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## Document(1)

1. [Johal v. Radek, \[2016\] B.C.J. No. 527](#)

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◆ [Johal v. Radek, \[2016\] B.C.J. No. 527](#)

British Columbia and Yukon Judgments

British Columbia Supreme Court  
Vancouver, British Columbia  
P.G. Voith J.

Heard: February 15-19, 2016.

Judgment: March 16, 2016.

Docket: M157034

Registry: New Westminster

**[2016] B.C.J. No. 527** | 2016 BCSC 454

Between Kulwant Kaur Johal, Plaintiff, and Rachel Radek, Katherine Joyce Keras, also known as Katherine Keras, Katherine Joyce Keras d.b.a. Traffic Pro Services also known as Pro-Safe Traffic Service, Ted W. Astells, Ted W. Astells d.b.a. Traffic Pro Services also known as Pro-Safe Traffic Service and West-Can Leasing Ltd., Defendants

(87 paras.)

### **Case Summary**

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**Damages — Physical and psychological injuries — Physical injuries — Body injuries — Soft tissue — Considerations impacting on award — Degree of impairment — Age of claimant — Action by plaintiff for personal injury damages allowed — Plaintiff, now age 70, was injured in 2012 motor vehicle accident — Between 2012 and 2015 she complained of pain in her neck, thoracic and lumbar spine, shoulders, and head, in addition to anxiety and sleep issues — Plaintiff's symptoms abated with time, allowing return to work as janitor — Injuries caused by accident rather than aging — Plaintiff awarded \$60,000 for non-pecuniary loss, \$31,037 for past wage loss, \$7,500 for loss of earning capacity, \$5,000 for costs of future care, and \$1,959 for special damages.**

**Damages — Types of damages — General damages — For personal injuries — Considerations — Duration of loss — Employment status — Extent of incapacity — Cost of future care — Loss of earning capacity — Special damages — Non-pecuniary loss — Action by plaintiff for personal injury damages allowed — Plaintiff, now age 70, was injured in 2012 motor vehicle accident — Between 2012 and 2015 she complained**

**of pain in her neck, thoracic and lumbar spine, shoulders, and head, in addition to anxiety and sleep issues — Plaintiff's symptoms abated with time, allowing return to work as janitor — Injuries caused by accident rather than aging — Plaintiff awarded \$60,000 for non-pecuniary loss, \$31,037 for past wage loss, \$7,500 for loss of earning capacity, \$5,000 for costs of future care, and \$1,959 for special damages.**

Action By the plaintiff, Johal, against multiple defendants for damages to compensate for personal injuries. In 2012, the plaintiff, now age 70, was involved in a motor vehicle accident with a vehicle owned and operated by the defendants. She was attempting a right turn when her vehicle was struck on the driver's side near the rear wheel by the defendants' pickup truck. Liability was not contested. The plaintiff visited her family physician on multiple occasions between 2012 and 2015 and complained of pain in her neck, thoracic and lumbar spine, shoulders, and head. She also suffered from anxiety. The plaintiff stated that her symptoms persisted to some degree at the time of trial. The plaintiff arrived in Canada in 1972 and worked as a janitor. She had three adult children. Her husband was deceased. The accident caused the plaintiff to miss 11 months of work before returning on a full-time basis. She continued to work in a part-time capacity despite her symptoms. At issue was the extent to which the plaintiff's present limitations were caused by the accident, or were a natural progression due to aging.

HELD: Action allowed.

It was clear that the plaintiff's symptoms significantly resolved or abated with time. She continued to suffer from periodic headaches and from some level of periodic neck, lumbar, and cervical pain, as well as from left shoulder and left arm pain. Her symptoms were exacerbated by heavy work and cold weather. The prognosis for her injuries was unclear. The plaintiff's periodic pain and sleep difficulties were caused by the accident. The plaintiff was awarded \$60,000 for non-pecuniary loss, \$31,037 for past wage loss, \$7,500 for loss of earning capacity, \$5,000 for costs of future care, and \$1,959 for special damages.

## Counsel

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Counsel for the Plaintiff: Rita Sidhu, ***Kavita Mohan***.

Counsel for the Defendants: Cheri Carey, Kuldip Johal.

