IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dobbin v. Siewert,*
2013 BCSC 1153

Date: 20130627
Docket: M113059
Registry: Vancouver

Between:

Lindsey Frances Dobbin

Plaintiff

And

Corey Gregory Siewert, Richard Wayne Siewert and
Theresa Lily Hall

Defendants

Before: The Honourable Mr. Justice Weatherill

Reasons for Judgment

Counsel for the Plaintiff:	T. J. Delaney J. E. Fung
Counsel for the Defendants:	A. Leoni
Place and Date of Trial:	Vancouver, B.C. May 27 - 31; June 3 & 4, 2013
Place and Date of Judgment:	Vancouver, B.C. June 27, 2013

A. Introduction

[1] This action arises out of a motor vehicle collision that occurred on July 8, 2009 (the “accident”) on Highway 97 in West Kelowna. Liability has been admitted.

[2] It is obvious from the photographs of the vehicles after the accident that they collided at high speed. The plaintiff is fortunate that her injuries were not as serious as they otherwise could have been. She says that, as a result of the accident, she is suffering from continuous and unrelenting pain that has permanently changed her life. She seeks non-pecuniary damages, damages for loss of past income and future income earning capacity, cost of future care, special damages and damages for diminished housekeeping capacity.

[3] The defendants say that the plaintiff’s accident-related injuries have resolved or should be resolved in a short period of time. They also take the position that the plaintiff is de-conditioned from her pregnancy between the date of the accident and trial and that she will recover completely from her injuries once she

begins a proper exercise regime.

B. Evidence at Trial

The Plaintiff

[4] The plaintiff was 23 years old at the time of the accident. She is now 27.

[5] On July 8, 2009, at approximately 5:00 p.m., she was driving eastbound on Highway 97 near Kelowna. The posted speed limit was 50 kph. She was wearing her seatbelt. It was rush hour and the four lane highway was busy. The weather was warm and sunny.

[6] Suddenly, the defendants' westbound vehicle crossed the center-line and collided head-on with a Subaru that was travelling eastbound in front of the plaintiff's vehicle. The plaintiff took evasive action but was unable to avoid colliding with the Subaru as it violently spun around after impact with the defendants' vehicle. The plaintiff's vehicle was equipped with air bags that deployed.

[7] The plaintiff described the impact as "intense", as if she was being thrown against a brick wall. Immediately before impact, she raised her left arm over her head to brace for the impact. Her arm and face were "burned" by the air bag. Her knees hit the dashboard. She briefly lost consciousness.

[8] When the plaintiff awoke, she saw smoke and steam rising from the scene. Fluids were leaking. People were screaming and there was general chaos.

[9] The plaintiff was able to exit her mangled vehicle unassisted. She lost a shoe in the process and cut her feet on broken glass.

[10] Emergency personnel arrived. The "jaws of life" had to be used to free the driver of the Subaru. The plaintiff was in shock. She began to vomit. She was taken to the Kelowna General Hospital where she was examined. She was released approximately four hours later. Complete bed rest was prescribed. She complied.

[11] The damage to all three vehicles was significant and extensive. The plaintiff's vehicle was written off by ICBC.

[12] The injuries the plaintiff sustained were varied and included burns to her forehead and left arm from the airbag, a sore neck, shoulders and shoulder blades, bruising from her seat belt, bruises to her face, a bruised spleen (although a subsequent ultra sound of the area was normal), a sore upper, mid and lower back, pain in her hips and sore knees. She was nauseous for approximately one month after the accident, vomiting two to three times per week. She began to experience what she described as migraine headaches three to four times a week.

[13] The cuts to her foot, the burns from the airbag and the bruising to her face and chest gradually cleared up uneventfully.

[14] The plaintiff was unable to tolerate prescription medication for her ongoing pain due to the side effects.

[15] The plaintiff commenced physiotherapy treatments approximately two months after the accident.

[16] The plaintiff did not drive a car for about four to five weeks after the accident because she was unable to perform a proper shoulder check due to pain in her shoulders and neck.

[17] The accident caused the plaintiff to become anxious about driving. She has become terrified of being involved in another car accident. She “freaks out” when she is a passenger in a vehicle and is constantly “back seat driving”. She is less anxious when she is the driver because she is in control, but remains extremely anxious about other drivers.

[18] The plaintiff described her emotional state after the accident as having spiralled downhill.

[19] The plaintiff’s father owns an earth-moving construction company called Wiltech Developments Inc. (“Wiltech”). Wiltech has been in the plaintiff’s family for at least three generations.

[20] The plaintiff worked for Wiltech during her high school summers. Upon graduation from high school in 2004, she commenced full time work with Wiltech as a rock truck driver. Wiltech’s rock trucks are large and carry 40 tons of material. The plaintiff’s job was physically demanding. She worked 10 hour shifts and earned $27.50 per hour. The work was seasonal and she generally did not work during the winter months.

[21] Driving a rock truck is physically demanding. The plaintiff was required to service the vehicle each morning, which involved climbing with lubrication buckets and fuel hoses. Operating the truck involved a great deal of bouncing and jostling, particularly while loading and when driving over rough terrain. Dumping the load also involved substantial twisting and shoulder turning.

[22] The plaintiff’s plan was to eventually train on other Wiltech earth moving equipment and to “move up the ladder”, eventually to management.

[23] At the time of the accident, the plaintiff was working full time at Wiltech. As a result of the accident, she was unable to return to work and she began to receive Employment Insurance (“EI”) benefits.

[24] In November 2009, four months after the accident, the plaintiff felt she had improved enough to return to work at Wiltech. However, the long hours of twisting, bouncing and sitting in the rock truck aggravated her accident-related injuries to the point that, after only four days, she had to stop work and return to bed rest.

[25] In January 2010, the plaintiff began seeing a kinesiologist twice a week. The kinesiologist prescribed stretching and light exercises in order to improve the plaintiff’s conditioning. This increased activity caused the pain in her neck, back, shoulders, hips and knees to flare up. The plaintiff had to cancel several of her appointments due to the intensity of the flare-ups.

[26] In March, 2010, the plaintiff’s EI benefits expired. She began working as a server at a Kelowna pub which she enjoyed. However, she was only able to work approximately four weeks due to her accident-

related pain which was aggravated by the fast pace and physical requirements of the job.

[27] By April 2010, the plaintiff's financial situation was such that her mother began assisting with her mortgage payments as well as her strata fees. Subsequently, Wiltech began paying her a small salary even though she was unable to work as a rock truck driver. Instead, she performed various small errands from time to time for the company, such as delivering bids and banking. In 2010 the plaintiff received $12,756.00 from Wiltech, essentially as a gift. The plaintiff has no obligation to repay this money.

[28] In July 2010, the plaintiff once again attempted to return to full time work at Wiltech. She continued for approximately one week but had to stop because her neck and lower back pain flared up. Her driving anxiety became heightened.

[29] During the summer of 2010, the plaintiff saw a psychologist on four or five occasions for the purpose of trying to resolve her depressed emotional state and driving anxiety, both of which she attributes to the accident. Those sessions were unsuccessful, in part due to the plaintiff's dislike of the psychologist.

