follows:

Non- pecuniary damages:	$60,000
Past wage loss (as agreed):	$8,900
Loss of earning capacity:	$12,000
Loss of housekeeping capacity:	$2,500
Cost of future care:	$8,000
Special damages (as agreed):	$300
TOTAL:	$91,700

[129] The plaintiff is entitled to costs unless there are circumstances that should be brought to my attention.

"J.S. Sigurdson J."
The Honourable Mr. Justice J.S. Sigurdson