Sangha v. Inverter Technologies Ltd.

British Columbia Judgments

British Columbia Supreme Court

New Westminster, British Columbia

W.P. Riley J.

Heard: April 16-20, July 26-27, August

17, 20, 2018; February 28, 2019.

Supplementary written submissions March 8, 13, 15, 2019.

Judgment: April 1, 2019.

Docket: M178277

Registry: New Westminster

[2019] B.C.J. No. 518 | 2019 BCSC 466

Between Paramjit Sangha, Plaintiff, and Inverter Technologies Ltd. and Leroy Morrison, Defendants

(157 paras.)

Case Summary

Damages — Physical and psychological injuries — Physical injuries — Body injuries — Neck — Soft tissue — Psychological injuries — Depression — Third party claims — Persons entitled to claim — Spouse — Recoverable losses - Housekeeping service — Considerations impacting on award — Pre-existing injury — Mitigation — Action by 59-year-old plaintiff for damages for personal injuries sustained in 2014 motor vehicle accident allowed — Plaintiff suffered neck and shoulder pain and worsening of pre-existing depression — She had not returned to work — Her frozen shoulder was expected to resolve by mid-2019 — Plaintiff was awarded $63,000 in non-pecuniary damages and $95,607 for loss of past earning capacity — Awards reflected 10 per cent reduction for failure to mitigate — Plaintiff was awarded $12,500 for loss of future earning capacity, $1,200 for in trust claim, $9,100 for special damages, and $33,974 for cost of future care.

Damages — Types of damages — General damages — For personal injuries — Considerations — Aggravation of pre-existing injury — Cost of future care — Loss of earning capacity — Special damages — Past loss of income — Employment income — Expenses and expenditures — Non-pecuniary loss — Pain and suffering — Action by 59-year-old plaintiff for damages for personal injuries sustained in 2014 motor vehicle accident

allowed — Plaintiff suffered neck and shoulder pain and worsening of pre-existing depression — She had not returned to work — Her frozen shoulder was expected to resolve by mid-2019 — Plaintiff was awarded $63,000 in non-pecuniary damages and $95,607 for loss of past earning capacity — Awards reflected 10 per cent reduction for failure to mitigate — Plaintiff was awarded $12,500 for loss of future earning capacity, $1,200 for in trust claim, $9,100 for special damages, and $33,974 for cost of future care.

Action by the 59-year-old plaintiff for damages for personal injuries sustained in a motor vehicle accident in 2014. Liability for the rear-end collision was admitted. The plaintiff suffered soft tissue injuries, including neck and shoulder pain and a frozen shoulder that persisted to trial. She had pursued various treatments including cortisone injections, massage therapy, and physiotherapy. She had rotator cuff surgery that delayed her recovery from her frozen shoulder. The plaintiff had a stable employment history as a production worker at a cake factory, except for time off during periodic bouts of depression, including at the time of the accident. She earned $36,000 per year. Her depression worsened after the accident. She did not return to work after the collision.

HELD: Action allowed in part.

Even though the plaintiff had pre-existing depression, the collision was a contributing cause to her continued or deepened depression. The plaintiff was awarded non-pecuniary damages of $63,000. Her loss of past earning capacity was fixed at $95,607. The damages awarded reflected a 10 per cent reduction for her failure to mitigate by not pursuing volunteer work as a means of addressing her depression. The plaintiff would likely be able to return to work once her frozen shoulder resolved, which was expected by mid-2019. Her loss of future earning capacity from trial to mid-2019 was fixed at $12,500. A discrete award for loss of housekeeping capacity was not appropriate. An in trust claim for the plaintiff's family was fixed at $1,200. The plaintiff was awarded $9,100 in special damages. She was awarded $33,974 for costs of future care, including anti-depressant medication.

Statutes, Regulations and Rules Cited:

Health Professions Act, R.S.B.C. 1996, c. 183, s. 39.3(7)

Counsel

Counsel for the Plaintiff: R. Sood, B. Yu.

Counsel for the Defendants: M. Lee, A. Eustace.

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Reasons for Judgment

W.P. RILEY J.

(1) Introduction

1 The plaintiff, Paramjit Sangha, seeks damages arising from personal injuries sustained in a motor vehicle collision. The collision occurred on 27 May 2014, in Surrey, when Ms. Sangha's car was hit from behind by a vehicle owned by the defendant Inverter Technologies Ltd. and driven by the defendant Leroy Morrison. The defendants have admitted liability. These reasons for judgment deal with the nature, extent, and duration of Ms. Sangha's injuries, and the quantum of her damages.

(2) Facts

(2.1) Ms. Sangha's Background

2 Ms. Sangha is currently 59 years old. She was born and raised in India and immigrated to Canada at the age of 17 or 18. She has been married for over 40 years. She has one son and one daughter. Ms. Sangha currently resides in Surrey with her husband, her son, her daughter in law, her grandchildren, and her elderly mother.

3 Prior to the collision, Ms. Sangha was in relatively good physical health. She had no major physical ailments, although from time to time she took medication for neck pain arising from tension headaches. She did not have a particularly active lifestyle, but she was able to maintain

her household, cook, and assist in providing care for her grandchildren, all in addition to working full-time at a job that was not without its physical demands.

4 Apart from time off during periodic bouts of depression as discussed in more detail below, Ms. Sangha had a relatively stable employment history as a production worker at a cake factory in Delta. She had been working full time at the cake factory since 2000. Plaintiff's counsel aptly described the nature of the work as "fast-paced". It involved various steps in the production, decoration, and packaging of cakes in a production line set up to make 300 to 600 cakes per hour. Some aspects of the work required repetitive movements that could be somewhat physically demanding. Ms. Sangha testified that she enjoyed the work and considered some of her co-workers to be her "second family". In the last two years before the collision, Ms. Sangha earned just under $36,000 per year. As discussed in greater detail below, she has not returned to work since the collision.

5 There was evidence that prior to the collision Ms. Sangha had a history of depression or mood disorders. She had been off work for 12 weeks in 2009 and again for another 12 weeks in 2010. Ms. Sangha was once again off work due to depression at the time of the accident. In the weeks before the collision, Ms. Sangha's mood had been improving and it appears that she was planning or hoping to return to work in early June 2014.

(2.2) The Collision

6 The collision occurred on 27 May 2014. Ms. Sangha was the driver and sole occupant in her car. She was driving from her home in Surrey to the construction site for her new house. She stopped at a red light and was waiting for a pedestrian to cross in front of her when she was hit from behind by the defendant Mr. Morrison. The force of the impact was strong enough to move Ms. Sangha's car forward a few feet even though she had her foot on the brake. Photographs marked in evidence show extensive damage to the rear end of Ms. Sangha's car.

7 Ms. Sangha did not anticipate the impact and was frightened at the thought of being pushed into the intersection where she might have hit the pedestrian crossing the road in front of her. After the collision, Ms. Sangha remained in her vehicle until paramedics arrived. She was taken by ambulance to the hospital, where she was given medication and sent home.

(2.3) Effects of the Collision

8 Ms. Sangha testified about the effects of the collision, which can be grouped in two categories, namely physical injuries and psychological effects. With respect to physical injuries, the most significant and prolonged effects of the collision have been ongoing pain in Ms. Sangha's neck and left shoulder. Ms. Sangha began to experience this pain more or less immediately. Ms. Sangha first reported neck pain when she visited her family doctor the day after the collision, explaining that before the collision her pre-existing neck pain from tension headaches had

improved by about 50%, but that the collision made the neck pain get worse again. Ms. Sangha first reported pain in her left shoulder at a follow-up visit with her family doctor two days after the collision.

9 Ms. Sangha testified that in the four years since the collision, her neck and shoulder pain have persisted. The most significant problem is her left shoulder, which has limited range of motion and continues to cause her pain with any degree of exertion. As described below, she has been diagnosed with "frozen shoulder".

10 Ms. Sangha has pursued various treatments and therapies, some of which have helped to reduce and manage the pain, but not eliminate it. She has had multiple cortisone injections in her shoulder, reducing the pain temporarily. She has had massage therapy. She has gone to physiotherapy, generally twice per week, for the past four years. She has also had rotator cuff surgery, which was largely successful but prolonged the effects of her frozen shoulder.

11 With respect to psychological effects of the collision, Ms. Sangha testified that she has become increasingly reluctant to drive due to fear of getting into another accident. She has also found it difficult to cope with the pain in her neck and shoulder. She is irritable and easily frustrated by her physical limitations, and the pain in her neck and shoulder affects her ability to sleep. Ms. Sangha also testified that her inability to return to work at the cake factory has made her depressed. She feels unproductive and misses her co-workers. Sometimes she just cries and feels suicidal. Ms. Sangha testified that she takes prescription medication to manage her depression. She has been under the treatment of a psychiatrist, who she continues to see on a regular basis. She has also attended psychological counselling to develop strategies for coping with her pain.

12 Ms. Sangha testified that her injuries have limited her in a number of ways. She testified that she has been unable to return to work, principally because of the pain, limited range of motion, and reduced strength in her left shoulder, but also because of the depression.

13 Ms. Sangha also testified about how her injuries have impacted on her ability to perform activities of daily living. She says she has been unable to do housework, cook, or care for her grandchildren the way she did before the collision. Before the collision she did the majority of the housework in her home, and since the accident she has had to rely on her husband and daughter-in-law. Ms. Sangha further testified that she was unable to drive for a certain period of time, and is generally more reluctant to drive in the wake of the accident.

14 However, on closer scrutiny Ms. Sangha's testimony with regard to activities of daily living was not particularly clear or precise. With regard to housework and cooking, Ms. Sangha gave evidence that before the collision she was responsible for cleaning the house, washing the floors, vacuuming, and doing the cooking. Sometimes her daughter-in-law helped. Ms. Sangha testified in chief that since the collision, she does very little housework, explaining that her husband helps,

but mostly her daughter-in-law does it. In cross-examination, Ms. Sangha agreed that in the period before the accident, her daughter-in-law would often do the house work while Ms. Sangha was away at work. Ms. Sangha rejected the suggestion that she was really only responsible for cleaning her own bedroom and bathroom, and doing laundry for herself and her husband. Ms. Sangha responded to this suggestion by explaining that she also cleaned her elderly mother's room, and that she and her daughter-in-law cleaned the kitchen "together". Ms. Sangha also disagreed with the suggestion that it was a traditional Indian household in which the daughter-in-law was expected to do all the housework, explaining, "we all make the mess, we all clean it up". With regard to Mr. Sangha's contribution to the housework, Ms. Sangha agreed that he has never really done anything beyond what a husband would be expected to do.

15 Ms. Sangha's husband also gave evidence about the effect of the collision on Ms. Sangha's ability to perform activities of daily living. In chief, he testified that prior to the collision, Ms. Sangha did all the housework, and that since the collision, Mr. Sangha, his son, and his daughter-in-law have had to do it. However, Mr. Sangha also testified that prior to the collision there was no specific arrangement regarding housework; all of the adult members of the family contributed, by doing "whatever worked out". After the collision, there was a period of some three or four months after Ms. Sangha had shoulder surgery where her arm was in a sling and she was unable to do any housework. During this particular time frame, Mr. Sangha had to help Ms. Sangha with things like getting dressed, combing her hair, and driving her to appointments. Since then Ms. Sangha's ability to cook and do housework has improved, and now she can do the dusting, cleaning, and laundry, but she cannot do any vacuuming or any "heavy" work around the house.

16 In cross-examination, Mr. Sangha agreed that he lived in a "traditional" household where most of the housework was done by the women. However, in response to more specific questions, Mr. Sangha testified that they lived in Canada and everyone was expected to help out around the house. There was no particular arrangement; all of the adult members of the family contributed and did what they could. In response to the suggestion that the women in his household do the housework as a team, Mr. Sangha said he does not know what the women do while he is at work. He agreed that he himself did more or less the same kind of housework before and after the collision. He agreed that after the collision Ms. Sangha continued to do the laundry, except for the four months right after her shoulder surgery.

17 With regard to driving, the evidence of both Ms. Sangha and her husband was relatively consistent. Prior to the accident, Ms. Sangha was able to drive herself wherever she needed to go. After the accident, Mr. Sangha frequently drove Ms. Sangha to medical appointments, treatments, and to run errands. In the four-month period after her shoulder surgery, Ms. Sangha was completely unable to drive. Since then, she has been able to drive, but is somewhat fearful; she is only comfortable driving in her local area, and when she has to go outside Surrey, a family member has to drive her.

(2.4) Diagnosis and Treatment of Ms. Sangha's Physical Injuries

(2.4.1) Evidence of Dr. Mann (Family Physician)

18 I heard evidence from Ms. Sangha's family physician, Dr. Mann. He testified as a fact witness, giving evidence as to certain observations he made and steps he took in relation to the treatment of Ms. Sangha's injuries. He was also qualified as an expert in family medicine, and he prepared an expert report setting out his diagnosis and prognosis of Ms. Sangha's conditions.