[30] In the fall of 2010 the plaintiff enrolled in the Certified Education Assistant program at Okanagan College. She did well and graduated in January 2011.

[31] In March 2011, the plaintiff commenced employment with School District 23 in Kelowna as a Certified Education Assistant, working full time 25 hours per week. Her duties include dealing with potentially aggressive children, children with self-abuse behavioural difficulties and children suffering from seizures. She also supervises children at lunch time and on field trips, dispenses first aid and handles emergency situations. She continues to be employed in this capacity. Although the job is physically and mentally demanding, she nevertheless finds it rewarding and enjoyable.

[32] The School District is aware of her accident-related injuries. The plaintiff has not requested any special accommodations from her employer in respect of them. Nor has she taken any days off due to her accident-related injuries.

[33] The School District's annual two-week spring break occurred shortly after the plaintiff commenced her employment. During that time, the plaintiff returned to Wiltech and drove a rock truck at a project in Yellow Lake, east of Okanagan Falls. Again, her neck, shoulder, back and knee pain flared up. She tolerated 47.7 hours of work and earned $1,311.75. She returned to her job at the School District after the spring break school holiday.

[34] During the summer of 2011, while school was out, the plaintiff collected EI benefits. She also did occasional "respite" work, relieving another caregiver. She earned $20 per hour for that respite work. She made no other attempt to "top up" her School District work hours. She returned to her job at the School District in September 2011.

[35] Throughout this period, the plaintiff increased her activity. She attended spin classes, the gym and yoga. She walked and did the home exercises recommended by her kinesiologist. She also purchased and

used a heating pad, which she found helpful.

[36] She described her condition as of late 2011 as follows;

a) pulsating headaches, three to four times per week;

b) sore neck;

c) burning feeling in her upper back between the shoulder blades which became worse with activity;

d) lower back pain;

e) achy knees and hips, especially after walking or climbing stairs;

f) poor sleep due to pain; and

g) anxiety while driving in a vehicle.

[37] In early 2012, the plaintiff unexpectedly became pregnant. She continued to work at the School District until the summer break and then again in September 2012 until mid-October 2012 when she went on maternity leave.

[38] The plaintiff's son was born on November 16, 2012. During the delivery, the plaintiff broke her tail bone, which resulted in her post-natal recovery being prolonged. She was inactive for several months while she recovered. She expects to remain on maternity leave until October 2013 at which time she plans to return to work as a Certified Education Assistant with School District 23 on a graduated basis, initially working only two days per week to accommodate her child care responsibilities. A graduated return to work program would not have been available to her at Wiltech.

[39] The plaintiff lives with and is engaged to the child's father, Tom Bowles. The plaintiff would like to have more children someday but she has no plans at the moment to do so.

[40] Prior to the accident, the plaintiff had no history of pain, headaches or sleep issues. She was highly active. She danced jazz and ballet three hours per week. She periodically played golf and tennis. She snow boarded, wake boarded, water skied, played baseball and volleyball. She regularly attended the gym, including boot camp, and ran. She was also involved in belly dance/aerobics during the summer months.

[41] As a result of the accident, the plaintiff is unable to participate in any of those activities. She has become a spectator. She attempted to play tennis but her pain flared up. In September 2011, she enrolled in a dance class but was only able to attend three sessions. Depending on the level of pain she is in, the plaintiff is able to engage in non-vigorous walking, spin classes, bike riding on flat terrain yoga and occasional massage therapy. She continues to complete her at-home exercises recommended by her kinesiologist to the extent her pain level allows it. The greater her physical activity, the greater her pain. She found that, during the several months following the birth of her child when she was inactive recovering from her broken tail bone, her pain level reduced significantly.

[42] The plaintiff's social life has changed markedly since the accident. She described herself before the accident as lively, active, athletic, carefree and social. She loved her life. Since the accident, she feels bitter and sad that she cannot do what she used to be able to do.

[43] The plaintiff's accident-related injuries have also impacted her ability to perform household chores. She is able to do vacuuming and cleaning but it aggravates her pain. She has to stagger those activities and pace herself. When he is not out of town for work, her fiancé Tom does the majority of the household chores, including cooking meals and lifting the baby.

[44] The plaintiff described her current condition as 50% of what it was prior to the accident. She remains in pain, both physically and mentally. Her ongoing complaints from the accident include frequent migraines, daily neck, shoulder and back pain, and pain in her hips and knees. She also wakes up at night due to pain. Her condition is aggravated by having to lift and care for her now six month old, twenty pound baby.

[45] The plaintiff's goal is to begin a program of re-conditioning her body once she finishes breast feeding and feels that she can handle the pain associated with the exercise regime recommended by Dr. Paramonoff, a physiatrist whom she saw in preparation for this action.

[46] Prior to the accident, the plaintiff's career plan was to continue to work at Wiltech, move up the ranks and, together with one or more of her two siblings, ultimately take over the company upon her father's retirement. She would have done so even with the unexpected birth of her child. In her words, "Wiltech was my career". She did not have a "stay-at-home" personality. She described herself as a competent and respected employee.

[47] The plaintiff maintained that, had she been physically able to drive a rock truck without pain on the three occasions when she returned to Wiltech after the accident, she would have done so on a permanent basis. However, her father made it clear that he was not going to replace a full time worker simply to allow the plaintiff to experiment as to whether or not she could return to work. Wiltech is not a company with a program allowing injured employees to gradually return to full time work.

[48] I found the plaintiff to be a forthright and credible witness.

Valerie Dobbin

[49] Valerie Dobbin is the plaintiff's mother. She is Wiltech's bookkeeper and office manager.

[50] Mrs. Dobbin testified regarding how the plaintiff's personality and physical condition changed from before to after the accident. Prior to the accident, the plaintiff was in good physical condition. She confirmed the pre-accident activities that the plaintiff testified to. Skiing and water sports, in particular, were a large part of the Dobbin family life. Since the accident, the plaintiff has not been able to participate in those and many other family activities. She and the plaintiff have gone on occasional hikes and have participated in spin classes together, but not nearly as frequently as prior to the accident. She described the plaintiff as a person who is dedicated to doing what she can to get better. She is beginning to see some improvement in the plaintiff's condition but, in Mrs. Dobbin's words, she is living the life of an older, unfit woman.

[51] Mrs. Dobbin confirmed that the plaintiff is coping with housework but that it is strenuous for her.

[52] She also confirmed the plaintiff's evidence that she becomes hysterical as a vehicle passenger, constantly worrying that the driver is not seeing what is happening around the vehicle.

[53] Mrs. Dobbin confirmed that she and Wiltech assisted the plaintiff financially, both before and after the accident. The payments were a gift to the plaintiff. The payments made after the accident were made because the plaintiff was struggling financially.

[54] Regarding Wiltech and its future management, Mrs. Dobbin testified that the company is in her children's blood and, in her opinion, there is opportunity for all three of her children to work for the company if they wish and are able.

[55] Mrs. Dobbin provided evidence, through the wages paid to the plaintiff's former co-workers, of the income the plaintiff would have earned and could expect to have earned at Wiltech but for the accident.

Jesse Van Exan

[56] Mr. Van Exan is a former employee of Wiltech. He operated a variety of Wiltech earthmoving equipment including rock trucks, bulldozers, excavators, packers and water trucks.