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## Reasons for Judgment

Arsh Samra

**P.G. VOITH J.****Introduction**

**1** On May 30, 2012, the plaintiff, Ms. Johal, was involved in a motor vehicle accident at the intersection of Westminster Highway and No. 5 Road in Richmond, British Columbia (the "Accident"). Ms. Johal has advanced a claim in which she seeks compensation for the injuries she suffered in the Accident, as well as for the consequences of those injuries.

**Background**

**2** Ms. Johal is presently 70 years old. She moved to Canada with her husband in 1972. She has three adult children, two of whom gave evidence at trial. She has, since her arrival in Canada, worked almost exclusively for two different companies in various janitorial capacities. She has worked for her present employer, The Original Cakerie ("The Cakerie"), since 1997. Following the Accident, she was off of work for approximately 11 months. She thereafter returned to work on a full-time basis and she continues to work in that capacity at the present time.

**3** Her husband died in 2002 and since that time she has generally, though not at all times, lived alone in a large home located in Richmond. She remains very close to both her daughters and their children, and she generally sees each of them several times a week. There was less evidence relating to her son and her relationship with him.

**4** Following the Accident, Ms. Johal saw her family physician, Dr. Wong, and complained to him of pain in her neck, thoracic and lumbar spine, shoulders, and head. She complained of some anxiety. Ms. Johal says that she continues to struggle, to some degree, with most of these symptoms to the present day.

**The Accident**

**5** On the day of the Accident, Ms. Johal was on her way to work. She intended to make a right-hand turn onto Westminster Highway. Her vehicle was struck on the driver's side, near the rear wheel, by a pickup truck driven by the defendant, Ms. Radek. The defendants accept that they are liable for the Accident.

**6** Ms. Johal called her daughter who lives nearby. Her son-in-law was at the scene of the Accident within minutes and helped her out of her vehicle. Both the

police and an ambulance attended at the scene, but Ms. Johal insisted she did not need to go to the hospital. Instead, she was taken to her daughter's home by her son-in-law, Mr. Kondola, who also gave evidence. Her car was then towed away.

**7** Mr. and Mrs. Kondola both said that Ms. Johal seemed shaken when she arrived at their home. She spent the day with them and then went home that evening. She saw Dr. Wong two days later - that being the first day he was available.

**8** The evidence at trial indicated that the estimated damage to Ms. Johal's vehicle was slightly more than \$5,000. Mr. Kondola, who had formerly worked as a tow-truck driver, also said that he could see and feel that the rear wheel on Ms. Johal's vehicle was bent.

### **Credibility**

**9** Ms. Johal was a forthright witness. Her evidence was supported by her daughters and her son-in-law. Much of the evidence of these three latter witnesses was not challenged by the defendants in any meaningful way. Her evidence, as it related to her injuries, was also supported by the records from, and evidence of her physiotherapist, as well as by the records and evidence of Dr. Wong. Still further, the existence of her injuries and the cause of those injuries were supported by the evidence of both Drs. Craig and Rickards, a physiatrist and orthopedic surgeon respectively, who were called by the plaintiff and the defendants respectively.

**10** The defendants challenged various aspects of Ms. Johal's evidence. For example, they questioned the state of her health prior to and shortly after the Accident. They also questioned why she did not return to work at The Cakerie on a graduated return-to-work basis.

**11** The evidence provided by Ms. Johal, in the first instance, on these and other issues, was subsequently supported by the evidence of various third-party witnesses and by various contemporaneous business and other records.

**12** The challenge, in this case, does not arise from any concerns with Ms. Johal's credibility or with the reliability of her evidence. Rather, it arises because it is necessary to distinguish between those changes in Ms. Johal's life that arose subsequent to the Accident that were caused by the Accident, and those changes that reflect the reality of Ms. Johal's age.

## **The Plaintiff's Physical Injuries, Improvement and Prognosis**

### **A) Status of Injuries**

**13** I have described the various injuries that Ms. Johal complained of when she first met with Dr. Wong. Dr. Wong's expert report, which traced Ms. Johal's attendances at his office, revealed that Ms. Johal continued to complain of these same or similar symptoms until November 2013. After the Accident, she initially saw Dr. Wong several times a month. She did so until May 2013. She then saw him every few months until November 2013. Thereafter, she did not see Dr. Wong for any Accident-related symptoms for more than a year. In 2015, she again saw Dr. Wong, three times in relation to complaints about her Accident-related injuries.