19 With respect to his qualifications, Dr. Mann graduated from medical school in 1997, did a two-year residency, and has been practising family medicine ever since. As a family physician, he sees patients of all ages with a broad range of medical concerns. Dr. Mann testified that if he encountered a particular medical condition that required specialized treatment, he would refer his patient to a specialist and would generally defer to the specialist's expertise. He sees about 10 motor vehicle accident patients per week. Dr. Mann estimated that he had prepared more than 50 medical-legal reports, all for patients that he is treating.

20 Dr. Mann has been Ms. Sangha's family physician since at least 2008. Thus, he treated Ms. Sangha both before and after the collision.

21 Although Dr. Mann testified that he did not consider himself to be an advocate for Ms. Sangha, and he expressly acknowledged his duty to the Court as an expert witness, I must take into account that Dr. Mann was in effect performing two roles in this case. One role was that of a treating physician, whose duty is to provide medical care for his patient. The other role was that of an expert witness, whose duty is to the Court, to present opinion evidence in his areas of expertise objectively, without favouring either side.

22 These dual roles placed Dr. Mann in a somewhat difficult position. Counsel for the defendants did not take issue with Dr. Mann's qualifications and did not oppose his recognition as an expert witness in family medicine. I accept that position as reasonable. I was satisfied that based on his training and experience, Dr. Mann was qualified to present opinions in relation to family medicine. Although I have seen no basis to question Dr. Mann's integrity or credibility, I do find that on occasion both his report and his *viva voce* testimony strayed into areas of advocacy. I will take this into account in deciding how much weight to give his testimony.

23 With regard to Ms. Sangha's physical injuries arising from the collision, Dr. Mann's report indicates that when he saw Ms. Sangha on 28 May 2014 (the day after the collision) she reported that "her neck and back were aching". Ms. Sangha stated that "prior to the accident she was seeing a massage therapist for neck pain and her symptoms were 50% better", but the accident made it worse. On examination, Dr. Mann noted that Ms. Sangha's neurological exam was normal, the range of motion in her neck and back was reduced, and there were visible signs of tenderness and pain. Dr. Mann told Ms. Sangha to obtain a cervical foam collar, get an x-ray, and return for a follow-up.

24 Ms. Sangha returned to see Dr. Mann on 29 May 2014. The x-rays showed no fracture. Ms. Sangha reported that her neck continued to ache and that she also had pain in her left shoulder, which on examination showed a reduced range of motion and visible signs of pain with external and internal rotation.

25 In subsequent appointments with Dr. Mann, more or less twice monthly over the next two years, Ms. Sangha consistently reported continued neck and left shoulder pain. In physical examinations, Ms. Sangha was consistently observed to have limited range of motion in her left shoulder. Dr. Mann recommended a variety of treatments for Ms. Sangha's neck and back pain, including cortisone injections, physiotherapy, pool therapy, a rehabilitation specialist, and psychological counselling. Ms. Sangha received multiple cortisone injections, which sometimes reduced the pain in her shoulder for at least some period of time. She regularly received physiotherapy, often twice per week. She saw a rehabilitation specialist who helped to explain the source of the pain, and ordered a number of follow-up tests including a CT scan and a "nerve conduction study".

26 As part of his diagnostic measures, Dr. Mann ordered an MRI test for Ms. Sangha's left shoulder. The results of the MRI test were obtained in December 2014. They showed "an advanced supraspinatus tendinosis with an incomplete full-thickness and partial-thickness tear with intact fibres". In other words, Ms. Sangha had a tear of some sort in a tendon in her shoulder. Acting on this, Dr. Mann referred Ms. Sangha to an orthopedic specialist. Ms. Sangha waited for basically one year to get an appointment with a specialist. Over this time, Ms. Sangha continued to visit Dr. Mann twice per month, reporting continuing pain in her neck and left shoulder. Throughout this time, Dr. Mann was of the view that Ms. Sangha was unable to return to work.

(2.4.2) Evidence of Dr. Douglas (Orthopedic Surgeon)

27 Ms. Sangha first saw an orthopedic specialist, Dr. Lu, on 9 December 2015. Dr. Lu referred Ms. Sangha to a colleague, Dr. Douglas, for a consultation about possible surgery on Ms. Sangha's left shoulder.

28 Dr. Douglas presented an expert report and testified at trial. With respect to his qualifications, Dr. Douglas obtained his medical degree in 2007, and then completed a residency, graduating with a specialty in orthopedic surgery in 2012. He also completed a one-year fellowship in sports arthroscopy and shoulder reconstruction. He now practices as an orthopedic surgeon with a focus on trauma, primarily in relation to disorders of the shoulder and knee. I found Dr. Douglas to be an expert qualified to give opinion evidence in relation to orthopedic surgery.

29 I would summarize the evidence of Dr. Douglas with respect to the diagnosis and treatment of Ms. Sangha's left shoulder as follows:

a) When he first saw Ms. Sangha on 2 March 2016, Dr. Douglas noted that Ms. Sangha's ultrasound results indicated "biceps tendinitis, inflammation of the supraspinatus rotator cuff tendon with calcium deposits and a partial full thickness tear". On physical examination of Ms. Sangha's left shoulder, Dr. Douglas noted that Ms. Sangha had limited range of motion in both active and passive tests. She showed some degree of pain with movement, but displayed good strength in her shoulder. Dr. Douglas concluded that Ms. Sangha basically had two problems, namely (i) frozen shoulder, and (ii) a torn rotator cuff tendon. Dr. Douglas recommended an aggressive program of physiotherapy, focusing on improving passive range of motion.

b) In a follow-up appointment on 3 May 2016, Dr. Douglas noted some improvement in Ms. Sangha's range of motion, although she continued to have some restriction, and she described having pain in a specific area around her rotator cuff. Dr. Douglas recommended surgery "to assess her shoulder inter-operatively and to repair the full thickness tear to the supraspinatus".

c) Ms. Sangha opted to have the surgery, which Dr. Douglas performed on 30 June 2016. In the course of the surgery, Dr. Douglas saw that Ms. Sangha had a full thickness tear of the tendon, as well as bursitis. The fraying of the tendon indicated that the tear was from a degenerative condition. Dr. Douglas repaired the tendon and removed a spur which may have been the source of some of the irritation.

d) After the surgery, Ms. Sangha had to keep her left arm in a sling for eight weeks, including while sleeping. Ms. Sangha was unable to do any pushing or pulling with her left arm until the rotator cuff healed and she regained her strength.

e) Dr. Douglas followed up with Ms. Sangha in nine separate appointments between 25 July 2016 and 10 October 2017. Dr. Douglas noted that Ms. Sangha experienced resolution of pain in her shoulder at rest, but continued to have issues with restricted passive range of motion. Ms. Sangha's range of motion was worse than before the surgery, up until the most recent visit on 10 October 2017, at which point Dr. Douglas was able to achieve the same level of passive range of motion as before the surgery. Dr. Douglas also arranged for Ms. Sangha to have one or more cortisone injections.

f) Dr. Douglas reviewed reports from Ms. Sangha's physiotherapist completed shortly after the surgery and again one year after the surgery, concluding that the physiotherapy reports confirmed his own findings with respect to the range of motion in Ms. Sangha's left shoulder.

30 Dr. Douglas concluded that Ms. Sangha's shoulder problems were "multi-factorial". The two primary problems were (i) adhesive capsulitis, commonly referred to as "frozen shoulder", and (ii) a torn rotator cuff tendon. Dr. Douglas opined that the frozen shoulder was a result of the motor vehicle collision, but the torn tendon was not. Based on the physical appearance of the tear and the timing of Ms. Sangha's symptoms, Dr. Douglas opined that the torn rotator cuff tendon was

not caused by trauma from the motor vehicle collision. It was a chronic or degenerative problem. However, the treatment of the torn rotator cuff had the effect of delaying Ms. Sangha's recovery from the frozen shoulder problem.

31 With regard to the day-to-day effects of Ms. Sangha's condition, Dr. Douglas noted in his report that it would be "very difficult" for Ms. Sangha to return to work on a production line that involved some degree of repetitive motion and lifting as long as she continued to exhibit signs of frozen shoulder. Dr. Douglas also expressed the opinion that the frozen shoulder would "unquestionably" have impacted on Ms. Sangha's activities of daily living and activity level outside of work. Dr. Douglas was unable to comment on "the relationship between [Ms. Sangha's] depression and her pain symptoms".

32 With regard to prognosis, Dr. Douglas stated in his report that typically, "stiffness related to a frozen shoulder does resolve although the timing of this is very unpredictable". The outside limit would appear to be three years, although in most cases it would not take that long. In Ms. Sangha's case, the rotator cuff surgery probably prolonged her frozen shoulder condition. Dr. Douglas opined that it was more likely than not that Ms. Sangha will continue to have further relief to a point where she could return to work. Dr. Douglas was unable to comment on the effect of Ms. Sangha's psychological condition or mood disorder.

33 In terms of future treatment, Dr. Douglas recommended that Ms. Sangha continue with physiotherapy, but suggested that she seek out a physiotherapist with a specific interest in the treatment of shoulders. Dr. Douglas also recommended that Ms. Sangha consider further cortisone injection treatments. Finally, Dr. Douglas suggested that Ms. Sangha should continue to see a psychiatrist or psychologist with expertise in mood disorders, to address the possible relationship between Ms. Sangha's depression and her shoulder pain.

(2.4.3) Evidence of Dr. Horlick (Orthopedic Surgeon)

34 The defendants called Dr. Horlick to present opinion evidence with respect to Ms. Sangha's physical injuries. Dr. Horlick graduated from medical school in 1987 and completed an internship in 1988. He then completed a five-year residency in orthopedic surgery, followed by a fellowship in sports medicine focusing on the treatment of shoulder, hip, knee and ankle injuries. He now practices as an orthopedic surgeon, and holds a faculty position as an assistant professor of orthopedic surgery. Dr. Horlick has done 200 to 300 medical legal assessment reports. I found Dr. Horlick to be an expert qualified to provide opinion evidence in relation to orthopedic surgery and diagnosis, causes, treatments, and prognosis of musculoskeletal injuries following trauma.

35 I would summarize the substance of Dr. Horlick's opinion evidence as follows:

a) Dr. Horlick saw Ms. Sangha for an independent medical examination on 30 November 2017. He conducted an interview and a physical examination over a period of some two hours.

b) Dr. Horlick noted that the shoulder surgery had the effect of delaying the progression of treatment of Ms. Sangha's frozen shoulder. However, by 30 November 2017, some 17 months after her surgery, Ms. Sangha's shoulder showed continuing signs of improvement.

c) In his interview of Ms. Sangha, she reported some relief of pain at rest, an improved ability to sleep, and some increased range of motion.

d) In his examination of Ms. Sangha, Dr. Horlick noted an objectively measurable impairment of Ms. Sangha's left shoulder compared to the right, with some tenderness, some measurable impairment of range of motion, and some weakness of the rotator cuff muscles.

e) Dr. Horlick's conclusion was that Ms. Sangha had not yet reached the maximal level of recovery. He opined that with continued physiotherapy, Ms. Sangha could be expected to realize further improvement of her level of pain, range of motion and strength. Dr. Horlick expressed the view that as of the date of his 30 November 2017 report, Ms. Sangha was some six months away from achieving the maximum benefit of her treatments.

f) Dr. Horlick also opined that Ms. Sangha would likely be able to return to work within six months of the date of his report.

36 Dr. Horlick was cross-examined at length regarding certain typographical or transposition errors in his report. For example, there were a number of instances where Dr. Horlick erroneously referred to symptoms in Ms. Sangha's right shoulder, when it is clear that it was Ms. Sangha's left shoulder that had been injured. He also copy-pasted at least one phrase that was not applicable to his assessment of Ms. Sangha's case. I have taken these errors into account but in my view they do not materially impact on the substance of Dr. Horlick's opinion.

37 Dr. Horlick was questioned about whether a diagnosis of a major depressive disorder would impact upon a patient's recovery from a physical injury. Dr. Horlick did not appear to account for this in his opinion, responding to this line of inquiry by stating that he was not aware of any barriers to Ms. Sangha's recovery from an orthopedic perspective. Ultimately, Dr. Horlick agreed that he could not give an opinion as to the impact of a psychological condition on Ms. Sangha's physical recovery.

(2.4.4) Evidence as to Ms. Sangha's Current Physical Condition

38 I would conclude my review of the evidence with respect to Ms. Sangha's physical injuries by noting Dr. Mann's testimony about her current condition. Dr. Mann testified that as of 19 March 2018, Ms. Sangha continued to have neck pain, and pain and limited range of motion in her left

shoulder. In cross-examination, Dr. Mann agreed that Ms. Sangha had neck pain before the accident, and that as of her most recent visit, Ms. Sangha had basically returned to her pre-accident condition as far as neck pain was concerned. However, as of 19 March 2018, Ms. Sangha's shoulder pain and limited range of motion were a continuing problem.