[57] He testified that, even though the rock trucks were relatively new and were equipped with air ride seats and suspension, a driver still "felt it at the end of the day".

[58] He confirmed that, as an equipment operator working for Wiltech he earned $64,405 in 2009 and $70,912 in 2011.

Alison Huggins

[59] Ms. Huggins has been a close friend of the plaintiff's since 2001 when they met in Grade 9. She testified regarding the plaintiff's physical condition, activity level, personality and level of driving anxiety, both before and after the accident.

[60] Prior to the accident, the plaintiff was always fit, athletic and active. She was heavily involved in dance. She also snowboarded, went to the gym and exercised. She was bubbly, free spirited, friendly and outgoing.

[61] Since the accident, the plaintiff is not as mobile or active as she was previously. She usually cuts her physical activities short due to discomfort. Her energy level is substantially lower. She is more irritable. Lifting her son is sometimes an effort. While driving, she is anxious and has trouble making shoulder turns.

Tom Bowles

[62] Mr. Bowles is the plaintiff's fiancé and the father of the plaintiff's child. He met the plaintiff in Grade 9 and they dated for approximately four years. They rekindled their relationship in 2009 shortly after the

accident.

[63] Mr. Bowles confirmed that, prior to the accident the plaintiff was actively engaged in several sporting and other activities, including snowboarding, volleyball, wake boarding, running and dance. Since the accident, the plaintiff has not been able to snowboard or wake board. She signed up for a dance class with her sister but dropped out after only one session. In his words: “she just can’t do those activities any more”.

[64] He confirmed that he and the plaintiff travelled to Mexico approximately six months after the accident and that she seemed to be able to tolerate the five hour flight, although she did not engage in much physical activity while in Mexico.

[65] He described the plaintiff as being frustrated with her inability to do what she used to be able to do. Her current physical activities are comprised of yoga classes and walking with her son. Approximately four evenings per week, for approximately 20 to 60 minutes, the plaintiff does stretching and “plank” exercises at home and also exercises with an exercise ball and free weights. Mr. Bowles has noticed “some” improvement in the plaintiff’s condition but not much.

[66] Mr. Bowles gives the plaintiff a shoulder and back massage most evenings. The level of her pain seems to depend upon her activities during the day. She doesn’t seem to be able to sit for prolonged periods of time without changing her position or moving around.

[67] Her mood and personality is much more reserved than it was prior to the accident.

[68] The plaintiff and Mr. Bowles share the cooking responsibilities but he does most of the housework. He hires cleaning ladies approximately once per month to do the heavier cleaning, for which he pays $100.

[69] Mr. Bowles also confirmed the plaintiff’s driving anxieties.

Dr. Gerhard Verster

[70] Dr. Verster has been the plaintiff’s family physician since 2004. He has been a general medical practitioner for 28 years, both in Canada and in his native South Africa. He testified regarding his examinations of the plaintiff after the accident. He was also qualified as an expert in general family medical practice.

[71] Coincidentally, Dr. Verster was driving along Highway 97 shortly after the accident and witnessed the physical damage to the vehicles. He learned that the plaintiff was one of the drivers involved when she saw him approximately six days later on July 14, 2009.

[72] During that first consultation, the plaintiff complained of severe pain in her shoulders, neck and lower back, as well as constant headaches. She also reported experiencing abdominal pain. An ultra sound revealed nothing abnormal with her abdomen.

[73] During the period July 14, 2009 to April 18, 2013, Dr. Verster saw the plaintiff 25 times. Most if not all of these consultations were to deal with her accident-related injuries. Occasionally, the plaintiff reported

improvement in some aspects of her pain and/or range of motion. However, during subsequent consultations she reported that her pain had returned. Her pain and range of motion varied from consultation to consultation depending upon what the plaintiff had been doing physically.

[74] Dr. Verster prescribed various pain relief medicines and muscle relaxants. Those prescriptions did not help the plaintiff. He also recommended that the plaintiff see a physiotherapist and, later a kinesiologist.

[75] In Dr. Verster's opinion, the plaintiff sustained severe soft tissue injuries to her neck, lower back, shoulders, knees and hips as a result of the accident. He believes that she may continue to require physiotherapy, massage therapy in the future. He is of the opinion that the plaintiff's condition is gradually improving.

[76] Dr. Verster agreed that active rehabilitation, including muscle strengthening and conditioning programs should help the plaintiff, provided the intensity of her pain allows her to participate in those programs. However, he pointed out that there is no "time-line" for when the majority of soft tissue injury patients recover. Given that the plaintiff still has pain after almost four years, it is Dr. Verster's opinion that the probability of a full recovery has lessened. As he put it, some patients simply do not fully recover despite conditioning and exercise efforts.

Kamila Zloty

[77] Ms. Zloty is an occupational therapist who gave expert evidence, without objection, as part of the plaintiff's case by way of video deposition. She was well spoken, thoughtful, exceptionally knowledgeable and engaging. She was an impressive and refreshingly objective expert witness.

[78] Ms. Zloty's physical capacity evaluation of the plaintiff took place on February 5, 2013. It was thorough and lasted for 6.5 hours. It followed a functional capacity evaluation of the plaintiff on February 1, 2013 conducted by Robert Gander, an expert for the defendants, an examination on February 4, 2013 by the defendant's physiatrist expert, Dr. Reebye, and an examination on February 5, 2013 by the plaintiff's physiatrist expert, Dr. Paramonoff.

[79] The plaintiff gave Ms. Zloty "full and consistent effort" during the evaluation and provided to Ms. Zloty an accurate representation of her physical function at that time. Ms. Zloty was of the opinion that the plaintiff did not embellish her symptoms. If anything, the plaintiff overestimated her capacity for activity.

[80] During the evaluation, the plaintiff did not do well with either work intensive standing or work intensive sitting (although the sitting issues could have been related to her recently fractured tail bone). The plaintiff did not tolerate sustained periods of above-shoulder level reaching.

[81] When it was pointed out to her on cross-examination that Mr. Gander, the occupational therapist retained by the defendants, found the plaintiff was able to effectively perform in all test situations, she pointed to two differences in the respective assessments: one, that Mr. Gander did not perform Valpar 4 testing (which specifically assesses prolonged periods of reaching) and two, the difference between Mr.

Gander's and her assessment could well be attributable to the fact that, by the time Ms. Zloty examined the plaintiff, she had been examined by three other professionals over a four day period which, if anything, reflects the plaintiff's decreased functioning after sustained activities.

[82] In Ms. Zloty's opinion, the plaintiff is employable, with the potential to work in a limited selection of light and medium strength occupations on a part-time or full-time basis. Her physical restrictions for employment relate primarily to any work that requires intensive sitting, reaching, bending, crouching, kneeling, lifting and carrying.

[83] Ms. Zloty is of the opinion that the plaintiff does not meet the requirements necessary for a rock truck driver due to her reaching and strength limitations. In her opinion the plaintiff will not be able to tolerate that job over long periods of time without aggravating her neck and upper back pain. She agreed that attendance at a Wiltech job site to observe the actual rock trucks in operation would have provided her with a better understanding of the specific job function and endurance requirements. She based her assessment on the normal components of driving trucks that come into play.