**14** Ms. Johal also attended, on Dr. Wong's recommendation, at Back in Motion Physiotherapy ("Back in Motion"), 42 times between June 2012 and February 2013 for physiotherapy and other treatments, as well as to assist her in developing an exercise regime.

**15** The defendants emphasized that Dr. Wong's clinical records and report only refer to Ms. Johal having complained of headaches, a sore neck, and pain in her thoracic and lumbar spine. There is, however, no reference to Ms. Johal identifying pain in her left shoulder and arm - symptoms that Ms. Johal dealt with at length in her evidence at trial.

**16** Dr. Wong explained that he believed Ms. Johal's left shoulder and arm pain was a product of an injury to her neck which, in turn, caused pain to radiate into her shoulder. I accept this evidence. It accords with the evidence of Dr. Rickards. It also accords with the Back in Motion records, and with an early pain diagram that either Ms. Johal completed, or that was completed in consultation with her. Those records and that diagram reveal that Ms. Johal has, from the outset, and relatively consistently thereafter, complained of both neck and back pain, as well as left shoulder and some left arm pain.

**17** Still further, the plaintiff's two daughters and Mr. Kondola reported that Ms. Johal has consistently complained of, *inter alia*, shoulder and arm pain. Again, I accept their evidence.

**18** It is clear that Ms. Johal's various difficulties have significantly resolved or abated with time. This conclusion is partially based on Ms. Johal's evidence. Ms. Johal accepted that each of her headaches, left arm, left shoulder, and back

pain have improved with time. She said she only has pain in her left arm "sometimes". She said that her shoulder pain is worse when she is "tired from work" or when it is cold. The same is true of her back pain. This pain occurs less often and its intensity has diminished. It is now generally associated with heavy work.

**19** Ms. Johal said, however, that she continues to have neck pain of some intensity on a relatively regular basis. Once again, the symptoms are exacerbated by heavy work and fatigue.

**20** Ms. Johal's symptoms have also necessarily improved in light of the reality that she has returned to work on a full-time basis. In addition, she has, for practical purposes, stopped seeing Dr. Wong for her Accident-related injuries. In a similar vein, she no longer seeks physiotherapy, massage, or any other assistance for her injuries.

**21** Ultimately, I accept that Ms. Johal continues to suffer from periodic headaches and from some level of periodic neck, lumbar, and cervical pain, as well as from left shoulder and left arm pain. I further accept that these conditions are made worse by heavy work and that some are exacerbated by cold weather.

### **B) Mechanism of Injury**

**22** There was some disagreement between Drs. Craig and Rickards about the precise nature of Ms. Johal's injuries. There appeared to be some consensus that she has some soft-tissue injuries. Dr. Craig, based on an MRI, also considered that Ms. Johal has a "probable" partial tear in her left rotator cuff that is causing her ongoing shoulder and arm pain. Dr. Rickards, however, though he accepted that a partial tear was apparent on her MRI, considered that the tear is likely a normal part of the aging process. Instead, he considered that Ms. Johal is suffering from a cervical facet joint inflammation that is causing pain to radiate from her neck to her shoulder.

**23** This issue is not important or relevant from a causation perspective. Drs. Craig and Rickards ascribed the partial tear to Ms. Johal's rotator cuff and the cervical facet joint inflammation, respectively, to the Accident. Instead, the issue is relevant because if Ms. Johal is suffering from cervical facet joint inflammation, the prognosis for that inflammation, with treatment, is better than the prognosis for a rotator cuff injury.

**24** This issue is not easily resolved. Both experts were straightforward when giving evidence in support of their respective conclusions. Both referred to various factors that supported their respective conclusions. Both injuries, for example, would be exacerbated by physical work. Dr. Rickards also accepted that both conclusions were potentially correct and that Ms. Johal might suffer from both conditions.

**25** Ultimately, I accept Dr. Craig's conclusions for two reasons. First, Dr. Rickards relied on a chart which illustrated where pain from a cervical facet joint inflammation would normally radiate. The pain from this condition would, for example, radiate to Ms. Johal's left shoulder. It would not, however, radiate to her left arm. I have said that I accept that Ms. Johal has reported left arm pain from an early point in time.

**26** Second, Dr. Rickards opined that if Ms. Johal underwent a serious course of active rehabilitation, together with a course of non-steroidal anti-inflammatories, her injuries would likely resolve in two to four months. Ms. Johal did undergo a relatively extensive course of physical treatment and was given various exercises by the Back in Motion personnel who treated her. Similarly, Ms. Johal has taken anti-inflammatory medications at different times.