(2.5) Diagnosis and Treatment of Ms. Sangha's Psychological Issues

39 As noted above, Ms. Sangha gave evidence that after the collision, she became reluctant to drive and was fearful about another accident. She also testified that she became increasingly depressed due to pain from her injuries and because she was unable to return to work. The evidence indicates that Ms. Sangha reported these problems to her family physician, Dr. Mann, who prescribed medication and referred Ms. Sangha to a number of specialists. However, there is also evidence that Ms. Sangha had experienced stress-related depression before the collision. Indeed, in the months leading up to the collision, Ms. Sangha had been off work on stress leave, and she had also been on stress leave several years earlier. In order to properly assess the effect of the collision on Ms. Sangha's psychological condition, it is necessary to review the evidence about Ms. Sangha's psychological issues both before and after the event.

(2.5.1) Ms. Sangha's Psychological Condition Prior to the Collision

40 In her testimony, Ms. Sangha agreed that she was on stress leave at the time of the collision and that she had at least one prior bout of depression, after her brother had passed away. Ms. Sangha testified that her brother died in 2008 or 2009. Ms. Sangha's husband testified that his brother-in-law died in 2009 or 2010. Ms. Sangha's employment records indicate that she took bereavement leave in 2007.

41 Ms. Sangha's employment records, tax records, and medical records indicate that she received employment insurance benefits while on medical leave in 2009, 2010, and 2014. In particular:

a) Ms. Sangha was off work on medical leave from 14 July 2009 to 31 October 2009. Dr. Mann's clinical records indicate that this period of leave began with a fainting spell at work. In subsequent appointments with Dr. Mann, Ms. Sangha reported that she had been sad and withdrawn for the past two months, explaining that she was worried about her children and about her elderly mother. Dr. Mann's notes also state that Ms. Sangha was "off work due to stress". Dr. Mann diagnosed Ms. Sangha with depression and prescribed Cipralex, which appeared to assist.

b) Ms. Sangha was off work on medical leave from 8 July 2010 to 31 October 2010. Dr. Mann's clinical records indicate that this period of leave once again began with a fainting spell. There was no evidence of depression or mood disorder in connection with this period of leave. It appears that Ms. Sangha was on leave as a safety precaution, while her doctors assessed the cause of her dizziness.

c) Ms. Sangha was off work on medical leave commencing on 14 March 2014. In appointments with Dr. Mann leading up to this date, Ms. Sangha reported having headaches, stress, and depression arising from strife in her family and having to deal with tradespeople in relation to the construction of her new house. Dr. Mann once again prescribed Cipralex.

42 Ms. Sangha was cross-examined at length about the reasons why she went on medical leave on 14 March 2014. The net effect of Ms. Sangha's evidence on this point, as I assess it, is that she was experiencing stress in her life for a variety of reasons, including the fact that her son had moved out of the house because of strife with her husband, her daughter was getting married, and she had been having disagreements with tradespeople involved in building a new house. By mid-April, Ms. Sangha was taking Cipralex and had experienced some improvement in her mood. She was not completely better but was making progress. By mid-May, things were still improving; her daughter's wedding was over, and her son and husband had reconciled. Ms. Sangha was challenged in cross-examination about whether she was actually ready to return to work at this point. She testified that she was getting better, but had still not completely recovered from her depression, and was planning to return to work in mid-June. Considering all the evidence on this point, I consider it highly unlikely that by mid-May, Ms. Sangha was still so depressed that she was unable to return to work. In my view, Ms. Sangha's plan to return to work in mid-June had more to do with the expiry of the eligibility period for employment insurance benefits than it had to do with continuing depression.

(2.5.2) Ms. Sangha's Psychological Condition after the Collision

43 Ms. Sangha was injured in the motor vehicle collision on 27 May 2014. As noted above, she went to see Dr. Mann the next day, and continued to see him more or less twice per month thereafter. Ms. Sangha remained off work throughout this period of time. Dr. Mann's expert report references a total of 12 appointments between 28 May and 23 December 2014. There is no evidence that, in these appointments, Ms. Sangha reported any stress, anxiety, or depression associated with either the collision itself, or the pain from her injuries.

44 However, there is evidence that during this time frame Ms. Sangha told Dr. Mann that she was suffering from family-related stress, depression, and even suicidal ideation. In particular, on 29 July 2014, Ms. Sangha reported that she had been having suicidal thoughts for the past four days and that she was "very upset" because her daughter-in-law had moved to Toronto with her grandson. There is no evidence that during this appointment Ms. Sangha said anything about psychological issues related to either the collision or its physical effects. On 11 September 2014, Ms. Sangha reported to Dr. Mann that she "still gets sad"; Dr. Mann diagnosed Ms. Sangha with depression and once again prescribed Cipralex. Again, there is no suggestion that Ms. Sangha's sadness was linked to the motor vehicle accident or her physical injuries from the accident. Nor is this incident mentioned in Dr. Mann's expert report. From the context, I infer that Ms. Sangha's "sadness" was family-related.

45 Thus, the evidence supports the submission of the defendants that Ms. Sangha had ongoing issues of depression or mood disorder prior to the collision. Ms. Sangha's depression appears to have been driven primarily by family-related stress. Even after the collision, she continued to suffer from depression arising from strife in her family.

(2.5.3) Evidence as to the Psychological Effects of the Collision

46 According to Dr. Mann's expert report, the first indication of psychological concerns associated with the collision arose in an appointment on 6 January 2015. This was some six to seven months after the collision, at a time when Ms. Sangha was experiencing continuing neck and shoulder pain and was waiting to see an orthopedic surgeon. She reported to Dr. Mann that she was anxious about driving, and had poor sleep and difficulty concentrating. Dr. Mann recommended that Ms. Sangha see a psychiatrist and a counsellor.

(2.5.3.1) Evidence of Dr. Sandhu

47 Dr. Sandhu was Ms. Sangha's treating psychiatrist. He prepared an expert report and testified as a witness. With respect to qualifications, Dr. Sandhu graduated from medical school in 1987. He completed a four-year residency in psychiatry in 1996, and a six-month fellowship in forensic psychiatry in 1997. From 1997 to 2000, he worked as a psychiatrist at Surrey Memorial Hospital. Since 2000, Dr. Sandhu has run a private practice in psychiatry. He has also done work as a consultant in psychiatry at various mental health centres in Surrey and Delta. He has experience in dealing with patients who suffer from anxiety, and patients dealing with psychological issues following motor vehicle accidents. I found Dr. Sandhu to be an expert in psychiatry, qualified to give opinion evidence in relation to diagnosis, prognosis, and treatment recommendations for psychiatric conditions.

48 Dr. Sandhu testified that when he received the referral to see Ms. Sangha, the referral document indicated that Ms. Sangha suffered from motor-vehicle-related anxiety. The referral made no reference to Ms. Sangha's family history, and Dr. Sandhu was not made aware of any pre-existing psychological conditions. He was not provided with and therefore did not review any of Ms. Sangha's prior clinical records.

49 Dr. Sandhu's first appointment with Ms. Sangha was on 13 February 2015. According to Dr. Sandhu's expert report, Ms. Sangha was suffering from "anxiety" which in turn "triggered depressed mood", accompanied by "poor sleep, low energy, low motivation, anxiety, obsessive worrying and crying outbursts". Ms. Sangha also reported "low stress tolerance and feelings of frustration". She expressed "feelings of life not being worth living but without any suicidal thoughts". The report makes no mention of any history of depression or mood disorder prior to the collision, no reference to the suicidal ideations Ms. Sangha expressed to Dr. Mann, and no mention of the fact that Ms. Sangha had been taking prescription anti-depressant medications. Dr.

Sandhu's initial diagnosis was "major depressive disorder". He recommended treatment with an anti-depressant medication.

50 Ms. Sangha continued to see Dr. Sandhu, more or less once per month, from February 2015 up to the date of Dr. Sandhu's expert report on 6 November 2017. In the first few visits, Dr. Sandhu prescribed various anti-depressants which made Ms. Sangha nauseous, before ultimately settling on Cipralex, in November 2015. I note that if Dr. Sandhu had been given a complete history of Ms. Sangha's prior treatment for depression, he would have been immediately aware that Cipralex had been effective in treating Ms. Sangha's past bouts of depression. In any event, during her monthly appointments, Ms. Sangha repeatedly and consistently reported anxiety and depression associated with her physical injuries and consequent inability to return to work. She had poor sleep, low energy, and a preoccupation with pain.

51 At various points in time, Ms. Sangha expressed a desire to return to work. At one appointment, she explained that she could not return to her job at the cake factory because she was unable to lift more than 30 pounds, which was a requirement of her job. Ms. Sangha also stated that she missed her co-workers whom she regarded as a second family.

52 In his expert report, Dr. Sandhu concluded that Ms. Sangha was suffering from "treatment resistant chronic major depressive disorder". The disorder was "chronic" because it persisted for more than two years. It was "treatment resistant" because it failed to resolve with trials of two different anti-depressants from different classes of medication. Dr. Sandhu noted that according to literature, approximately 30% of patients with major depressive disorder become treatment resistant.

53 Dr. Sandhu's expert report also stated that Ms. Sangha suffered from "persistent and severe somatic symptom disorder". In testimony, Dr. Sandhu explained that this is a condition in which the patient is disproportionately preoccupied with pain. In Ms. Sangha's case, the condition was "persistent" because it caused psychological stress and functional impairment for a period of more than six months.

54 With respect to causation, Dr. Sandhu's opinion was that both of these conditions - depression and somatic symptom disorder - were attributable to "soft tissue injuries and psychological stress of pain" in connection with Ms. Sangha's motor vehicle collision. He opined that if Ms. Sangha had made a prompt physical recovery, then the depressive disorder may have resolved with anti-depressant medication. He added that Ms. Sangha's loss of connection to co-workers also contributed to or deepened her depression.

55 In describing the effects of these conditions, Dr. Sandhu's opinion was that the depression and the somatic symptom disorder were "intertwined", in that Ms. Sangha's perception of pain contributes to her depression and the depression in turn lowers her tolerance for pain. In Dr. Sandhu's opinion, these conditions made Ms. Sangha "totally disabled from any kind of work".

56 With regard to prognosis, Dr. Sandhu indicated in his report that Ms. Sangha was "unlikely to see any improvement". Dr. Sandhu opined that Ms. Sangha's psychological conditions were treatment-resistant, permanent, and life-long, and that Ms. Sangha was likely to require anti-depressant medication for the rest of her life.

57 In cross-examination, Dr. Sandhu acknowledged that he was not aware that Ms. Sangha had a history of depression for which she had been treated with anti-depressant drugs. He was not aware that Ms. Sangha had been on medical stress leave in the past, nor that she was on medical stress leave at the time of the collision. Dr. Sandhu was equally unaware that even months after the collision, Ms. Sangha reported to Dr. Mann that she was experiencing suicidal thoughts due to family-related strife, leading Dr. Mann to diagnose Ms. Sangha with depression and prescribe anti-depressant medication.

58 Dr. Sandhu further testified that, as Ms. Sangha's treating psychiatrist, he would accept that what Ms. Sangha told him was true; he did not consider it to be part of his job as a treating psychiatrist to confirm or verify what the patient tells him. Insofar as his role as an expert is concerned, Dr. Sandhu accepted that information that Ms. Sangha had a prior history of depression might have affected his opinions on the causation or prognosis of Ms. Sangha's condition. However, Dr. Sandhu did not review any of Ms. Sangha's prior medical records before writing his report.

(2.5.3.2) Evidence of Ms. Mann

59 Ms. Mann is Ms. Sangha's psychological counsellor. She prepared an expert report and testified at trial. Ms. Mann is a clinical counsellor with undergraduate degrees in science and education, and a post-graduate degree in psychological counselling. I found Ms. Mann to be an expert, qualified to give opinion evidence in clinical counselling and treatment of psychological conditions.

60 Ms. Sangha was referred to Ms. Mann for psychological counselling in connection with pain, anxiety, and depression following the motor vehicle accident. Ms. Sangha had approximately 20 counselling sessions with Ms. Mann between January 2015 and December 2017.

61 Ms. Mann stated in her written report and in her testimony that she was unable to offer any opinion on Ms. Sangha's condition prior to the accident, since she did not treat Ms. Sangha and did not review any of her pre-accident records. In cross-examination, she agreed that it would have been helpful to know if Ms. Sangha had a history of depression before the accident.

62 Based on Ms. Mann's evidence, I accept that Ms. Sangha diligently attended and fully participated in the counselling sessions, and that she found them helpful in processing her feelings about the collision and its effect on her life. Beyond this, I did not find Ms. Mann's evidence to be

of much assistance in assessing the causation and prognosis in connection with Ms. Sangha's psychological issues.