[84] Ms. Zloty is also of the opinion that, although the plaintiff is not functionally limited in her role as a Certified Education Assistant, she does not meet the full requirements of that job because it requires sitting, possible crouching/kneeling, looking down while working with the student at a desk, some components of bending to reach for school material and quick responsiveness to the needs of students. As she put it:

> ... when you're talking about someone's ability to work, it's not just whether or not they can work day in and day out. It's also whether or not they're comfortable working, whether or not they're able to work productively, whether they're able to do all the different requirements of their job as well.

The plaintiff is able to do the job, but with discomfort and pain.

[85] Ms. Zloty agreed on cross-examination that future improvement in the plaintiff's symptoms may result in an increase in her capacity to function in a job environment. She also agreed that the plaintiff is currently "deconditioned" and that it is possible a graduated return to work program would allow her to resume her previous job as a rock truck driver, provided the employer was prepared to accommodate such a program.

[86] I have no hesitation in accepting Ms. Zloty's opinion evidence in its entirety.

Kevin Turnbull

[87] Mr. Turnbull is an economist who provided expert evidence regarding the plaintiff's lost earnings and cost of future care claims. The defendants agreed that he was qualified to do so. His report dated March 1, 2013, went into evidence without objection.

[88] Mr. Turnbull's future care costs report was essentially comprised of mathematical calculations to help guide the Court in the event that it awarded such costs. He pointed out that any award for future care costs should be grossed-up to offset any income taxes that will be incurred on the investment income earned.

[89] Mr. Turnbull agreed on cross-examination that the information he had received regarding wage loss

was somewhat limited and that a more complete history of the plaintiff's earnings would have been helpful. However, the information he received, though limited, was focused on Wiltech and in his opinion was more useful than statistical averages would have been.

[90] Mr. Turnbull's calculation of past wage loss totalled $108,937. He based his calculation on the following:

a) the plaintiff's 2008 earnings were 85% of those of Mr. Van Exan who essentially did the same job. He therefore assumed that the plaintiff's 2009 (the accident occurred on July 8, 2009) earnings would have been 85% of those of the same co-worker;

b) for 2010, 2011 and 2012, he used the average of the highest incomes of Mr. Van Exan and one or two other co-workers (depending on the year) on the basis that the plaintiff, by then, would have had the same capacity to earn as the other Wiltech employees. For 2012 he included 80% of that average due to the plaintiff's pregnancy; and

c) all actual income, including EI payments, but not including Wiltech gift payments, were subtracted as were the income taxes and EI premiums that would otherwise been paid.

[91] Mr. Turnbull agreed on cross-examination that any EI benefits received by the plaintiff during the summer of 2011 and 2012 would reduce the loss and should be deducted from this calculation.

[92] Mr. Turnbull's calculation of future wage loss totals $560,701. He based that calculation on the following:

a) a base-line annual income of $56,757, based upon an average of what the plaintiff would have earned for 2009 through 2012 had she not become pregnant;

b) a graduated return to work at Wiltech after her pregnancy of two days per week during 2013 to 2015; three days per week during 2016 to 2018; four days per week during 2019 to 2021 and full time from 2022 to 2051 when she will turn 65;

c) subtraction of projected actual earnings from the plaintiff's Certified Education Assistant position with the School District , 25 hours per week, 52 weeks per year;

d) a discount rate of 2.5% per annum and adjustments for the plaintiff's probability of survival, assuming normal life expectancy, based upon mortality statistics for Canadian females of her age as published by Statistics Canada; and

e) there was no deduction for contingencies associated with early retirement, unemployment or inability to work due to accident or future pregnancy.

[93] Mr. Turnbull was a thoughtful and thorough expert witness who provided a fair and objective basis for his calculations.

Dr. Catherine Paramonoff

[94] Dr. Paramonoff is a physical medicine and rehabilitation specialist (physiatrist). She was qualified without debate as an expert in the field of physical medicine and rehabilitation.

[95] Dr. Paramonoff examined the plaintiff on two occasions: September 24, 2010 and February 5, 2013. Her examination on each occasion was thorough. Her reports set out her findings and opinions. They are detailed and dated the same date as the respective examinations.

[96] The plaintiff's reported levels of pain in her neck, shoulders and back improved slightly between Dr. Paramonoff's first and second examination. By February 2013, the plaintiff's neck extension range of motion had resolved. There was some improvement in neck flexion. There was a mild decrease in neck bending to the right, although neck bending to the left had generally improved. The plaintiff's back flexion showed some improvement but back extension showed no improvement.

[97] In Dr. Paramonoff's opinion, the plaintiff sustained soft tissue injuries as a result of the accident that have yet to fully resolve. The subsequent decreased level of physical activity due to the resulting pain caused a deconditioning of and muscle imbalance within her body which is contributing to the plaintiff's ongoing pain symptoms. The plaintiff is and will continue to be able to function, but with pain. The plaintiff's pregnancy has likely prolonged her recovery.

[98] Dr. Paramonoff opines that there are no medical restrictions to the physical activities that the plaintiff may participate in and that she will be better able to tolerate her activities with strengthening and reconditioning. Dr. Paramonoff recommends up to 18 sessions of physiotherapy to help guide the plaintiff towards an independent exercise program for her to carry out on her own over the long term.

[99] Dr. Paramonoff's prognosis is that the plaintiff will likely improve, both symptomatically and functionally. However, the plaintiff will continue to have residual symptoms and consequential pain as a result of the accident. In her opinion, the plaintiff is unlikely to ever fully recover and will simply have to learn to manage her pain, which will likely continue to flare up from time to time.

[100] Dr. Paramonoff was an impressive witness. I accept her opinion evidence in its entirety.

Robert Gander

[101] As noted above, Mr. Gander is an occupational therapist. He was qualified without debate as an expert in his field.

[102] He performed a full-day functional capacity evaluation of the plaintiff for the defendants on February 1, 2013. His expert report is dated February 25, 2013. It is thorough as well.

[103] Throughout the examination the plaintiff exerted consistently high physical effort levels and behaved in a manner consistent with a person who was interested in doing well. Mr. Gander was of the view that there was no basis for questioning the reliability of her subjective reports or the test results.

[104] Mr. Gander observed that, throughout the day, the plaintiff was able to fully and effectively reach forward and overhead. She demonstrated normal grip strength and fingering movements. She met the reference standard for full body range of motion. During some of the testing, the plaintiff requested and was permitted accommodations in terms of how she performed some of the tasks. The plaintiff was able to dependably and safely lift weights of 30 pounds on both an occasional and frequent basis.

[105] Mr. Gander found that the plaintiff was able to function but became fatigued which, in his opinion, was a reasonably accurate and reliable indicator of her actual functional capacity.

[106] Mr. Gander did not perform an on-site evaluation of the demands of a rock truck driver for Wiltech. Instead, he used American and Canadian published handbooks that rate the job requirements in various occupations, including dump truck drivers. He equated the physical demands of a dump truck driver to those of a rock truck driver. They included “medium strength force application”, “frequent reaching and handling” and “being physically able to endure the strain of driving for long time periods with limited rest stops”.