**27** While the course of treatment or the exercise regime at the Back in Motion facility was likely not as intensive or focused as Dr. Rickards would recommend, and while Ms. Johal has not taken anti-inflammatory medication on a sustained basis, the reality is that the pain from her injuries, though less severe than at one time, has continued to cause her distress.

### **C) Prognosis**

**28** The prognosis for Ms. Johal's injuries is unclear. I have said I think it unlikely that Ms. Johal's injuries would, as Dr. Rickards suggests, quickly resolve with an active exercise regime and a course of anti-inflammatory medication. Dr. Rickards recognized that injections or other treatments might also be necessary. I do accept the evidence of both Drs. Craig and Rickards that a further, more active exercise regime may further improve Ms. Johal's condition.

**29** Dr. Wong, in his report dated August 31, 2015, under the heading "Prognosis" opined:

Mrs. Johal has mostly recovered from the injuries sustained in the motor vehicle accident of May 30, 2012. She will likely remain symptomatic from her injuries for a further period of six months to one year. She should



not have any permanent sequelae or any future surgery as a result of her injuries.

**30** Dr. Craig, in turn, said in his second report:

As she has managed to return to work, I feel prognosis is favorable that she can continue this work long-term until retirement but prognosis for returning to heavier janitorial work he [sic] is more guarded based on the results of this MRI. She would be at risk of a flare in her shoulder symptoms if she had a heavier period at work. If she fails to respond to the aforementioned treatment options, and her shoulder symptoms become more functionally limiting, then I would recommend orthopedic assessment. If she requires future surgery, she would require up to six months off work plus postoperative rehabilitation.

**31** These latter conclusions appear to align most closely with the evidence and with my own conclusions. Ms. Johal has suffered some level of neck, back, shoulder, and arm pain for more than three-and-a-half years. She has now been at work, on a full-time basis, for nearly three years without interruption or further incident. She has some increased symptoms or increased intensity in her symptoms after work or when she has had a particularly hard day.

**32** Each of Drs. Wong, Craig, and Rickards have indicated that there continues to be some prospect of further improvement in the plaintiff's symptoms with exercise or other therapies, though their respective views on the extent of such improvement vary. I also consider that there is likely to be some improvement in Ms. Johal's symptoms when she ultimately retires. It is clear, as I have said, that her symptoms are exacerbated by the work she does.

**33** Both Dr. Craig and Dr. Rickards also identified degeneration in Ms. Johal's neck that was consistent with the level of degeneration that is common in persons of her age. Dr. Craig considered that Ms. Johal is at a slight risk of accelerated degeneration in her neck due to her injuries from the Accident. I accept that conclusion.

### **Causation**

**34** The defendants spent some time suggesting that Ms. Johal's symptoms or injuries were the product of her having done repetitive physical work over an extended time. There is no evidence of this. The opinions of Drs. Wong, Craig, and Rickards, though they came to different conclusions on the mechanism of

the plaintiff's injuries, are consistent. Each ascribes Ms. Johal's symptoms and difficulties to the Accident.

**35** I am, accordingly, satisfied that each of Ms. Johal's periodic headaches, neck, back, shoulder, and arm pain, as well as her ongoing difficulties with sleep, were caused by the Accident; *Athey v. Leonati*, [\[1996\] 3 S.C.R. 458](#) at paras. 13-19; *Clements v. Clements*, [2012 SCC 32](#) at para. 8; and *Ediger v. Johnston*, [2013 SCC 18](#) at para. 28.

**36** Counsel for the defendants also spent some time seeking to establish that Ms. Johal, post-Accident, had heart concerns, or gastrointestinal concerns, or other difficulties that would have prevented her from working. Ms. Johal denied these suggestions. Her evidence was subsequently supported by Dr. Wong. I accept their evidence on this issue.

### **Non-Pecuniary Loss**

**37** Ms. Johal is an impressive woman. She has worked full time, in physical employment, for more than 40 years. Her daughters explained that their father was only at home, on account of his work, on weekends. Thus, almost all of the various responsibilities associated with raising and caring for her three children and of maintaining the family home, also fell to her.

**38** That home warrants some further description. It is a 4,000 square foot, four-bedroom, four-bathroom structure that is surrounded by a large garden. Before the Accident, that home was maintained by the plaintiff, and its condition was described as "immaculate" by Ms. Johal's daughters and by Mr. Kondola. Ms. Johal also cut the grass. She generally maintained the property, both inside and outside, without assistance.