(2.5.3.3) Evidence of Dr. Spivak

63 The defendants called Dr. Spivak to offer a critical review of Dr. Sandhu's expert report, and a response to Dr. Sandhu's expert opinion. With respect to qualifications, Dr. Spivak obtained his medical degree in 1997, and then completed a residency in psychiatry in 2002. He then worked for 10 years as an emergency room inpatient and outpatient psychiatrist at a hospital in Calgary, where he became the director of psychiatric emergency and adult acute inpatient care. Since 2013, Dr. Spivak has focused his work on outpatient psychiatry. Part of his current practice involves conducting independent medical examinations and medico-legal reports. I found Dr. Spivak to be an expert who was qualified to give opinion evidence in relation to the diagnosis, causation, treatment, and prognosis of psychiatric conditions.

64 Dr. Spivak's opinion was based solely on a review of Dr. Sandhu's expert report and Ms. Sangha's medical records. He had never met with, much less interviewed or examined Ms. Sangha. Plaintiff's counsel was highly critical of this fact, indicating that since Dr. Spivak had not examined Ms. Sangha, he was in no position to comment on her diagnosis. I note, however, that Dr. Spivak was asked to offer an opinion on a very narrow issue, namely the methodology of Dr. Sandhu's report and the soundness of Dr. Sandhu's opinion. When viewed through this lens, the criticism that Dr. Spivak never actually met with Ms. Sangha misses the point.

65 As to the substance of Dr. Spivak's report and his testimony before me, I did not find his evidence to be particularly helpful. Recall that Dr. Sandhu diagnosed Ms. Sangha with two separate psychological conditions, somatic symptom disorder, and treatment resistant major depressive disorder. I will deal with Dr. Spivak's assessment of each of these two diagnoses in turn.

66 Dr. Spivak's principal criticism of the somatic symptom disorder diagnosis would appear to be a matter of medical terminology, in that this disorder is meant to describe individuals with a perception of pain that is disproportionate to the physical effects of their injuries. In Dr. Spivak's view, Dr. Sandhu did not adequately assess the information as to the nature of Ms. Sangha's physical injuries, and therefore could not properly conclude that Ms. Sangha has had a disproportionate response to the pain caused by those injuries. I do not find this helpful, because quite apart from whether Ms. Sangha's condition is or is not properly characterized as somatic symptom disorder, the issues I have to determine are whether Ms. Sangha's professed preoccupation with pain is a genuine psychological condition, the duration of the condition, and the extent to which it can be treated.

67 With respect to the depression diagnosis, Dr. Spivak's criticism is in effect a disagreement with Dr. Sandhu as to the degree or severity of Ms. Sangha's depression. Because Dr. Spivak did

not actually examine Ms. Sangha, I do not consider his observations about the degree or severity of her depression to be particularly meaningful, although I do accept his assertion that Dr. Sandhu's expert report makes some sweeping conclusions that may not stand up to critical evaluation. For example, Dr. Spivak takes issue with Dr. Sandhu's conclusion that Ms. Sangha's depression is treatment resistant. From Dr. Spivak's perspective, this conclusion is "imprecise", since it does not take into account that the depression may be enduring due to certain "barriers", namely continuing pain and physical limitations. Dr. Spivak suggests that if Ms. Sangha's physical condition improves, the depression may not be "treatment-resistant". Dr. Spivak was also critical of Dr. Sandhu's assertion that Ms. Sangha's major depressive disorder will be "lifelong"; the fact that a condition is "chronic" does not necessarily mean it will never abate.

(2.5.4) Conclusions as to the Nature, Extent, and Duration of Ms. Sangha's Injuries

68 My conclusions with respect to the nature, extent, and duration of Ms. Sangha's injuries are as follows:

a) Ms. Sangha suffered soft tissue injuries to her lower back, neck, and left shoulder as a result of the collision. The lower back injury resolved within a reasonable time after the collision, but the neck and shoulder injuries were more persistent. These injuries caused Ms. Sangha pain, and impacted her life in a number of ways, including restricting her ability to return to work, restricting her activities of daily living, impairing her sleep, and impacting upon her mood. I will set out the specifics of these impacts in my analysis of Ms. Sangha's claim for damages.

b) With respect to the neck injury, Ms. Sangha had been experiencing neck pain from tension headaches prior to the accident. Just before the accident, Ms. Sangha's neck was 50% better, but the accident made it worse. Ms. Sangha continued to suffer from neck pain for a prolonged period of time, but by the time of the trial her neck had returned to its pre-accident condition.

c) With respect to the left shoulder injury, in the short term Ms. Sangha experienced pain at rest, heightened pain with movement, and restricted range of motion. Over time, the pain at rest abated, but Ms. Sangha developed a frozen shoulder causing pain with movement and persistent restricted range of motion. In treating Ms. Sangha's frozen shoulder, doctors identified a torn tendon. The torn tendon was the product of a degenerative condition that was not tied to the accident, but treatment of the torn tendon had the effect of delaying Ms. Sangha's recovery from the frozen shoulder.

d) As of the date of trial, Ms. Sangha was still experiencing pain and limited range of motion in her left shoulder. However, based on the expert evidence of Dr. Douglas and Dr. Horlick, I find that there is a significant likelihood that Ms. Sangha will continue to see improvement, the frozen shoulder condition will resolve, and Ms. Sangha will experience a full recovery.

e) With respect to Ms. Sangha's psychological condition, she had been diagnosed with and treated for several bouts of depression before the collision, and indeed at the time of the collision Ms. Sangha was on medical leave due to depression. The failure to advert to, or account for, these pre-existing bouts of depression impacts upon the weight to be attached to Dr. Sandhu's expert opinion as to the cause, severity, duration, and treatability of Ms. Sangha's depression.

f) After the collision, the pain and limitations of Ms. Sangha's physical injuries, and her inability to return to work at the cake factory contributed to or deepened Ms. Sangha's pre-existing depression.

g) The severity and duration of Ms. Sangha's depression is tied directly to the severity and duration of her physical injuries. I do not accept Dr. Sandhu's opinion that Ms. Sangha's depression is treatment resistant and life long. Rather, I find that to the extent Ms. Sangha sees further improvement in the condition of her shoulder, she is likely to see a corresponding degree of relief from her depression.

h) Dr. Sandhu's diagnosis of somatic symptom disorder is not helpful in evaluating the nature and extent of Ms. Sangha's injuries. The basis for this diagnosis would appear to be Ms. Sangha's preoccupation with pain, physical limitations, and inability to work. All of the factors driving the somatic symptom disorder diagnoses are tied, directly or indirectly, to the continuing effects of Ms. Sangha's frozen shoulder problem. To the extent that Ms. Sangha sees continuing improvement of her frozen shoulder, she will no longer be fixated on the condition or its life-restricting effects.

(2.6) Impact of the Collision on Ms. Sangha's Ability to Work

(2.6.1) Ms. Sangha's Evidence

69 Ms. Sangha's testimony about the impact of the collision on her ability to work can be summarized as follows:

a) Although she was off work on stress leave at the time of the collision, her depression was getting better and she was planning to return to her job at the cake factory on or about 15 June 2014. In my review of this evidence above, I concluded that (i) it is highly unlikely that by mid-May of 2014 Ms. Sangha was so depressed that she was unable to work, and (ii) her plan to return to work in mid-June of 2014 had more to do with the eligibility period for employment insurance benefits than it had to do with continuing depression. It follows that I accept Ms. Sangha's assertion that, but for the collision, she would have returned to work at the cake factory by mid-June 2014.

b) Ms. Sangha testified that she has been unable to return to her job at the cake factory because of the effects of the collision. Ms. Sangha testified that she would be unable to meet the demands of the job because she is no longer able to stand for an

entire shift due to back pain, and she is unable to lift cakes weighing as much as 30 pounds due to her shoulder injury. Later, Ms. Sangha testified that if her shoulder got better, she would be able return to work right away. In cross-examination, Ms. Sangha agreed that her back pain was more or less resolved. She confirmed her belief that if her shoulder got better, she could return to the cake factory job; in other words, the only thing preventing her from returning to work was the condition of her left shoulder.

c) As to retirement age, Ms. Sangha's plan before the collision was to continue working full-time at the cake factory until she retired at the age of 67. When asked in cross-examination about why she planned to work until the age of 67 and not 65, Ms. Sangha responded that people born after 1958 have to work until age 67. When it was suggested that she would retire at age 65 if that was the legal retirement age, she disagreed, stating that she would work until she was 67 if health permitted. Ms. Sangha admitted that in her examination for discovery, she said she would work until "retirement age", and that she had "seven years left". Based on her age at the time, that would have meant working until age 65, not 67.

d) Ms. Sangha professed to miss her job and her co-workers at the cake factory. She testified that not being able to go to work makes her sad and depressed. She believes if she were able to go back to work she would be much happier.

e) When asked in direct examination about whether she considered getting a different job, Ms. Sangha said she thought about it, but she cries a lot and she wonders what would happen if she kept crying at work. In cross-examination, Ms. Sangha agreed that since the collision she has not looked for another job. When pressed with the suggestion that getting another job might help to break her cycle of depression, Ms. Sangha replied that she wanted to work at the cake factory because that is where her friends are.

f) When asked about the work history outlined on her resume, Ms. Sangha agreed that she previously worked at Boston Pizza and at the Market Square Café. She said she worked at both locations as a dishwasher. Although her resume said she also worked as a cashier, she denied this, but then added that sometimes she handled the cash register when co-workers went on break. Ms. Sangha's resume indicated that she had also worked as a receptionist at a driving school.

g) Ms. Sangha suggested that she might be unable to find work because of her limited ability to speak English. She testified that all of the staff and clients at the driving school where she worked spoke Punjabi. Ms. Sangha admitted that she was required to speak English at the cake factory, but testified that she once got in trouble for speaking Punjabi on the factory floor. The employer's representative, Ms. Riestra, confirmed that all workers at the factory had to be proficient in English, and were expected to communicate in English while on the factory floor for safety reasons. Based on all the evidence, I find that Ms. Sangha is sufficiently

proficient in English to work at a variety of jobs, of the sort that she has had in the past.

(2.6.2) Functional Capacity Evaluation

70 Ms. Sangha participated in a functional capacity evaluation ("FCE") examination on 17 April 2017. The examination was conducted by two individuals, Ms. Jhaj and Mr. Buttar, working as a team. They prepared a joint FCE report. Both were called as witnesses.

71 Ms. Jhaj has a university degree in kinesiology and is a certified work capacity evaluator. Ms. Jhaj completed an FCE program and then obtained certification to conduct work capacity evaluations. I found Ms. Jhaj to be an expert in FCE testing, scoring, interpretation of test results, qualified to give expert opinion evidence with respect to Ms. Sangha's functional capacity in the work place and in the activities of daily living.

72 Mr. Buttar is an occupational therapist. He has a university degree in occupational therapy and (until recently, as described below), he has been a member of the College of Occupational Therapists. He also completed an FCE program and obtained certification to conduct work capacity evaluations. I found Mr. Buttar to be an expert qualified to give opinion evidence in (i) functional capacity test protocols, (ii) scoring and interpreting functional capacity evaluations, (iii) providing an opinion on whether an FCE matches the demands of a person's employment and activities of daily living, and (iv) providing an opinion on costs of future care.

73 Mr. Buttar testified before me on 26 July 2018. Several months after the evidence was in and both parties made their final submissions, plaintiff's counsel sent a letter advising the Court that Mr. Buttar's status as a registered occupational therapist had been revoked by the British Columbia College of Occupational Therapists, as of 6 July 2018. Plaintiff's counsel was unaware of this at the time of trial, and notified the Court in writing on the very day when the matter came to her attention. Based on the timing of these events, it would appear that Mr. Buttar was a properly certified occupational therapist at the time that he did the FCE and cost of future care reports, and at the beginning of trial when his reports were tendered, but that he was no longer a properly certified occupational therapist by the date of his testimony. Mr. Buttar made no mention of this development when he testified.

74 After receiving the plaintiff's letter, the parties were directed to appear before the Court to advise how they intended to deal with this issue. At a subsequent court appearance on 28 February 2019, neither party made a request to re-open the evidence, and neither party sought a mistrial, although these options were specifically canvassed. Rather, both parties proposed to deal with this development by way of written submissions, and the Court acceded to that proposal.

75 Appended to the supplementary written submissions of the defendants is a copy of the College of Occupational Therapist's discipline order in respect of Mr. Buttar. This document was published on the College's website on 26 July 2018, pursuant s. 39.3(7) of the *Health Professions*

Act, R.S.B.C. 1996, c. 183. Plaintiff's counsel made no objection to the defendants' reliance on the public notice. I therefore take judicial notice of this document, which sets out the circumstances in which Mr. Buttar's status as a registered occupational therapist was revoked.