[107] In Mr. Gander’s opinion, the plaintiff does not currently possess sufficient neck/trunk positioning capacity to effectively manage the entirety of her pre-accident job demands on a dependable basis. However, he is also of the opinion that the plaintiff’s strength capacity meets the majority of that job’s strength demands.

[108] Mr. Gander is also of the opinion that the plaintiff is capable of performing typical household management and homemaking endeavours, although those activities may have to be “paced”. He did not comment on whether the plaintiff would “pay the price” with increased pain.

[109] Mr. Gander’s opinion did not differ substantially from that of Ms. Zloty.

[110] Mr. Gander was a credible and helpful expert witness.

Dr. N.K. Reebye

[111] Dr. Reebye is a physiatrist who examined the plaintiff on behalf of the defendants on February 4, 2013. The appointment lasted approximately three hours, 20 minutes of which were devoted to a physical examination. The balance of the time was used to obtain from the plaintiff’s a detailed account of her history. He found the plaintiff to be “a very straight forward young lady” and had no reason to disbelieve what she told him.

[112] Dr. Reebye has impressive credentials and was qualified as an expert in Physical Medicine and Rehabilitation without debate.

[113] Dr. Reebye’s diagnosis is that the plaintiff likely suffered mild to moderate soft tissue injuries as a result of the accident. Although he is of the opinion that these injuries have objectively healed without complication, he nevertheless agreed that the plaintiff’s pain is likely still present.

[114] According to Dr. Reebye, the anxiety that the plaintiff is experiencing about driving is quite common in

serious car accident victims. Her driving anxiety did not surprise him.

[115] Dr. Reebye agreed that the longer a patient's pain symptoms last, the worse the prognosis for full recovery. He agreed that if pain symptoms are present for more than two years after a motor vehicle accident, those symptoms are far less likely to completely resolve. However, in the plaintiff's case, he is of the opinion that, because she is still young and active, her prognosis remains "good" even though her symptoms have persisted for more than three years.

[116] Dr. Reebye recognized that the plaintiff's pre-accident employment as a rock truck driver was "very physically demanding" and that she could not have been expected to return to such a job immediately after maternity leave. However, he is of the opinion that the plaintiff will be able to gradually return to that position as her ability to tolerate residual pain improves.

[117] Dr. Reebye's opinion did not differ substantially from that of Drs. Paramonoff and Verster. To the extent there is a difference, it is that Dr. Reebye is more optimistic the plaintiff will recover significantly.

[118] Dr. Reebye is of the opinion that the physiotherapy and kinesiology treatments the plaintiff received were appropriate.

Mark A. Gosling

[119] Mr. Gosling is an economist who testified as a rebuttal expert on behalf of the defendants with respect to the expert opinion of Mr. Turnbull. He was qualified to critique and opine on income loss (past and future) calculations and projections as well as the cost of future care multipliers that were provided by Mr. Turnbull.

[120] One of Mr. Gosling's main criticisms of Mr. Turnbull's calculations is that he made no adjustment for applicable labour market contingencies such as unemployment and other reasons the plaintiff might withdraw from the labour force. Mr. Gosling was of the view that the application of those contingencies will reduce the plaintiff's loss of income estimate by 28%.

[121] He also criticized Mr. Turnbull's use of post-accident former co-worker earnings to assess the plaintiff's future wage loss because those co-workers were male. This comparison was inappropriate because the plaintiff now has child care responsibilities and there had been no analysis of the age of those co-workers, their seniority or their skill level.

[122] Mr. Gosling provided the court with various alternative income projections and loss calculations. He calculated the plaintiff's pre-trial loss of income to be $82,100 if her gift income is not included as income and $66,200 if her gift income is included as income. He calculated the plaintiff's future income loss to be $179,700 (if she continues working as a Certified Education Assistant) and $70,900 if she returns to working as a truck driver at Wiltech. For the latter eventuality, he assumed a 10% earnings impairment due to her injuries.

[123] Mr. Gosling was of the opinion that Mr. Turnbull's estimate of the plaintiff's post-accident income was underestimated if the plaintiff is capable of working more than 25 hours per week.

[124] Mr. Gosling agreed with the future care cost multipliers used by Mr. Turnbull.

C. Analysis

a) Non-Pecuniary Damages

[125] The assessment of non-pecuniary damages in each case is decided on its unique facts. It is, however, helpful to consider other cases with similar factual circumstances for guidance when determining the appropriate award.

[126] Counsel for the plaintiff submits that non-pecuniary damages in the range of $80,000 to $100,000 should be awarded in this case. He relies on the following decisions in support of this submission:

1. *Olson v. Ironside,* 2012 BCSC 546 ($100,000);
2. *Murphy v. Jagerhofer,* 2009 BCSC 335 ($100,000); and
3. *Foran v. Nguyen*, 2006 BCSC 605 ($90,000).

[127] In *Olson,* the plaintiff was 19 years old when she was injured in a motor vehicle accident. The accident prevented her from continuing a healthy, active and outgoing life style. She suffered soft tissue injuries to her back and neck along with headaches, anxiety and depression. She also continued to suffer from chronic cervicogenic headaches on a daily basis, exacerbation of pre-existing migraines, post-traumatic thoracic outlet syndrome, chronic sleep disruption, major depression (in remission at trial), post-traumatic stress disorder (in partial remission at trial) and permanent right temporomandibular joint dysfunction. Like the plaintiff here, she was unable to perform restaurant work, due to her physical limitations. The court awarded $100,000 for her non-pecuniary damages.

[128] In *Murphy*, the 36 year old plaintiff sustained soft tissue injuries in a rear end collision. He also suffered from headaches and neck and back pain. Some effects of the accident had not resolved and would continue into the future. The court awarded non-pecuniary damages of $100,000.

[129] In *Foran*, the plaintiff suffered chronic pain in her neck and the right side of her upper back. In addition, she had chronic daily headaches. Although some of her symptoms had improved, it was probable that she would continue to experience these problems. As well as losing sleep, feeling constantly fatigued and gaining weight, there was an increased risk of re-injury. The court awarded her $90,000.

[130] The defendants submit that an appropriate award for non-pecuniary damages in this case is $45,000. They rely on the following decisions:

1. *Hill v. Durham*, 2009 BCSC 1480 ($40,000);
2. *Stone v. Kirkwood*, 2008 BCSC 1295 ($40,000)
3. *Chinguangco v. Herback*, 2013 BCSC 268 ($45,000)
4. *Peck v. Peck*, 2012 BCSC 1617 ($45,000)
5. *Iliopoulous v. Abbinante,* 2008 BCSC 336 ($50,000); and
6. *Thauli v. Gill*, 2009 BCSC 1929 ($50,000)

[131] In *Hill*, the plaintiff was 44 years old at the time of the accident and three years had passed by the time of trial. She was an active person before the accident. She had worked briefly as a heavy equipment operator before entering the service industry, eventually gaining a sales management position with a hotel, travelling between 12 and 14 times a year for its promotion. The plaintiff's only health problem of note before the accident was difficulty with her knees. After the accident, Ms. Hill experienced headaches and soreness in her back, which interfered with her ability to sleep. She also suffered from pain in her right knee, which the court found was attributable to the accident. The court held that the plaintiff had sustained a moderate soft tissue injury that caused her significant pain in the first six months. Her condition was likely to improve, with the exception of her right knee injury.