**39** Still further, Ms. Johal has always taken pride and pleasure in her cooking. She has always cooked both Indian and other foods from "scratch", and enjoyed preparing various elaborate and time-consuming dishes.

**40** She takes great pleasure in her grandchildren. Prior to the Accident, she regularly had them stay with her. She took them to the park and on other outings.

**41** Much of this has changed since the Accident. The question is why. More specifically, to what extent are these changes attributable to the Accident, and to what extent are they attributable to the fact that Ms. Johal is now 70 years old,

and nearly four years older than when the Accident took place. The answer lies somewhere between these two positions.

**42** I start with the observation that Ms. Johal has, in the last five years, had both her knees replaced. She also has diabetes, though that condition is controlled with diet and does not require any medication.

**43** Notwithstanding these facts, Ms. Johal continues to work on a full-time basis doing janitorial work. Periodically, though infrequently, she does overtime work. She cleans bathrooms, offices, the lunch room, and other areas on The Cakerie's premises. She mops and vacuums. She likes both her work and her work colleagues, and she has no present intention of retiring. A senior representative of her employer was called to give evidence. He confirmed that Ms. Johal is regarded positively and that the company is happy with her work. All of this speaks to a high level of ongoing functionality.

**44** Furthermore, the May 2012 report of Dr. Rickards identifies that Ms. Johal walks regularly. Ms. Johal testified that she also does her various exercises and that she rides a stationary bicycle for her knees.

**45** It is not surprising that, quite apart from the Accident, Ms. Johal might slow down somewhat and moderate her activities. That this might be so was apparent in various ways. For example, Ms. Johal has, since the Accident, had third parties or her son-in-law, care for her lawn and clean her gutters. Nevertheless, no claim is advanced on behalf of Ms. Johal for the future cost of these activities, in recognition of the fact that such physical tasks inevitably become more difficult and less realistic with increasing age.

**46** In a similar vein, Ms. Johal had listed her home for sale in May 2013, though that listing was later withdrawn, in recognition of the fact that the home was more than she needed and required significant effort to maintain.

**47** Still further, the evidence relating to Ms. Johal's diminished efforts to maintain or clean her home was relatively modest and should be put in context. There was reference to "dust" now being apparent when that would not have been the case before. Similarly, there might now be "water spots" on the mirrors above the sink when that would not have happened prior to the Accident. Mr. Kondola described the present state of the plaintiff's home as "average".

**48** Having said this, I accept that, at the end of a workday, Ms. Johal now sometimes has pain that inhibits her ability to maintain her home. I further

accept that the pain in her shoulders and arms will inhibit her ability or wish to cook or bake. Still further, I accept, based on her evidence and the evidence of her daughters, that Ms. Johal is both somewhat more withdrawn and more irritable than in the past. Finally, I accept that she is less willing to spend time with her grandchildren, though I note that two of these grandchildren are in their teens, and are at a stage where sleepovers, or outings with their grandmother, would be less common in any event.

**49** I also note and accept that Ms. Johal is not a woman with many hobbies. Her primary sources of pride and pleasure came from her home, from cooking, and from entertaining and caring for her children and grandchildren. Her diminished ability to do these things, in such circumstances, would be felt all the more acutely.

**50** The considerations that are relevant to an award of non-pecuniary damages were explained in *Stapley v. Hejslet*, [2006 BCCA 34](#), leave to appeal ref'd [\[2006\] S.C.C.A. No. 100](#):

[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](#) (QL), [2005 BCCA 54](#)).

**51** In this case, the issue of Ms. Johal's age is potentially relevant. An award for non-pecuniary loss addresses both losses to the date of trial, and also those losses that are likely to be suffered in the future.

**52** Some cases rely on the "Golden Years" doctrine, which suggests that an injury may have a greater impact on an older person, whose activities are already constrained by age, than on a younger person who may be active in other respects; see for example; *Taylor v. Grundholm*, [2010 BCSC 860](#) at para. 60; and *Fata v. Heinonen*, [2010 BCSC 385](#) at para. 88. Other cases suggest that the competing considerations of the plaintiff's age and the application of the "Golden Years" doctrine may balance each other out; see *Mathroo v. Edge-Partington*, [2015 BCSC 122](#) at para. 96; and *Duifhuis v. Bloom*, [2013 BCSC 1180](#) at paras. 58-59. It is this last group of cases that I consider most useful and that I rely upon.