76 The College's public notice indicates that Mr. Buttar was subject to disciplinary proceedings as a result of failure to comply with a previous consent order regarding the supervision of his practice and the completion of an ethics program. The previous consent order arose from prior complaints of "unethical billing" and "improper record keeping". As a result of all this, the College cancelled Mr. Buttar's registration as an occupational therapist effective 6 July 2018. As a consequence, Mr. Buttar is prohibited from holding himself out as an occupational therapist and from practicing in the field of occupational therapy. He is not permitted to apply for registration or reinstatement for a period of five years.

77 Counsel for the defendants submits that Mr. Buttar "misrepresented his credentials when he failed to inform the Court that he was no longer registered with the College". In the result, counsel says Mr. Buttar was "not properly qualified" as an expert to give opinion evidence in accordance with the standards of admissibility discussed in *R. v. Mohan*, [1994] 2 S.C.R. 9 [*Mohan*] and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

78 Counsel for the defendants also cited *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308, leave to appeal ref'd [2017] S.C.C.A. No. 419 [*J.P.*] In that case, the trial judge relied heavily on the opinion of an "expert" psychologist. On appeal, new evidence was adduced to show that the witness was not a licensed psychologist, her degrees came from "diploma mills", and her only real experience was in advocacy rather than expertise in the particular field in which she had been qualified to give opinion evidence at trial. The Court of Appeal ruled that the opinion evidence had to be rejected because of the witness's fraudulent credentials, regardless of when the fraud was or could have been discovered: *J.P.* at para. 187.

79 Counsel for the plaintiff responds by submitting that when Mr. Buttar testified, the Court was satisfied that his testimony met the threshold requirements set out in *Mohan*, namely (i) relevance, (ii) necessity, (iii) absence of an exclusionary rule, and (iv) proper qualification as an expert. Counsel says the defendants did not oppose Mr. Buttar's qualification, and did not raise any concerns with respect to the *Mohan* criteria. Counsel submits that expertise does not need to come from any particular professional designation. In Mr. Buttar's case, his expertise came from having the requisite education, skills, and special knowledge to perform functional capacity evaluations and cost of future care assessments, and the fact that his professional qualifications were revoked is irrelevant. The plaintiffs say Mr. Buttar's evidence was admissible, and the Court should not reduce the weight to be attached to the functional capacity and cost of future care reports, which are "helpful and trustworthy on their face", and consistent with all the other evidence.

80 I cannot agree with the plaintiff that the revocation of Mr. Buttar's professional status is "irrelevant". It is relevant in at least two ways.

81 First, I agree with the plaintiffs that Mr. Buttar "misrepresented his credentials when he failed to inform the Court that he was no longer registered with the College". Mr. Buttar entered into a consent disposition of the disciplinary proceedings against him on 6 July 2018. He clearly knew the terms of the disposition prohibited him from practicing as an occupational therapist, and from holding himself out to the public as such. Yet, when he appeared in Court on 26 July 2018, he said nothing to anyone about the change in his status. He allowed the parties and the Court to labour under the misapprehension that he was a certified occupational therapist, when in fact he was not. This conduct is nothing short of shocking. It speaks directly to the credibility of Mr. Buttar as the author of the two reports and as a witness giving evidence in Court.

82 Second, the fact that the College saw fit to revoke Mr. Buttar's registration says that the College, as the body responsible for supervising the practice of occupational therapy in British Columbia, no longer has confidence in Mr. Buttar's fitness to practice in this field. The College's order prohibits Mr. Buttar from practicing as an occupational therapist and from holding himself out as such. This significantly undermines the reliability of the functional capacity evaluation report and the cost of future care report. It also undermines the reliability of Mr. Buttar's testimony.

83 I also reject the suggestion of plaintiff's counsel that there is any significance to the fact that the defendants did not initially object to the qualification of Mr. Buttar as an expert when he testified in Court on 26 July 2018. The defendants did not know at that time that Mr. Buttar's certification had been revoked. Had the revocation of Mr. Buttar's status been known to the parties and the Court at the time that his reports were tendered in evidence, or at the time that he was called to testify, there would have been a very serious debate about whether this witness was a properly qualified expert under the fourth criterion in *Mohan*. There also would have been a serious issue about whether the Court should allow Mr. Buttar's testimony under the discretionary second step of the admissibility inquiry discussed in *White Burgess* at para. 24. The fact that Mr. Buttar did not bring the issue to the attention of anyone when he was called to testify can only make matters worse, in the sense that the failure to do so further undermines Mr. Buttar's credibility as a witness. On the other side of the coin, it could be argued that Mr. Buttar was in fact qualified to practice in his field at the time that he prepared his reports, and he is also a certified FCE examiner. Thus, it is at least arguable that concerns relating to revocation of Mr. Buttar's professional qualifications should be treated as a matter of credibility and weight of his evidence, not qualification and admissibility.

84 Assuming the ship has now sailed on the issue of admissibility, I am still left with the task of weighing Mr. Buttar's evidence. Given the revocation of Mr. Buttar's qualifications and his failure to disclose this when he testified, I have serious concerns about both the credibility and reliability of his evidence. In one sense, the situation is not quite as dire as in *J.P.*, since Mr. Buttar was qualified in his field at the time he prepared his reports, and he is also a certified FCE examiner. Thus, Mr. Buttar had the necessary expertise to do the work he did at the time he did it. In another

sense, this case is even more troubling than *J.P.*, since Mr. Buttar's qualifications were revoked by his professional association based on professional misconduct, and Mr. Buttar did not disclose this to anyone. The underlying misconduct appears to have related to billing practice and record keeping, but these are important aspects of the profession. Improper record keeping in particular can bear on the preparation of expert reports. And since Mr. Buttar did not disclose the change in his qualifications, the defendants were not in a position to probe or challenge his testimony with the benefit of all relevant information.

85 Turning to the substance of the FCE report, as noted this was a "joint report" authored by Ms. Jhaj and Mr. Buttar. Ms. Jhaj wrote the part dealing with the observations and testing procedures, and Mr. Buttar wrote the part setting out the conclusions as to Ms. Sangha's functional capacity. Thus, as Ms. Jhaj put it in cross-examination, she was responsible for setting out the portions of the report summarizing the FCE data, and Mr. Buttar was responsible for authoring the portion of the report dealing with interpretation of the data.

86 I will briefly describe how the FCE was conducted. Ms. Sangha was interviewed and filled out a variety of questionnaires. A musculoskeletal examination was performed. Ms. Sangha was also required to do a variety of biomechanical tests. These included basic movements including bending, standing, squatting, and basic physical tasks including pushing, pulling, and lifting. The evaluators then assessed Ms. Sangha in terms of both "vocational disability" and "general disability".

87 With regard to the "vocational disability" assessment, the results of Ms. Sangha's biomechanical tests were compared to the physical requirements of her job, determined by reference to her job description, a job site visit, and the National Occupational Classifications. Ms. Jhaj and Mr. Buttar concluded that Ms. Sangha was, as of the date of the examination, unable to meet the physical demands of her job as a cake factory worker. This was "primarily due to [Ms. Sangha's] inability to maintain safe biomechanical postures with above shoulder reaching tasks, lifting tasks, carrying tasks, and sustained postures such as stooping", "as per her job demands".

88 In cross-examination, it was suggested to Ms. Jhaj that the conclusion might have been different if Ms. Sangha had been taught proper biomechanical movements. Ms. Jhaj's response was that when Ms. Sangha used improper biomechanics, the evaluators would interrupt and show the correct movement, but Ms. Sangha was still unable to perform the movement safely. The gist of Ms. Jhaj's evidence was that Ms. Sangha was unable to perform certain movements in a biomechanically safe manner because of physical limitations.

89 With regard to the "general disability" assessment, the FCE report noted that Ms. Sangha "reported minimal difficulties with self care", and that she was "independent" with most tasks, although some tasks take her longer to perform due to pain. She reported inability to groom her hair due to limited range of motion, for at least some period of time after her shoulder surgery. She also reported limitations in her ability to do household chores, prepare meals, and perform

heavy cleaning and laundry. She is able to clean her own room and do laundry for herself and her husband, but her daughter-in-law now cleans the rest of the house, and she gets help from her family with "heavier cleaning tasks". The FCE report indicated that Ms. Sangha's self-reported limitations in performing functions of daily living were "consistent with the range of motion and strength limitations" found in the FCE.

90 With regard to prognosis, the FCE was conducted about nine months after Ms. Sangha's shoulder surgery. The FCE report noted that while "most recovery" is seen within six to nine months, improvements can be seen for up to one to two years after surgery. The longer the symptoms continue, the greater the likelihood that Ms. Sangha will not achieve full recovery. In cross-examination, Ms. Jhaj agreed that the results of the FCE only speak to Ms. Sangha's capabilities at the time of the examination - in April of 2017 - and Ms. Jhaj could not say whether Ms. Sangha's capabilities have improved since.

91 One important factor in assessing the reliability of the FCE is the subject's physical effort and forthrightness during the testing procedures. In this case, the testing procedures identified concerns with objective measurements of Ms. Sangha's effort. In particular:

a) Ms. Sangha's "five position grip test" gave an objective indication that she did not put forth full effort. Ms. Sangha's results deviated significantly from the bell-curve results one would expect to see in a test subject putting forth maximal effort.

b) Ms. Sangha's heart rate showed minimal elevation during a number of tests, which is another objective indication of low effort. In cross-examination Ms. Jhaj suggested that certain medications might affect heart rate, but was unable to comment on the extent to which any particular medication might have this effect. Ms. Jhaj also suggested that heart rate would not be indicative of low effort where a subject fails a particular test because of biomechanical limitation rather than fatigue. However, for at least some of the tests with limited increase in heart rate, there is no indication that Ms. Sangha was told to stop the test because of bad biomechanics.

c) Ms. Sangha's subjective activity level ratings were "inconsistent with her demonstrated abilities". She also received high scores on questionnaires intended to gauge subjective fear of pain or re-injury. She scored high in "pain catastrophizing" and high in fear of re-injury. In the pre-testing phase, Ms. Sangha rated her shoulder pain as 2/10. At the end of the testing, some seven hours later, Ms. Sangha rated her shoulder pain at 2-3/10. Ms. Jhaj agreed that this was unusual, but noted that Ms. Sangha had taken Tylenol at the beginning of the assessment.

92 Mr. Buttar downplayed these concerns in the FCE report. Under the heading "Cooperation and Effort", Mr. Buttar wrote, "[i]t is the opinion of the assessors that the capabilities of Ms. Sangha demonstrated during this assessment are an accurate representation of her full capabilities". Under

the heading "Physical Effort Findings", Mr. Buttar wrote, "[o]verall test findings, in combination with clinical observations, suggest the presence of near full levels of physical effort on Ms. Sangha's behalf". The next few sentences in the report appear to include some acknowledgment that Ms. Sangha put forth less than full effort, although the key sentence is grammatically unsound, confusing, and impossible to understand.

93 The responding report of Ms. Bull, a fully qualified and properly certified occupational therapist, is critical of the FCE report authored by Ms. Jhaj and Mr. Buttar. In particular, Ms. Bull asserts that the "conclusions regarding Ms. Sangha's effort are inconsistent". I agree entirely with this observation. In my view, the objective indicators are inconsistent with full effort. This undermines the reliability of the FCE results. Furthermore, Mr. Buttar's failure to frankly acknowledge the inconsistency undermines the reliability and credibility of the FCE report. Considering this evidence together with the broader concerns about Mr. Buttar's credibility and reliability, I am not prepared to place any weight on the conclusions in the FCE report.

94 I have also considered whether any use might be made of Ms. Jhaj's testimony, and her portions of the FCE report. Ms. Jhaj was a properly qualified expert and there were no serious issues raised with respect to her credibility. However, this is a situation in which the plaintiffs chose to rely on a "joint report", that is, a single report prepared by two different experts, both relying to one extent or another on the expertise of the other. This, of itself, could prove to be problematic in certain circumstances. In this particular case, Mr. Buttar was responsible for writing the portion of the FCE report interpreting the FCE data and setting out the conclusions. In these circumstances, the Court is unable to extricate any reliable or meaningful evidence from Ms. Jhaj's portion of the FCE report.

(2.6.3) Evidence of Dr. Douglas

95 Dr. Douglas opined that Ms. Sangha would be unable to meet the demands of her job at the cake factory until her frozen shoulder condition had resolved. The frozen shoulder impaired Ms. Sangha's ability to lift things over her head, which Dr. Douglas understood to be a requirement of her work at the cake factory. In cross-examination, Dr. Douglas reiterated that until the physical limitations and pain associated with her frozen shoulder had resolved, Ms. Sangha would be unable to return to work at the cake factory. Dr. Douglas added that in his opinion Ms. Sangha would be able to work in a job that did not require Ms. Sangha to do the same kind of lifting.

(2.6.4) Evidence of Ms. Mann

96 Ms. Mann's expert report indicates that in the course of her counselling, Ms. Sangha frequently expressed concern about being unable to return to work. This triggered feelings of anxiety, helplessness, and social isolation. Ms. Mann recommended to Ms. Sangha that she do some volunteer work, because this might help Ms. Sangha to feel more productive and less isolated. Ms. Sangha seemed receptive to the idea but in subsequent counselling sessions over the

next 18 months, she did not follow through. Ms. Mann testified that this was not unusual, explaining that many of her clients comply with 30 to 50% of her recommendations, whereas Ms. Sangha was 70% compliant.