[132] In *Stone*, the plaintiff was 25 years old at the time of the accident. He suffered a flexion extension injury to the soft tissue in his neck, back and shoulder, which was moderate in nature. Demanding activities would cause him significant pain. The court accepted the plaintiff's evidence that his previous back injury only caused him intermittent plain.

[133] In *Chingcuangco*, the plaintiff was 25 years old at the time of the accident. She developed debilitating pain in her neck and lower back as well as headaches. She also sustained bruising to her chest and abdomen, pain in a right foot toe and a chipped tooth. While the bruising and toe pain resolved relatively quickly, her lower back pain persisted with flare ups as well as tension headaches, continuing to the time of trial four years later. It was determined that she would be fully recovered within the following year.

[134] In *Peck*, the plaintiff was in university at the time she was involved in a motor vehicle accident. She sustained moderate injuries, suffering from continuing neck and shoulder pain, headaches as well as anxiety. She experienced limitation in her ability to engage in her former recreational activities. The court found that she was not physically disabled and that she should get better over time. The court also found that while the trauma of the accident caused her anxiety, her prognosis was less guarded than estimated by consulting therapists. Her description of her discomfort was at odds with her level of activity.

[135] In *Iliopoulous*, the plaintiff was in two accidents within one year of one another. At the time, she was a 45 year old mother of four teenagers and the sole income earner of the home. She brought an action against the driver of the motor vehicle that caused the first accident, alleging she suffered soft tissue injuries that persisted and were likely permanent in nature and that the second accident had only aggravated those injuries for a two-week period. At the time of trial, the plaintiff complained of pain in her right hip radiating through her waist and lower back, tingling and, similar to the plaintiff in this case, anxiety while driving. The court found the plaintiff had sustained significant soft tissue injuries in the first collision and that the second collision had only briefly aggravated her condition. Her chronic pain was unlikely to resolve.

[136] In *Thauli*, the plaintiff was a 24 year old server at a popular restaurant. She was an outgoing and active young woman before the accident. The court found that the plaintiff sustained an injury to her knee, neck and left upper back as well as headaches. The court also found that the pain in her upper left back caused her depression, which was fully resolved within two years of the accident. At the time of trial, she

was still having difficulty with heavier tasks, such as carrying her growing baby. However, the court concluded that her injuries were likely recovered, despite her complaint of pain, and that she required more application in her rehabilitation.

[137] There is no question that the plaintiff's life has changed dramatically as a result of the accident. She went from being a highly active, happy, athletic and social person who engaged in dancing, exercise and many sports to a person who is a substantially less active spectator, has become more irritable, is anxious while in a vehicle and has much less energy. At one point after the accident the plaintiff, in her words, reached "rock bottom". Despite almost four years having elapsed since the accident, she continues to live with and tolerate pain in her neck, shoulders and back as best she can. She still experiences anxiety when she is in a vehicle.

[138] Both Dr. Paramonoff and Dr. Reebye agree the plaintiff will need to manage her injuries (over the long term, if not for the rest of her life) by active exercise one hour a day, at least five days a week. Even with such a regime, in Dr. Paramonoff's opinion, she will likely continue to have flares of pain from time to time.

[139] After considering all of the evidence, I find that the plaintiff suffered moderate soft tissue injuries to her neck, shoulders and back. Although there is insufficient evidence to support a finding that she also suffered a mild concussion, she did experience a brief period of unconsciousness immediately after the accident and vomiting for approximately one month thereafter. I also accept that she continues to suffer from pain and anxiety.

[140] I find that an appropriate award for non-pecuniary damages in this case is $60,000.

b) Past Loss of Income

[141] I find that, but for the accident, the plaintiff would have continued to work at Wiltech as she had in previous years.

[142] The plaintiff's pre-accident earnings, including EI benefits (during Wiltech's off season) were $38,317 in 2007, $52,715 in 2008 (which was 85% of what Mr. Van Exan earned that year) and $20,164 in 2009 from March to the date of the accident on July 8, 2009.

[143] I disagree with counsel for the defendants that the plaintiff's average earnings from 2007 to 2009 should be used. In 2008, the plaintiff earned $50,000 working full time at Wiltech and received $2,715 in EI benefits. There is no evidentiary reason for finding that the plaintiff would not have continued to have increased her earnings into the future.

[144] I find it is more probable than not that (a) the plaintiff would have earned approximately $54,744 (85% of Mr. Van Exan's earnings of $64,405) in 2009 ($54,744) and (b) thereafter, the plaintiff would have had the same capacity to earn as other Wiltech rock truck operators doing the same job as the plaintiff was doing prior to the accident.

[145] I accept Mr. Turnbull's projections of what the plaintiff's gross post-accident earnings to trial would

likely have been but for the accident ($206,413). I also accept his calculations of the plaintiff's gross actual earnings during that period ($63,976) and his resulting calculation of total net loss equal to $108,937, net of income taxes and employment insurance premiums that would have been paid by the plaintiff on her lost income.

[146] However, it is clear on the evidence that the money the plaintiff received from Wiltech in 2010 and 2011 ($18,044) would not have been received had the accident not occurred and had she continued working as a truck driver for Wiltech. That amount must be deducted from Mr. Turnbull's net loss calculations.

[147] Accordingly, the plaintiff is entitled to an award for past wage loss of $90,893.

c) Loss of Future Income Earning Capacity

[148] The burden of proof to be applied to future or hypothetical events has been discussed by our Court of Appeal in several cases.

[149] In *Parypa v. Wickware,* 1999 BCCA 88 the Court of Appeal stated:

> [65] Then how shall we determine the extent of the damage? What certainties, probabilities or possibilities must the plaintiff demonstrate in order for the court to conclude there has been damage to the plaintiff's earning capacity? This issue was addressed in Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 (C.A.). In Steenblok, the trial judge dismissed the plaintiff's claim for damages for loss of future earning capacity, finding that the plaintiff had failed to show on a balance of probabilities, that his chronic pain from a soft tissue injury to his neck and upper back was irreversible. Hutcheon J.A. allowed the appeal, awarded $150,000 for loss of future earning capacity, and commented on the applicable burden of proof. He said at 135:
>
> > I think that placed upon the plaintiff an unduly high burden in the proof of future loss of earning capacity. I shall return to a discussion of the burden on a plaintiff in respect of future events. It is sufficient at this point to state the proposition of law that in dealing with future loss substantial possibilities must be considered by estimating the chance of the event occurring and that the balance of probabilities is confined to determining what did in fact happen in the past. That is the law, as I understand it, decided in Kovats v. Ogilvie, [1971] 1 W.W.R. 561, 17 D.L.R. (3d) 343 (B.C.C.A.); Schrump v. Koot (1977), 18 O.R. (2d) 337, 4 C.C.L.T. 74, 82 D.L.R. (3d) 553 (C.A.); and Janiak v. Ippolito, [1985] 1 S.C.R. 146, 31 C.C.L.T. 113, 16 D.L.R. (4th) 1, 9 O.A.C. 1, 57 N.R. 241. The proposition is based on language taken from those three cases.