**53** The positions of the parties, in respect of this head of loss, are not terribly different. The defendants, based on the various cases they rely on, argue that an award of \$50,000 to \$55,000 would be appropriate. The plaintiff argues that an award in the range of \$60,000 to \$90,000 would be appropriate, though counsel concedes that the cases at the higher end of this range involved injuries that required surgical intervention to be repaired; see for example *Chabot v. Chaube*, [2014 BCSC 300](#); *Milliken v. Rowe*, [2011 BCSC 1458](#), aff'd [2012 BCCA 490](#); and *Moussa v. Awwad*, [2010 BCSC 512](#).

**54** In several of the cases referred to by counsel for Ms. Johal, the symptoms of the plaintiffs were more severe. Thus, in *Moussa*, apart from needing to undergo invasive surgery, the plaintiff, who was 46 at the time of the accident, no longer travelled, was unable to work consistently, and had "experienced a great deal of emotional difficulty". The plaintiff was awarded \$75,000 on account of his non-pecuniary losses.

**55** In *Gaudreault v. Gobeil*, [2015 BCSC 483](#), the Court dealt with a 43-year-old man, who suffered from back and neck pain, as well as shoulder pain that troubled him "all day, every day". The plaintiff was awarded \$75,000 in non-pecuniary damages.

**56** I consider that the circumstances of the plaintiff in *Gregory v. Insurance Corporation of British Columbia*, [2010 BCSC 352](#), var'd on other grounds [2011 BCCA 144](#), where the Court awarded \$60,000 for non-pecuniary loss and in

*Zhang v. Gheboreanenya*, [2015 BCSC 938](#), where the Court made an award of \$65,000, to be more closely aligned with Ms. Johal's circumstances.

**57** The defendants relied, *inter alia*, on *Anderson v. Rizzardo*, [2015 BCSC 2349](#), where the plaintiff had been required to leave his "dream job" on account of his injuries but suffered no adverse impact on his ability to do housework, or yard maintenance, or to engage in most of his leisure or recreational activities. The Court awarded that plaintiff \$60,000 on account of his non-pecuniary losses.

**58** In *Mothe v. Silva*, [2015 BCSC 140](#), Ross J. awarded a 48-year-old plaintiff, who suffered from neck and shoulder pain, as well as headaches, \$40,000 for his non-pecuniary losses. The injuries did not, with modest exceptions, prevent the plaintiff from working but he did so in pain. His injuries contributed to his fatigue and a "discouraged, pessimistic outlook". In addition, his injuries had "reduced his enjoyment of recreational activities and his family life".

**59** I have found that the plaintiff's ability to maintain her home, including her ability to cook and clean, have been impaired as a result of the Accident. Accordingly, she has and will continue to suffer some loss of housekeeping capacity. She is entitled to be compensated for that loss, even if she has not paid third parties to assist her; *Kroeker v. Jansen* (1995), [4 B.C.L.R. \(3d\) 178](#) at para. 9 (C.A.), leave to appeal ref'd [\[1995\] S.C.C.A. No. 263](#).

**60** The real question is whether this head of loss should be addressed separately or as part of the plaintiff's non-pecuniary damage claim. Because Ms. Johal's cooking and maintenance of her home had, in the past, been so important to her, I consider that her diminished ability to perform these tasks is best addressed in combination with, rather than separately from, her general damages claim; see *Kroeker* at paras. 23-28; *McTavish v. MacGillivray*, [2000 BCCA 164](#) at paras. 27, 73; *Szymanski v. Morin*, [2010 BCSC 1](#) at paras. 145-146; and *Blackman v. Dha*, [2015 BCSC 698](#) at para. 83.

**61** Having regard to the findings I made, the principles I have referred to, and the authorities I have reviewed, I consider that an award of \$60,000 properly compensates Ms. Johal for her non-pecuniary losses. This award also includes and recognizes that Ms. Johal has and will continue to suffer some diminution in her housekeeping capacity.

### **Past Wage Loss**

**62** Compensation for past wage loss or past loss of earning capacity is based on what a plaintiff would have, not could have, earned but for the injury that that plaintiff sustained; see, for example, *Rowe v. Bobell Express Ltd.*, [2005 BCCA 141](#) at para. 30.