(2.6.5) Evidence of Dr. Sandhu

97 Dr. Sandhu's report also noted that Ms. Sangha expressed anxiety and frustration about being unable to return to work at the cake factory. Ms. Sangha frequently expressed worry that she would be unable to return to her job or that she would lose her job because of her injuries. At one point she told Dr. Sandhu that she could not return to her job at the cake factory because she could not lift 30 pounds, which was a job requirement. Ms. Sangha also repeatedly asserted that she missed her co-workers, who she regarded as a second family.

98 Dr. Sandhu opined that based on his diagnoses of (i) treatment resistant major depressive disorder and (ii) somatic symptom disorder, Ms. Sangha was unable to work at any job whatsoever. He further opined that these were lifelong conditions. In Dr. Sandhu's opinion, Ms. Sangha was not psychologically or emotionally fit to handle the stresses of any workplace. He testified that she would be unable to do volunteer work for the same reasons. Dr. Sandhu conceded in cross-examination that Ms. Sangha might be able to return to work if her depression improved by some 20 to 30%.

(2.6.6) Evidence from Ms. Sangha's Employer

99 Ms. Riestra, the human resources manager at the cake factory, was called as a witness for the plaintiff. There were two aspects to Ms. Riestra's testimony. First, Ms. Riestra gave evidence about Ms. Sangha's employment and earnings history. Second, Ms. Riestra testified about the physical demands of Ms. Sangha's job as a production worker.

100 With regard to Ms. Sangha's employment history, Ms. Riestra referred to human resources records indicating that Ms. Sangha had been working at the cake factory since 2000. She had been on leave several times, as described above. Most recently, Ms. Sangha was on leave commencing on 19 February 2014, and has not been back to work since. Before going on leave, Ms. Sangha was earning $17.40 per hour, working 40 hours per week. Ms. Sangha earned just under $36,000 per year in her last two full years of employment. If Ms. Sangha had continued working, her hourly wage would have increased incrementally, up to approximately $18.80 as of April 2018. Ms. Riestra confirmed that the factory has no mandatory retirement age, there are some workers over the age of 65, and the oldest worker at the factory is 73.

101 With regard to the physical requirements of Ms. Sangha's job, Ms. Riestra explained that workers rotate through three separate work stations: oven, decorating, and packaging. All of the workers must therefore be capable of doing the tasks at all three stages of the production process. Ms. Riestra confirmed that Ms. Sangha was unable to meet the physical requirements of the job,

however the specifics of her testimony on this issue were based on the results of the FCE, which I am not prepared to place any weight on for the reasons discussed above. Nevertheless, at a more general level, it is clear to me from Ms. Riestra's testimony that Ms. Sangha's job as a production worker required her to lift rather heavy cakes above her head on a relatively frequent basis. In cross-examination, Ms. Riestra explained that some of the cakes weighed as much as 28 pounds, and workers would be required to handle cakes of this weight in order to do the job. There are no "less demanding" production worker positions at the factory.

(2.6.7) Conclusions as to the Impact of the Collision on Ms. Sangha's Ability to Work

102 My conclusions concerning the impact of the collision on Ms. Sangha's ability to work are as follows:

a) I accept that Ms. Sangha's pre-existing depression had resolved by mid-May 2014. I find on a balance of probabilities that but for the collision, Ms. Sangha would have returned to work on 15 June 2014.

b) As a result of the collision, Ms. Sangha was unable to return to her job at the cake factory as planned on 15 June 2014. Since then, all of Ms. Sangha's injuries, with the exception of the frozen shoulder, have resolved. Ms. Sangha's frozen left shoulder continues to cause restricted range of motion and pain with movement beyond a certain range. I am therefore satisfied based on the evidence of Ms. Sangha, Dr. Mann, Dr. Douglas, Dr. Horlick, and Ms. Riestra that Ms. Sangha has been unable to meet the physical demands of her job at the cake factory due to the continuing effects of her frozen left shoulder. The physical effects and restrictions of Ms. Sangha's frozen shoulder have continued up to and including the last date of trial. In reaching this conclusion, I have not placed any weight on the FCE report or the associated *viva voce* testimony of Mr. Buttar or Ms. Jhaj.

c) I am also satisfied, based on the prognosis evidence of Dr. Douglas, that Ms. Sangha can be expected to achieve a full recovery within three years of her shoulder surgery, which took place on 30 June 2016. Thus, the frozen shoulder can be expected to be fully resolved by 30 June 2019, and Ms. Sangha would be able to return to work at the cake factory at that time.

d) But for the continuing effects of her frozen left shoulder, Ms. Sangha would have been able to return to her job at the cake factory. If the physical effects of Ms. Sangha's frozen left shoulder were to resolve, Ms. Sangha would be able to return to work at the cake factory.

e) With respect to the impacts of Ms. Sangha's psychological condition on her ability to work, I do not accept the opinion of Dr. Sandhu that Ms. Sangha's depression and preoccupation with the effects of the collision are such that she is unable to handle the stresses of any form of employment. Although Ms. Sangha continues to suffer from depression, she has in the past been able to return to work after bouts of

depression. Her current state of depression is based on her current circumstances, including the fact that she feels frustrated, anxious, unproductive, and socially isolated because she is not working.

f) The evidence indicates that Ms. Sangha had shoulder surgery on 30 June 2016, after which her shoulder was in a sling for some six to eight weeks. Even allowing for a further period of four weeks of recovery after her arm was out of the sling, Ms. Sangha would have recovered from the shoulder surgery by the beginning of October 2016. As of this date, although Ms. Sangha was still unable to meet the physical demands of her job at the cake factory due to continuing effects of the frozen shoulder, there was nothing preventing her from seeking either part-time employment at another workplace, or a volunteer position, doing a less physically demanding form of work. I find further that returning to work at another job in a part-time capacity or doing volunteer work would likely have reduced Ms. Sangha's feelings of frustration, anxiety, and social isolation, and her corresponding depression.

(3) Analysis

(3.1) Causation

103 To prove causation, the plaintiff must show a "causal link" between his or her injuries and the defendant's tortious conduct. The primary test for determining causation is the "but for" test, under which the plaintiff must show on a balance of probabilities that his or her injuries would not have occurred "but for" the negligence of the defendant. The plaintiff need not show that the defendant's conduct is the sole cause of the injury, so long as the plaintiff establishes a "substantial connection" beyond the *de minimis* range between the plaintiff's injuries and the defendant's tortious conduct: *S.R. v. Trasolini*, 2013 BCSC 1135 at para. 146, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Blackwater v. Plint*, 2005 SCC 58; *Resurfice Corp. v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32.

104 I will first address Ms. Sangha's physical injuries. I am satisfied that the motor vehicle collision was a significant cause of her lower back, neck, and left shoulder injuries. There is no real dispute that but for the motor vehicle collision, Ms. Sangha would not have suffered these physical injuries. Ms. Sangha's lower back pain has resolved. With respect to neck pain, although there was evidence that Ms. Sangha had a pre-existing issue, the law says that a defendant is liable for damages where a victim's pre-existing condition is worsened by the defendant's tortious conduct. See *Athey* at para. 35. With respect to Ms. Sangha's left shoulder, the evidence indicates the collision was a substantial contributing cause of Ms. Sangha's frozen shoulder, the symptoms of which continued even after she had fully recovered from surgery to repair the degenerative tendon tear. The surgery delayed Ms. Sangha's recovery from the frozen shoulder. According to the reasoning in *Athey*, the defendants are liable for damages in connection with Ms. Sangha's frozen left shoulder, even if that condition was unexpectedly severe owing to Ms. Sangha's pre-existing degenerative tendon tear.

105 I will next address Ms. Sangha's psychological injuries. There is no distinction at law between physical and psychological injury insofar as the test for causation is concerned: *Trasolini* at para. 146. Recall that after reviewing the evidence regarding Ms. Sangha's psychological condition, I made four key findings. First, I found that at the time of the collision, Ms. Sangha had been diagnosed with and treated for several bouts of depression; in other words, this was a pre-existing condition. Second, I found that after the collision, the pain and limitations of Ms. Sangha's physical injuries, and her inability to return to work at the cake factory contributed to or deepened her pre-existing depression. Third, I found that the severity and duration of Ms. Sangha's depression is tied directly to the severity and duration of her physical injuries. Fourth, I found the diagnosis of somatic symptom disorder unhelpful because, to the extent that Ms. Sangha is preoccupied with pain, physical limitations, and inability to work, her fixation with these issues is tied to the continuing effects of her frozen shoulder condition. My conclusion is that, even though Ms. Sangha had pre-existing depression, the collision was a contributing cause to Ms. Sangha's continued or deepened depression.

(3.2) Damages

106 Ms. Sangha claims non-pecuniary damages for pain and suffering, and pecuniary damages for loss of earning capacity, special expenses, and future costs of care arising from physical and psychological injuries caused by the collision. I will deal with each of these in turn.

(3.2.1) Non-Pecuniary Damages

107 Non-pecuniary damages are awarded to compensate an injured plaintiff for pain, suffering, and loss of enjoyment of life arising from the defendant's tortious conduct. The reality is that "money cannot provide true restitution", since "what has been lost is irreplaceable" and there is no way to place a market value on pain, suffering, and loss of enjoyment of life: *Gillam v. Wiebe*, 2013 BCSC 565 at para. 68. In this regard, a damages award is intended to provide "solace", in the sense that "money can be used to make the injured person's life more endurable": *Gillam* at para. 68.

108 The appropriate amount of compensation is not merely a function of the seriousness of the plaintiff's injuries viewed in isolation. Rather, the court must consider the effect of the injuries on the plaintiff's particular circumstances, taking into account factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 45-46. It is therefore necessary for the court to have an "appreciation of the individual's loss": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637, cited in *Stapley* at para. 45.

109 Counsel for Ms. Sangha says that her client, who is now 59 years old, has suffered from neck

pain, lower back pain, and shoulder pain even at rest. Over time, the neck and lower back problems have resolved, but the pain and restricted range of motion associated with her frozen left shoulder have persisted. The discomfort from her physical injuries has affected Ms. Sangha's ability to sleep. She has been restricted in her activities of daily living. She has also suffered from feelings of anxiety, lack of productivity, and social isolation, all contributing to prolonged depression. Ms. Sangha has been suffering from the physical and psychological effects of the collision for more than four years, and the prognosis is that the frozen shoulder symptoms could continue for another year. Ms. Sangha also says she has suffered from her inability to return to work; she misses her co-workers and feels socially isolated and depressed. In these circumstances, Ms. Sangha seeks non-pecuniary damages of $150,000.

110 I accept that the collision has caused Ms. Sangha physical suffering, but I note that the neck and lower back pain resolved over time. The most significant physical injury from the collision has been Ms. Sangha's frozen left shoulder, which originally caused pain at rest but as of the date of trial was painful only at movement beyond a certain restricted range of motion. And although Ms. Sangha's physical injuries have caused restrictions on her daily activities, there is no evidence that she led a particularly active lifestyle which has been curtailed by the effects of the collision. I also accept that the collision and its aftermath have caused Ms. Sangha to suffer from depression, which was a pre-existing condition the effects of which were prolonged and exacerbated by Ms. Sangha's physical injuries and their effects on her life.

111 Plaintiff's counsel cited a number of cases involving non-pecuniary damages awards which, adjusted for inflation, range from $117,000 to $149,000. See *Pistruga v. Garcia*, 2014 BCSC 1795; *Hanson v. Yun*, 2013 BCSC 2313; *Dycke v. Nanaimo Paving and Seal Coating Ltd.*, 2007 BCSC 455. In several of those cases, the plaintiffs were considerably younger and arguably more active than the plaintiff in the case at bar. What is more, in each case, the plaintiff appeared to suffer soft-tissue injury that involved torn tendons or ligaments requiring one or more surgeries. The case at bar is different in that Ms. Sangha had shoulder surgery to repair a pre-existing condition. In Ms. Sangha's case, the primary significance of the surgery is that it delayed her recovery from the frozen shoulder condition caused by the collision.

112 By contrast, the counsel for the defendants cited cases involving non-pecuniary damages awards ranging from $50,000 to $75,000. See *Peake v. Higo*, 2009 BCSC 265; *Wepryk v. Juraschka*, 2012 BCSC 974; *Matias v. Lou*, 2015 BCSC 544; *Wendt v. Pantages*, 2017 BCSC 2428. These cases generally involved middle-aged or older plaintiffs who suffered soft-tissue injuries leading to frozen shoulder, in some cases accompanied by depression or other psychological distress. Counsel for the defendants says an award of $70,000 to $80,000 is appropriate in Ms. Sangha's case.