[150] More recently, the Court of Appeal in *Moore v. Brown,* 2010 BCCA 419 said:

> [40] As was noted in *Rosvold (Rosvold v. Dunlop,* 2001 BCCA 1, 84 B.C.L.R. (3d) 158) at para. 9, the capital asset approach requires an evaluation of hypothetical events that may affect the award based on simple probability, not on a balance of probabilities. In *Athey v. Leonati,* [1996] 3 S.C.R. 458, Major J. explained the applicable principles, commencing at para. 27:
>
> > 27. Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are simply given weight according to their relative likelihood: *Mallett v. McMonagle*, [1970] A.C. 166 (H.L.); *Malec v. J. C. Hutton Proprietary Ltd.* (1990), 169 C.L.R. 638 (Aust. H.C.); *Janiak v. Ippolito*, [1985] 1 S.C.R. 146. For example, if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken

> into consideration as long as it is a real and substantial possibility and not mere speculation: *Schrump v. Koot* (1977), 18 O.R. (2d) 337 (C.A.); *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).
>
> ***
>
> 29 This point was expressed by Lord Diplock in *Mallett v. McMonagle*, *supra*, at p. 176:
>
> > The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[151] Other British Columbia cases that have applied the same burden of proof: see *Perren v. Lalari*, 2010 BCCA 140 at para. 32 and *Drodge v. Kozak*, 2011 BCSC 1316 at para. 147. The plaintiff must demonstrate both impairment to her earning capacity and a substantial possibility that the impairment will result in a pecuniary loss. As noted, it is open to the Court to either increase or reduce the damages award based on the percentage chance that the plaintiff's condition will worsen or improve.

[152] In determining the extent of loss of earning capacity I must take into account all substantial possibilities and give them the appropriate weight in relation to how likely there are to occur: *Parypa,* at para. 67. As well, I must consider the plaintiff's ongoing duty to mitigate.

[153] Prior to the accident, the plaintiff was not simply working in the regular labour market as truck driver employed by another business without further opportunity. She was working for a family company - one that her family had operated for at least three generations. She was hard working and respected within the company. I find that, but for the accident, she would have likely continued working for Wiltech and, over time, advanced within the company. I find it is more probable than not that she would have ultimately taken over the running of the company with her siblings upon her parents' retirement.

[154] Instead, she became a Certified Education Assistant. That was not by choice. It was an alternative career she turned to after she was no longer able to work at Wiltech due to her accident-related injuries.

[155] I agree with counsel for the plaintiff that, as a result of the accident, she is less capable overall of earning income and less marketable as an employee. She has lost the ability to take advantage of any physically heavy or medium requirement job opportunities.

[156] The impairment of her capacity to earn income is not just the difference between what she would be earning as a rock truck driver and what she is now earning as a Certified Education Assistant. Her capacity to earn income from all sources has been impaired, as was evidenced by her inability to work as a waitress: *Parypa* at paras. 30 and 32.

[157] Despite her ongoing challenges, the plaintiff remains dedicated to doing what she can to get better

within the limitations she faces. I have no doubt that she will continue to strive beyond these limitations and will, in time, improve. Both Ms. Zloty and Mr. Gander are of the opinion that, currently, the plaintiff is not functionally limited from working as a Certified Education Assistant. However, she will not be able to function without suffering from pain. There is certainly the potential for the plaintiff returning to Wiltech in the future, if not in operations then in a management capacity. Regardless, I find that that there is a substantial possibility she will continue to be affected by her accident-related pain regardless of her vocation.

[158] I find that had the accident not occurred and had the plaintiff become pregnant as she did in 2012, she is the kind of person who would have adapted and found a way to continue working at Wiltech. I make this finding despite her evidence that her father expected his employees to work full time. Such is the reality of being part of a family business, particularly in circumstances where that business is as integral as it was to the plaintiff's life.

[159] Mr. Turnbull's calculation of the net present value of the plaintiff's gross future loss of earnings, to age 65, taking into account probability of survival statistics, is $560,701. The calculations assume a fixed base-line annual income of $56,573. They also assume that, after her pregnancy, the plaintiff would have returned to work at Wiltech two days per week for the first three years, three days per week for the next three years, four days per week for the next three years and full time thereafter to the age of 65. His calculations assume actual annual earnings of $27,586 from her job as a Certified Education Assistant. There is no evidence that more than 25 hours per week will be available to the plaintiff in that job. I also note that none of his calculations take into account potential increases in earnings from cost of living or the realistic possibility of future training on other pieces of equipment or management responsibilities at Wiltech. In my view, Mr. Turnbull's calculations are conservative.

[160] In contrast, Mr. Gosling's loss of future earnings calculations focus on broad statistical data for B.C. truck drivers and include only negative contingencies, such as potential unemployment and the likelihood of a female leaving the work force. In my view, it is not appropriate in the case of employment in a family company to use statistical average contingencies.

[161] Mr. Gosling's calculations assumed that the plaintiff had worked at Wiltech in 2009 from January 1 to July 8. He was unaware that Wiltech does not operate during the winter months and that the plaintiff did not start work that year until March. He used statistical labour market contingencies which did not take into consideration that the plaintiff likely had a greater attachment to the workforce because her job was in the family business, or that unemployment at Wiltech was less likely than the statistical average or the opportunities available to the plaintiff in the management of the family business.

[162] I prefer Mr. Turnbull's approach.

[163] However, I find that there is a 50% chance the plaintiff will return to Wiltech at some point in her working life. Accordingly, I find that an appropriate award for her loss of future earning capacity is $280,000.

d) Cost of Future Care

[164] The plaintiff has the onus of establishing that the future care costs are reasonably necessary based upon medical evidence to promote her mental and physical health: *Milina v. Bartsch*, (1985), 49 B.C.L.R. (2d) 33 (S.C.) (affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.)) at page 78.

[165] The plaintiff claims the following costs for future care:

a) 18 physiotherapy sessions at $60 per session	$1,080.00
b) 12 massages per year at $98 per massage	$1,176.00
c) gym membership at $500 per year	$500.00
d) yoga costs per year	$1,200.00
e) five counseling sessions at $100 each	$500.00

[166] Her claimed one-time expenses (physiotherapy and counseling) total $1,580.00. Her claimed annual expenses total $2,876.00. The plaintiff says there will be other periodic expenses such as new heating pads and occasional over-the-counter medication. Using Mr. Turnbull's multiplier (column 8, table 1) to age 65, her claimed expenses total $60,675 (21,097/1,000 = 21.097 x $2,876 = $60,675}.

[167] The defendants acknowledge that the plaintiff will require the strengthening and conditioning that has been recommended by the medical experts. However, they say that a reasonable rehabilitation program will only occupy six months of full time attendance and that, thereafter, she should be able to return to work at Wiltech as a rock truck driver. On that assumption, they say that the plaintiff should be entitled to recover a loss of six months of earnings adjusted for her working only two days per week on a graduated return to work program, or $9,978.20.