**63** In this case, the necessary assessment is relatively straightforward and is amenable to a significant degree of precision. The plaintiff called evidence from the payroll coordinator at The Cakerie. That evidence established: a) that Ms. Johal was off of work from May 30, 2012 to April 20, 2013; b) that Ms. Johal worked seven part-time shifts during that period; and c) the hourly wage, vacation and RRSP benefits that Ms. Johal was entitled to. This information establishes that the loss that Ms. Johal suffered, including her regular pay, her lost vacation pay, and her lost RRSP benefits is \$29,237.40.

**64** Several further sub-issues arose. The defendants argued that Ms. Johal could have gone back to work earlier than she did. They argued that Ms. Johal had failed to mitigate her losses. This submission was based on a medical note made on October 26, 2012, in which Dr. Wong expressed the view that Ms. Johal should be off of work for a further month and then return to work on a graduated return-to-work basis.

**65** Ms. Johal did return to work on a graduated basis in January 2013. At that time, she said she was told by a supervisor to stay off of work until she was able to return on a full-time basis. The defendants challenged this evidence at some length and with some vigour. That evidence is, however, consistent with internal Cakerie records, as well as with what Ms. Johal had told Dr. Wong and her physiotherapist at the time. I accept her evidence on this issue. I also accept that the timing of her return to work on a full-time basis was consistent with her capabilities and her recovery. This conclusion is also supported by the opinion evidence of Dr. Wong.

**66** The last sub-issue is whether Ms. Johal, had she not been injured, would have been able to avail herself of a temporary posting in the Sanitation Department of The Cakerie. Ms. Johal had, for some time prior to the Accident, worked in the Housekeeping Department. The work in the Sanitation Department is somewhat more physically demanding and paid an additional \$3.89 per hour.

**67** The evidence of The Cakerie's payroll coordinator and the evidence of Ms. Johal was consistent. The Sanitation Department posting was internal. Preference was given to the most senior person who had relevant experience.

Ms. Johal had worked in the Sanitation Department in the past. She said she was the second most senior employee at The Cakerie.

**68** Past hypothetical facts are to be given weight according to their relative likelihood and are to be taken into account as long as the occurrence is a real and substantial possibility; *Smith v. Knudsen*, [2004 BCCA 613](#) at para. 29; *Athey* at para. 27; and *Lines v. W & D Logging Co. Ltd.*, [2009 BCCA 106](#) at paras. 45-46, leave to appeal ref'd [\[2009\] S.C.C.A. No. 197](#).

**69** I consider that there is a very high likelihood that Ms. Johal would have received the temporary posting in the Sanitation Department had she been able to apply for that position and that she suffered a loss as a result of her inability to do so. I assess the value of that loss at \$1,800. That figure, in combination with the \$29,237.40 I referred to earlier, yields a total sum of \$31,037.40.

### **Loss of Future Earning Capacity**

**70** In *Pololos v. Cinnamon-Lopez*, [2016 BCSC 81](#), I described the legal principles that pertain to this head of loss and said:

[133] The relevant legal principles are well-established:

- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, [2009 BCCA 106](#) at para. 185, leave to appeal ref'd [\[2009\] S.C.C.A. No. 197](#);
- b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, [2011 BCCA 144](#) at para. 32;
- c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, [2001 BCCA 1](#) at para. 18;
- d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiy* (1985), [26 B.C.L.R. \(3d\) 353](#) at para. 7 (S.C.); and *Perren v. Lalari*, [2010 BCCA 140](#) at paras. 11-12;



- e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
- f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, [2014 BCCA 48](#) at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, [2013 BCCA 507](#) at paras. 36-37.
- g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.

**71** The plaintiff argues that in this case, though the quantification of a loss of future earning capacity requires an assessment, the "earnings approach" would be more appropriate. I agree. The plaintiff argues that her injuries will prevent her from working in the Sanitation Department of The Cakerie in the future and that her loss of earning capacity should be assessed at \$30,000.

**72** I consider this figure excessive for several reasons. I start with the observation that the \$30,000 figure roughly translates to the difference between Ms. Johal working full time in the Sanitation Department, as opposed to the Housekeeping Department, for the next four years or until she approaches the age of 75.