113 While damages awards in other cases may be useful in gauging what is reasonable, the case law does not establish a tariff for any particular kind of injury, and the award must always be determined based on an individualized assessment of the plaintiff's loss: *Stapley* at para. 45, citing

Lindal at p. 637. In the case at bar, to the extent that I can be guided by the case law in gauging what is reasonable, I find the cases cited by the defendants to be more comparable to Ms. Sangha's circumstances than the cases cited by the plaintiff.

114 Taking into account the nature and duration of Ms. Sangha's physical and psychological injuries and the effect that these injuries have had on her life, including her inability to perform some of the housework and child care activities that she used to do, her inability to return to a job that she enjoyed, and the resulting deepening and prolongation of her pre-existing depression, my conclusion is that Ms. Sangha is entitled to non-pecuniary damages of $70,000.

115 The defendants say the non-pecuniary damages award should be reduced because of Ms. Sangha's failure to mitigate her loss. Where the defendant alleges that the plaintiff has failed to mitigate damages in the treatment of an injury or medical condition, the burden is on the defendant to prove (i) that the plaintiff acted unreasonably in not following a recommended course of treatment, and (ii) the extent to which the plaintiff's damages would have been reduced if the recommended course of treatment had been followed: *Rahimi v. Ma*, 2014 BCSC 710 at para. 36, citing *Chiu v. Chiu*, 2002 BCCA 618 at para. 57. This involves a modified objective standard, under which the court must determine whether a reasonable person, in possession of all the information known to the plaintiff, ought reasonably to have pursued the recommended treatment. The burden is on the defendant to prove that this standard has been met, and then to prove "the extent, if any, to which the plaintiff's damages would have been reduced" by treatment that was recommended but not followed: *Rahimi v. Ma* at para. 37, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

116 The defendants allege that Ms. Sangha failed to mitigate in two discrete ways.

117 First, counsel for the defendants argues that Ms. Sangha failed to take anti-depressant medications as prescribed by her doctors. Ms. Sangha was questioned at some length about the medications prescribed for her and whether she took them. She maintained that she took medications as prescribed by her doctors. I found her testimony on this point to be credible. Although she stated in examination for discovery that she had some fear about taking a particular anti-depressant after hearing that someone who was using it ended up committing suicide, the evidence goes no farther than to show that Ms. Sangha had some reservations, which she overcame. In short, I accept Ms. Sangha's evidence that she took the anti-depressant medications prescribed by her doctors.

118 Second, counsel for the defendants contends that Ms. Sangha failed to pursue volunteer work as a means of addressing some of the root causes of her depression. Before addressing that argument it is first necessary to explain the significance of this point.

119 I have found that Ms. Sangha's pre-existing depression was deepened and prolonged by her injuries and the resultant effect on her life, including her inability to return to work at the cake

factory. The inability to return to work contributed to the depression in causing Ms. Sangha to have feelings of frustration, anxiety, and social isolation. Against this backdrop, the defendants say Ms. Sangha failed to mitigate the effects of her depression by failing to pursue volunteer work.

120 On the evidence, I am satisfied on a balance of probabilities that Ms. Sangha's psychological counsellor Ms. Mann recommended that Ms. Sangha seek out volunteer work, and that Ms. Sangha declined to follow Ms. Mann's advice. In particular, the evidence indicates that when Ms. Mann recommended to Ms. Sangha that she consider volunteer work, Ms. Sangha said she would think about it. In subsequent counselling sessions, Ms. Mann asked if Ms. Sangha had looked into volunteer work and she replied that she had not.

121 When examining whether Ms. Sangha acted unreasonably in declining to pursue volunteer work, I have to consider Ms. Mann's evidence that many of her clients do not comply with all of her advice or recommendations. According to Ms. Mann, many of her clients are only 50% compliant with her advice. This makes sense, since many times patients suffering from psychological issues are simply unable to comply with recommendations of mental health professionals. Ms. Mann testified that in her assessment, Ms. Sangha was in general more compliant than most of her clients. In my view, this evidence cuts both ways. On the one hand, it suggests that as a general rule, Ms. Sangha followed the advice of her counsellor. In other words, Ms. Sangha did not ignore or disregard her counsellor's advice. On the other hand, the evidence suggests that as a general rule Ms. Sangha was capable of acting on the advice she received. This is significant because, when it came to Ms. Mann's advice about pursuing volunteer work, Ms. Sangha made no effort whatsoever. There is no evidence that Ms. Sangha ever even inquired into doing volunteer work. Thus, this is not a situation where Ms. Sangha tried to act on or comply with her counsellor's advice but found herself unable to do so.

122 There is also the evidence of Dr. Sandhu, who opined that Ms. Sangha was unable to work in any capacity due to her depression. However, as noted above, I did not accept that opinion because it was not based on a full appreciation of Ms. Sangha's medical history, including the fact that she had returned to work after past bouts of depression.

123 Considering all the evidence on this point, I am satisfied on a balance of probabilities that Ms. Sangha acted unreasonably in failing to pursue volunteer work as a means of addressing her depression. On the record in this case, this was a significant and obvious means for Ms. Sangha to deal with her feelings of anxiety, frustration, and social isolation. Ms. Sangha reported to both Dr. Sandhu and Ms. Mann that she enjoyed her work, that she missed her colleagues, and that she felt frustrated and depressed because she was unable to return to work at the cake factory due to her physical injuries. This left open the possibility of seeking out a volunteer position (or obtaining alternate employment), to address feelings of unproductiveness and social isolation. Ms. Mann recognized this and suggested that Ms. Sangha might consider volunteer work. I find on a balance of probabilities that Ms. Sangha acted unreasonably in making no effort to do so.

124 The defendants must also prove that the plaintiff's damages would have been reduced if the plaintiff had pursued the recommended course of action. Keeping in mind that the issue here is the extent of Ms. Sangha's non-pecuniary damages, the defendants are not required to prove that the plaintiff's loss would have been reduced by some precise amount, in dollars and cents. Rather, the defendants must show on a balance of probabilities that if the plaintiff had pursued the recommended course of action, this would actually have made a quantifiable difference in the sense of having a material bearing on the extent of her loss.

125 I am satisfied that by the point in time when her neck pain, lower back pain, and active shoulder pain had resolved, Ms. Sangha would have been physically able to do volunteer work, or a part-time job. I am also satisfied that in view of her work skills and work history, she would likely have been successful in finding such a position. I find further that had Ms. Sangha had done so, this would have had the effect of reducing her anxiety, frustration, social isolation, and resulting depression. On the basis of this reasoning, I would reduce the non-pecuniary damage award by 10%, to $63,000.

(3.2.2) Loss of Past Earning Capacity

126 As stated in *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30, "a claim for what is often described as 'past loss of income' is actually a claim for loss of earning capacity". In other words, it is "a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury": *Rowe* at para. 30.

127 In *Grewal v. Naumann*, 2017 BCCA 158 at para. 45-48, Goepel J.A. set out the key principles governing a claim of lost earning capacity. I note that while Goepel J.A. was in dissent in *Grewal*, his discussion of the law on this issue was endorsed by the majority, per D. Smith J.A. at para. 66. For ease of reference, I would summarize the legal principles set out in *Grewal* as follows:

(a) The principles applicable to a claim of past lost earning capacity are the same as the principles applicable to a claim of future lost earning capacity: *Grewal* at para. 46, citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.

(b) In either case, i.e. a claim of either past or future loss, the plaintiff must establish (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss: *Grewal* at para. 48.

(c) To the extent that the analysis requires a consideration of hypothetical events, the plaintiff is not required to prove these events on a balance of probabilities; what is required is a "real and substantial possibility, and not mere speculation": *Grewal* at para. 46-48, citing *Smith v. Knudsen* at para. 29.

(d) Where the court finds both impairment of earning capacity and a real and substantial possibility of an event resulting in loss, damages must then be assessed. The damages are to be valued using either the earnings approach or the capital asset approach: *Grewal* at para. 48.

128 In the case at bar, Ms. Sangha claims damages for lost earnings based on her inability to return to work as a production worker at the cake factory. In my analysis of the evidence above, I concluded that: (i) Ms. Sangha's pre-existing depression had resolved itself by mid-May 2014, and Ms. Sangha was planning to return to her job at the cake factory on 15 June 2014; (ii) as a result of the collision, Ms. Sangha was unable to return to her job at the cake factory as planned on 15 June 2014; and (iii) from that date until the date of trial, Ms. Sangha has been unable to meet the physical demands of her job at the cake factory due to the continuing effects of her frozen left shoulder. On the basis of those findings, I agree with plaintiff's counsel that Ms. Sangha suffered a loss of past earning capacity from 15 June 2014 until the date of trial, which commenced on 16 April 2018.

129 It is thus necessary to consider how to value the loss. I find that it is most appropriate to assess the value of Ms. Sangha's loss under the earnings approach. Using the wage figures furnished by Ms. Riestra, my conclusion is that Ms. Sangha's net loss of earnings from 15 June 2014 until 16 April 2018, less taxes, but including loss of MSP and RSP benefits, is $106,241.

130 The defendants once again assert that the amount of loss should be adjusted to reflect Ms. Sangha's failure to mitigate. I have previously found that Ms. Sangha's non-pecuniary damages should be reduced by 10% on account of her failure to seek out volunteer work. I would apply the same reasoning in the assessment of damages for lost income. Although Ms. Sangha has been unable to return to work at the cake factory because of the physical limitations imposed by her frozen shoulder condition, this does not mean she has been unable to work at any form of employment from the date of the collision on 14 May 2014 up to and including the date of trial. The evidence indicates that Ms. Sangha was fully recovered from the shoulder surgery by 1 October 2016. I am satisfied that from that date forward, Ms. Sangha would have been in a position to seek out some other form of employment, within her physical capabilities.

131 The defendants must prove not only that the plaintiff failed to take reasonable steps to mitigate her loss, but also the amount by which the plaintiff's damages would have been reduced. However, as we are dealing with hypotheticals or contingencies, this is an assessment, not a calculation. What is necessary is for the defendants to establish that had the plaintiff taken appropriate steps to mitigate, these steps would have had a material and quantifiable bearing on the extent of the plaintiff's loss. I am satisfied that had Ms. Sangha sought out alternate employment, it is more likely than not that she would have been successful in finding another job within her physical capabilities.

132 Even if Ms. Sangha had only been able to secure a part-time, minimum wage job, this would

have had a material bearing on her loss of earnings from 1 October 2016 to 16 April 2018, roughly 40% of the time period in which Ms. Sangha has not been working in the wake of the collision. Taking all of this into account, I find it appropriate to reduce the plaintiff's damages for loss of past income by 10%, or $10,634. This results in a net award of $95,607 on account of lost earnings from the date of the collision to the date of trial.

(3.2.3) Loss of Future Earning Capacity

133 The principles governing future loss of earning capacity are largely the same as the principles governing past loss of earning capacity. Applying those principles in this particular case, there are two issues for consideration. First, I must determine whether Ms. Sangha has proven that she has suffered a loss of income earning capacity as a result of the accident. Then, if satisfied that Ms. Sangha has established an entitlement to damages for loss of future earning capacity, I must assess damages based on the value of the loss.

134 At the first stage, the analysis turns largely on the medical evidence with respect to her current physical and psychological conditions, and the prognosis of recovery. In particular:

a) With respect to Ms. Sangha's physical injuries, I accept that at the time of her testimony in April 2018, she continued to have restricted movement and continuing pain in her left shoulder. However, I also accept the expert opinion evidence of Dr. Douglas and Dr. Horlick that Ms. Sangha's frozen shoulder condition is likely to resolve over time. Dr. Horlick opined that Ms. Sangha was likely to achieve full recovery within six months of his November 2017 report, meaning that Ms. Sangha's condition would be likely to resolve by the spring of 2018. Dr. Douglas gave an opinion that the outside limit for a full recovery from frozen shoulder would be three years; in Ms. Sangha's case, Dr. Douglas would expect that recovery time to run from the date of her shoulder surgery on 30 June 2016, meaning that Ms. Sangha's frozen shoulder should be fully resolved by 30 June 2019. The plaintiff has not presented any evidence to support the conclusion that Ms. Sangha will suffer a loss of future earning capacity beyond this date.

b) With respect to Ms. Sangha's psychological condition, I have concluded that the physical injuries and resulting limitations had the effect of deepening or prolonging Ms. Sangha's depression. However, I have also concluded that since the deepening or prolongation of Ms. Sangha's depression is tied directly to her physical injuries and limitations, her psychological condition will improve when she recovers from her physical injuries. I have also concluded that returning to work is likely to remove some of the root causes of Ms. Sangha's depression. All of these findings weigh against a conclusion that Ms. Sangha suffered any loss of earning capacity as a result of depression tied to the collision.