[168] There is no evidentiary basis for the proposition that the plaintiff will become fully rehabilitated after attending a program for six months full time. Dr. Reebye expects that the plaintiff will improve her condition by participating in a rehabilitation and conditioning program for several months. He stated that "relaxation techniques, breathing exercises, yoga, meditation and other natural methods will be helpful. However, if her symptoms do not improve it is better for her to have a brief period of counselling and/or the use of medications to help improve her (sic) normalize her emotional upsets". He also stated she will benefit from active exercises, including stretching and strengthening exercises, breathing techniques, walking and core strengthening.

[169] On the other hand, Dr. Paramonoff opined:

> I continue to recommend Ms. Dobbin be referred to a physiotherapist; with a focus now (given the symptom improvement since I last saw her) on guiding Ms. Dobbin with implementing an independent exercise program for strengthening and conditioning (to address the deconditioning and muscle imbalance); up to 18 sessions are recommended, including checking in over the next approximately 6 months to guide the exercise progression. I recommend Ms. Dobbin carry out a regular, independent exercise program, gradually building up, ideally to 5 days a week, of one hour each time, and continue with this over the long term, to manage residual symptoms over the long term.

[170] I am persuaded that Dr. Paramonoff's opinion concerning the plaintiff's future treatment needs is more

probable than that of Dr. Reebye. However, I am not persuaded that the plaintiff's claim for a gym membership or yoga costs is justified beyond five years. I am also persuaded that the plaintiff will not require massage treatments for her accident-related injuries beyond ten years.

[171] The plaintiff is entitled to her claimed one-time physiotherapy and counseling expenses totaling $1,580.00

[172] The plaintiff is also entitled to recover annual expenses for a gym membership and yoga classes of $1,700 for five years. The present value of that award (from Mr. Turnbull's Table B) is ($5,225 / $1,000) x $1,700 = $8,882.25.

[173] Finally, the plaintiff is entitled to recover annual expenses for 12 massages amounting to $1,176.00 for ten years. The present value of that award, in 2013 (also from Mr. Turnbull's Table B) for ten years is ($9,307 / $1000) x $1,176 = $10,945.03.

[174] Accordingly, the plaintiff is entitled to an award for her cost of future care of $21,407.28.

e) Diminished Housekeeping Capacity

[175] The plaintiff argues that she has been and continues to be unable to do her housekeeping chores.

[176] In *Jones v. Davenport*, 2008 BCSC 18, Mr. Justice Halfyard stated, at para. 92 that the plaintiff must:

> …establish a real and substantial possibility that she will continue in the future to be unable to perform all of her usual and necessary household work. It would also need to be shown that the work that she will not be able to do will require her to pay someone else to do, or require others to do it for her gratuitously.

[177] The plaintiff's evidence is that it takes her much longer to do her household chores than it did before the accident. She has to "pace" herself, often having to rest between chores or stagger them day to day. Mr. Bowles does much of the housework and, unbeknownst to the plaintiff until recently, had hired a cleaning service to clean the house approximately once per month, at a cost to him of $100 per visit.

[178] I am persuaded that there is a real and substantial possibility the plaintiff will be unable to perform all of her usual and necessary household work as a result of her past and ongoing accident-related injuries. However, in my view, any award in that respect should be modest given that she has been and continues to be able to do that work, albeit not as efficiently.

[179] I award the plaintiff $1,000.00 for past diminished housekeeping capacity.

[180] I also award the plaintiff an amount based on a future annual housekeeping expense of $500.00 for ten years. Using Mr. Turnbull's Table B, the present value of that award is ($9,307 / $1000) x $500 = $4,653.50.

f) Special Damages

[181] The plaintiff claims the following special damages:

a) Family Wellness Centre Massage	$2,595.00
b) Massage (April 30, 2013)	98.00
c) Kinesiology	2,800.93
d) Physiotherapy	515.00
e) Ambulance (paid by ICBC)	80.00
f) Prescription medication	155.24
g) Blood work	488.15
h) Other medication (estimate)	360.00
i) Heating pad (estimate)	80.00
j) Exercise bands and ball	35.00
k) H20 Centre	798.00
l) Gym	506.00
m) Yoga membership	3,700.00
n) Travel expenses to attend physiatrist	715.00
o) Mileage to attend medical appointments	2,221.25
TOTAL	$15,147.57

[182] The defendants have concerns regarding some of these claims:

a) the $3,700 yoga expense is an unsupported estimate. The plaintiff could not say with any confidence how many yoga classes she had attended. Moreover, yoga was not a modality that was recommended by her doctor. I accept that the plaintiff incurred some additional expense for yoga that she would not have incurred but for the accident. I assess this expense at $2000.00.

b) the mileage expense claim fails to take into consideration the fact that, but for the accident, the plaintiff would have driven to work at Wiltech, the daily commute for which took between seven minutes and one-half hour. In *Bilinski v. Smith*, 1996 CanLII 2821 (B.C.S.C.), Madam Justice Satanove observed:

> The Plaintiff claimed $1,521.00 for the cost of travelling for medical treatment. The Defendants submitted this was more than offset by the savings of the cost of travelling to the Langley office on all these days the Plaintiff never attended work. As I have assessed damages for the Plaintiff's past wage loss without taking into account the amount of money she saved by not travelling to Langley (over $5,000.00), the Defendant's point is well taken.

The defendants say that the mileage for attending medical appointments is offset by her not having to commute to work at Wiltech. I agree.

[183] The plaintiff is entitled to recover special damages in the amount of $11,226.32.

g) Mitigation

[184] The defendants argue that the plaintiff has failed to mitigate her loss. They say the plaintiff's

attendance at her 26 kinesiologist sessions was fairly infrequent (usually once per week and twice per week on only 5 occasions).

[185] The plaintiff ceased her kinesiologist treatments because they increased her pain symptoms. The more active she was, the worse her symptoms became. Since then, the plaintiff has focused on yoga and at-home exercises that the kinesiologist recommended. The defendants submit that the plaintiff's failure to continue her kinesiologist sessions was unreasonable. They submit that the plaintiff's award for non-pecuniary damages should be reduced by 25%.

[186] It is trite law that the defendants bear the onus of proof that the plaintiff failed to take reasonable steps to mitigate her loss: *Hsu v. Williams*, 2011 BCSC 1412, at para. 42. In my view, there is no evidentiary basis for a finding that the plaintiff has failed to mitigate her damages. Throughout, she has been motivated to get better. To the extent that she did not follow a particular rehabilitation and conditioning time-table, it was because of either her pregnancy or her accident-related pain. As Dr. Paramonoff put it, she is able to function in her daily life but with pain and will have to adapt accordingly. That is precisely what she has done and continues to do.

D. Conclusion

[187] The plaintiff is entitled to judgment against the defendants in the following amounts:

Non-pecuniary damages	$60,000.00
Past Wage Loss	90,893.00
Loss of Future Earning Capacity	280,000.00
Cost of Future Care	21,407.28
Diminished Housekeeping Capacity	5,653.50
Special Damages	11,226.32
TOTAL	$469,180.10

[188] The awards for loss of future earning capacity, cost of future care and future diminished housekeeping capacity will have to be grossed up to account for income taxes on investment income earned from the award.

[189] The plaintiff is entitled to recover her costs at Scale B. If the parties are unable to agree on costs, they are at liberty to apply.

"Weatherill J."