**73** This ignores the real and substantial possibility of several negative contingencies. The first is that there may not be a full-time posting in the Sanitation Department. In the year that the plaintiff was absent from work, there was a single temporary posting of three months. The second consideration or contingency is whether the plaintiff, with increasing age, could, absent the Accident, have continued to satisfy the more onerous and physically-demanding requirements of the Sanitation Department position. The third is that Ms. Johal may retire in the next few years. Her daughters testified that they have discussed this matter with their mother.

**74** There is a further contingency, namely that Ms. Johal might, in fact, be able to do the work required in the Sanitation Department. I have said that the

prognoses given by Drs. Wong and Rickards, and even Dr. Craig, though his prognosis was more guarded, contemplated the prospect that Ms. Johal could continue to improve and approach her pre-Accident state. There is then some prospect that she may yet do some Sanitation Department work.

**75** In all the circumstances, I consider that an award of \$7,500 properly compensates Ms. Johal for this head of loss.

### **Cost of Future Care**

**76** The purpose of an award for the cost of future care is to restore, to the extent possible, with a monetary award, an injured person to the position they would have been in had an accident not occurred. This award is based on what is reasonably necessary, on the medical evidence, to promote the mental and physical health of the plaintiff; *Gignac v. Insurance Corporation of British Columbia*, [2012 BCCA 351](#) at para. 30. There must be some evidentiary link between a physician's assessment of pain or disability and the care recommended by a qualified healthcare professional; *Gregory v. Insurance Corporation of British Columbia*, [2011 BCCA 144](#) at para. 39.

**77** Thus, the plaintiff has the onus of establishing: a) that the future care items being claimed are reasonably necessary based on medical evidence; and b) that the cost of these future care items is reasonable; *Milina v. Bartsch* (1985), [49 B.C.L.R. \(2d\) 33](#) at 78 (S.C.), aff'd (1987), [49 B.C.L.R. \(2d\) 99](#) (C.A.).

**78** Both Drs. Rickards and Craig opined that Ms. Johal would benefit from an extended active training regime. Dr. Craig, for example, believed that Ms. Johal would require 18 to 24 sessions followed by a further six to eight sessions thereafter. Sessions at the Back in Motion facility cost approximately \$55 to \$60 apiece. Dr. Rickards also believed that Ms. Johal might require periodic massage or physiotherapy treatments while undertaking this course of exercise.

**79** Dr. Craig also considered that Ms. Johal might require trigger-point injections which are, apparently, covered through the Medical Services Plan and have no cost associated with them. He also considered, however, that there was a possibility Ms. Johal might require several Botox injections at an approximate cost of \$600 for each such injection.

**80** Finally Dr. Rickards believed that Ms. Johal might need access to a gym or exercise facility to undertake and maintain her exercise regime.

**81** An award for future cost of care is based on a prediction of the medical and non-medical services that will likely be in the plaintiff's best interest. In *Krangle (Guardian ad litem of) v. Brisco*, [2002 SCC 9](#) at para. 21, the Court said:

... No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial ... requires courts to peer into the future and fix the damages for future care as best they can. ...

**82** Having regard to the foregoing legal principles and evidence, I consider that an amount of \$5,000 reasonably provides for the plaintiff's future care costs.

### **Special Damages**

**83** Ms. Johal seeks \$1,958.70 in special damages. That sum is comprised of amounts that Ms. Johal has paid to have her lawn maintained, her treatments at Back in Motion, and the mileage for her accident-related medical visits. The defendants argue that Ms. Johal's calculations included mileage for non-Accident related-medical attendances to Dr. Wong. My review of the records does not support this assertion, and I consider the global amount claimed by Ms. Johal on account of her special damages to be both accurate and reasonable.

### **Summary**

**84** I have awarded Ms. Johal the following amounts:

Non-pecuniary Loss	\$60,000.00
Past Wage Loss	\$31,037.40
Loss of Earning Capacity	\$7,500.00
Cost of Future Care	\$5,000.00
Special Damages	\$1,958.70
<b>TOTAL</b>	<b>\$105,496.10</b>

**85** I consider that the foregoing award properly and fairly compensates Ms. Johal for her losses.

**86** Counsel for the parties have agreed that they can make the necessary tax and other adjustments to this award. If they encounter difficulty in doing so, they can seek my further assistance.

**87** The plaintiff is, absent considerations that I am unaware of, to have her costs of this action. If, however, the parties require a further hearing to address the issue of costs, they can arrange for that hearing through the Registry.

P.G. VOITH J.