135 The medical evidence goes no further than to suggest that Ms. Sangha's future earning

capacity will be impaired from the date of trial (which began on 16 April 2018) to the date of anticipated recovery (on 30 June 2019), a period of some 15.5 months. Beyond this date, the evidence does not "establish a real and substantial possibility of a future event", namely a continuation of the frozen shoulder condition giving rise to a continuing loss of income earning capacity. I appreciate that Ms. Sangha is not required to prove on a balance of probabilities that she will continue to suffer from the effects of the frozen shoulder; all that is required is a real, non-speculative possibility that the frozen shoulder will persist. However, there is nothing but speculation on which to ground a finding that Ms. Sangha's frozen shoulder issues will continue beyond the time frame within which Dr. Douglas opines she should realize a full recovery.

136 I conclude that Ms. Sangha has established a minimal entitlement to damages under this heading, for the 15.5 month period between the date of the trial and the end of June 2019. In light of that conclusion, I must go on to the second step of the analysis, that is, valuation of the loss. In terms of the proper approach to valuation, both parties cited *Perren v. Lalari*, 2010 BCCA 140 at para. 32, in which the Court explained that if loss of earning capacity is proven, the value of the loss must be then be assessed using either the earnings approach or the capital asset approach.

137 In this particular case, the damages are not substantial, for several reasons. First, the impairment of Ms. Sangha's income-earning capacity is of a limited duration, namely a period of some 15.5 months from the date of trial to the date of anticipated recovery. Second, even accepting that Ms. Sangha's frozen shoulder condition will prevent her from returning to work at the cake factory in this 15.5 month period, this does not mean Ms. Sangha would be unable to obtain some other kind of work. There is no evidence about the difference between the income Ms. Sangha would earn at the cake factory and the income she could earn at some alternate employment, for example by working as a dishwasher, a cashier, or a receptionist as she has in the past. However, even if Ms. Sangha were only able to get a minimum wage job, the difference between a loss of future income at the cake factory and any future income at some other job would not be significant. The award must also account for the negative contingency that even without the accident, Ms. Sangha might have been off work for certain periods of time for depression, although of course she may well have received employment insurance benefits for the first ten weeks of any such period of lost employment.

138 Although both parties urged me to value the loss using the earnings approach, I consider the capital asset approach to be more appropriate in view of my findings of fact and the contingencies at play in this case. I would value the loss at $12,500, a figure representing roughly one-third of the annual income Ms. Sangha would have been earning had she not been injured in the collision, and continued to work at the cake factory from the date of the trial until the date of anticipated recovery on 30 June 2019.

(3.2.4) Loss of Housekeeping Capacity

139 Ms. Sangha has established that from the date of the collision up to the date of trial, her

physical injuries and resulting restricted movement negatively affected her ability to do housework. This has been taken into account in the non-pecuniary damages award addressed above. To justify a discrete award of damages for future loss of housekeeping capacity, Ms. Sangha must establish a real and substantial possibility that she will continue to suffer from injuries that would make a reasonable person standing in her shoes unable to perform "usual and necessary household work", giving rise to a true loss of capacity: *Kim v. Lin*, 2018 BCCA 77 at para. 27-37; *Menhinick v. Lobesz*, 2008 BCSC 1285 at para. 55, citing *McTavish v. MacGillivray*, 2000 BCCA 164.

140 In my view this is not an appropriate case for a discrete award of damages for loss of housekeeping capacity, for two reasons. First, the evidence as to limitations on Ms. Sangha's ability to do housework is vague and unconvincing, and demonstrates nothing more than a minimal curtailment of her ability to do housework. Second, the limitation on Ms. Sangha's ability to do housework is temporary and of relatively short duration. This is because the medical evidence indicates that Ms. Sangha is expected to make a full recovery from her frozen shoulder condition by the end of June 2019.

(3.2.5) In Trust Claim

141 Ms. Sangha also advances an "in trust" claim as compensation for various forms of assistance and labour provided by family members, to help with certain activities of daily living which Ms. Sangha has been unable to manage on her own due to her injuries. As explained in *Farand v. Seidel*, 2013 BCSC 323 at para. 99, "in trust" awards are "generally limited to seriously injured plaintiffs for support services beyond those normally to be expected in a marital or family relationship".

142 Plaintiff's counsel relies on the testimony of Ms. Sangha and her husband that as a result of her injuries, other adult family members have had to help her with activities of daily living, including personal hygiene, housework, and driving. Counsel suggested in closing argument that the services rendered by family members should be valued at $15 per hour, at an average of five hours per week, from the date of the collision to the date of trial.

143 There is evidence that for a period of some four months after her shoulder surgery, Ms. Sangha required assistance in personal grooming, and in being driven to appointments and on errands. Although the surgery was directed specifically toward the repair of a tendon tear not attributable to the collision, I accept that the surgery was performed in the context of a broader effort to treat Ms. Sangha's frozen shoulder condition arising from the collision. Accepting that the services provided by family members should be valued at $15 per hour, for five hours per week, over a period of 16 weeks, I award "in trust" damages in the amount of $1,200 for this particular period of time.

144 Beyond the four-month period following her shoulder surgery, the vague and somewhat

contradictory evidence concerning the extent to which Ms. Sangha required help with activities of daily living does not meet the threshold required to justify an "in trust" award. Apart from the time frame during which her arm was immobilized following surgery, Ms. Sangha was not a "seriously injured person" who required support "beyond that which would normally be expected in a marital or family relationship".

(3.2.6) Special Damages

145 In *Redl v. Sellin*, 2013 BCSC 581 at para. 55, the Court set out the principles applicable to special damages claims as follows:

> Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness...

146 The plaintiff claims a total of $14,370 in special damages for treatments and medications. The defendants agree that Ms. Sangha should be awarded special damages to cover costs of physiotherapy treatments totalling $5,400, but argue that the balance of the special expenses have not been proven.

147 I have reviewed the receipts for medical treatments, counselling, therapy, and drug purchases submitted by Ms. Sangha in support of her claim. The amounts paid for physiotherapy, diagnostic imaging, and pain counselling, totalling $7,100, are justifiable.

148 With respect to drug purchases, the plaintiff has submitted receipts totalling some $6,750. Of these, some $4,750 are for prescriptions filled in the name of Ms. Sangha's husband. I cannot conceive how these receipts came to be included in the evidence in support of Ms. Sangha's damages claim, but whatever the reason, they have nothing to do with the costs incurred by Ms. Sangha in connection with her injuries. That leaves some $2,000 in drug purchases; I accept that these are reasonable. There are also receipts for things like eye exams, glasses, and dental treatments which also have nothing to do with Ms. Sangha's injuries from the motor vehicle collision. In the net result, Ms. Sangha has proven medical, treatment, and counselling expenses totalling $9,100.

(3.2.7) Costs of Future Care

149 Damages for costs of future care are awarded to restore the plaintiff to his or her pre-accident condition, to the extent that this is possible, based on what is shown to be reasonably necessary to preserve or promote the plaintiff's mental and physical health: *Gignac v. Rozylo*, 2012 BCCA 351

at para. 29-30. The amounts claimed must be (i) justified based on medical evidence as to what is reasonably required to preserve or maintain the plaintiff's health, and (ii) reasonable: *Redmond v. Krider*, 2015 BCSC 178 at para. 174, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at p. 84.

150 Implicit in an award of costs of future care is the notion that the plaintiff is required to incur the costs to address some ongoing ill effects caused by the defendant's tortious conduct. In this particular case, I have found that Ms. Sangha continues to suffer the effects of a frozen shoulder condition attributable to the collision, and that the physical limitations and associated inability to return to her preferred workplace have deepened or prolonged Ms. Sangha's pre-existing depression. However, the lynchpin of all of this is the frozen shoulder condition, and on that score I have accepted the opinion of Dr. Douglas that this condition is likely to be resolved by, at the latest, the end of June 2019. Any award for costs of future care is therefore limited to the 15.5 month period between the date of trial and the date on which Ms. Sangha's underlying medical condition is expected to resolve.

151 The one exception to this reasoning relates to the cost of anti-depressant medication. Recall my finding that Ms. Sangha had pre-existing depression which was exacerbated or prolonged by the pain and physical limitations associated with her collision-related injuries. Dr. Sandhu expressed the opinion that Ms. Sangha will need to stay on anti-depressant medication for the rest of her life. Although I did not accept certain aspects of Dr. Sandhu's opinion, I do accept this aspect of his prognosis, on the reasoning that once a person suffers a prolonged bout of depression the person is likely to require anti-depressant medication indefinitely. Even if the depression abates, it may be necessary to continue to take the anti-depressant medication as a prophylactic measure. The defendants argue that Ms. Sangha was already taking anti-depressant medication before the collision. That is true, but the evidence indicates that Ms. Sangha took the medication for specific periods of time. On my assessment of all the evidence, the collision deepened and prolonged Ms. Sangha's depression, increasing the risk of recurrence to the point where, as Dr. Sandhu explains, Ms. Sangha will most likely have to be on anti-depressant medication for the rest of her life.

152 However, I also consider it appropriate to reduce the award for cost of anti-depressant medications to account for several negative contingencies. In particular, the award must account for the possibility that Ms. Sangha may have had other, unrelated bouts of depression which required her to take medication. The possibility that Ms. Sangha will at some point find it appropriate to stop taking the medication must also be considered. I will therefore reduce the award for anti-depressant medications by 30% to account for these negative contingencies.

153 To prove the quantum of future care costs, Ms. Sangha relies on a report prepared by Mr. Buttar. As noted above, I have serious concerns with respect to the credibility and reliability of Mr. Buttar's evidence. However, I am prepared to accept the evidence with respect to the costs of future care for two reasons. First, the evidentiary basis for a finding that the costs are reasonably

necessary is grounded in expert opinion evidence that is independent of Mr. Buttar, whose report is really only useful as a tabulation of categories of expenses that can be verified by objective sources. Second, the defendants tendered a responding report from Ms. Bull, which does not take issue with many of the items listed in Mr. Buttar's cost of future care report. The single exception is Mr. Buttar's costing of physiotherapy at a rate of $75 per session. Ms. Bull indicates that this is "in excess of typical rates". The bills submitted in support of Ms. Sangha's special damages claim indicate that she has been paying $30 per session for her physiotherapy treatment. I find this to be a more appropriate figure in determining costs of future care. Subject to this one point, I accept the cost figures set out in Mr. Buttar's report, despite the serious concerns with respect to the credibility and reliability of his evidence.

154 Based on the reasoning discussed above, my conclusions on the particular costs of future care claimed by Ms. Sangha are as follows:

Item	Cost	Total
(a) Anti-Depressants	Cipralex, annual cost of $1,594.99, for 26 years, totalling $41,469.74, reduced by 30% for negative contingencies.	$ 29,028.82
(b) Pain Medications	15.5 month supply of Tylenol, Trazadone, and Oxazapam.	$ 1,127.92
(c) Pain Counselling	Total of eight sessions, at $100 per session.	$ 800.00
(d) Kinesiology	Total of 16 sessions over eight weeks, at $75 per session.	$ 1,200.00
(e) Occupational Therapy	Total of four sessions over eight weeks at $237.50 per session.	$ 950.00
(f) Physiotherapy	Total of eight sessions over a period of 16 weeks a $30 per session.	$ 240.00
(g) Fitness Centre	One annual fitness pass cost of $457.	$ 457.00
(h) Heating Pad	One-time equipment cost of $45.	$ 45.00
(i) Self-Massage	One-time equipment cost of $125.	$ 125.00
Total		$ 33,973.74

155 Ms. Sangha also seeks damages to cover the cost of attendance at a pain clinic. Given the expert opinion evidence that Ms. Sangha's frozen shoulder condition is likely to resolve within 15.5 months of the date of trial, the plaintiff has failed to prove that attendance at a pain clinic is medically necessary. Moreover, there is no evidence in the record about the cost of such a program. Plaintiff's counsel relied on the cost findings in another decided case. I do not consider this to be an appropriate use of case law, which is no substitute for evidence on a factual point.

(4) Summary

156 In summary, I award the following damages:

(i) Non-Pecuniary Damages: $ 63,000.00
(ii) Loss of Past Earning Capacity: $ 95,607.00
(iii) Loss of Future Earning Capacity: $ 12,500.00
(iv) In Trust Damages: $ 1,200.00
(v) Special Damages: $ 9,100.00
(vi) Costs of Future Care: $ 33,973.74 _____
Total: $ 215,380.74

(5) Costs

157 If the parties are unable to agree on costs, they can file written submissions. Counsel for the plaintiff may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within three weeks of the release of these reasons. Counsel for the defendants may file written submissions of four pages or less (plus an affidavit containing any supporting materials) within two weeks of receiving the plaintiff's written submissions. Counsel for the plaintiff may file a reply of two pages or less (plus any reply affidavit material) within one week of receiving the written submissions of the defendants. If either party takes the view that submissions on costs cannot effectively be dealt with in writing, that party may, within the time limits set out above, submit a request to schedule a further appearance for oral submissions on costs.

W.P. RILEY J.

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