IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Simmavong v. Haddock,*
2012 BCSC 473

Date: 20120330
Docket: M092959
Registry: Vancouver

Between:

Hailie Simmavong

Plaintiff

And

William Robert Haddock

Defendant

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Plaintiff:	J. Scott Stanley
Counsel for the Defendant:	Jon R. Walsh
Place and Date of Trial:	Vancouver, B.C. November 21-25, 28-29, 2011
Place and Date of Judgment:	Vancouver, B.C. March 30, 2012

[1] This trial concerns the plaintiff's claim for damages arising from a motor vehicle accident, which occurred on June 24, 2007.

[2] Liability for the accident is denied as there is an action yet to be commenced relating to the plaintiff's daughter. The parties have agreed to litigate the claim for the plaintiff's damages only at this time.

THE ACCIDENT

[3] The accident occurred as the plaintiff was travelling northbound on the Cedar Valley Connector at or near the Lougheed Highway in Mission. Her vehicle and that driven by the defendant struck one another in a head-on collision. There was significant damage to both vehicles.

[4] At the time of the motor vehicle accident the plaintiff was pregnant. Her daughter Emily was born the next day, some seven weeks premature.

THE PLAINTIFF PRIOR TO THE ACCIDENT

[5] The plaintiff is 33 years old, married and has a four and one-half year old daughter.

[6] The plaintiff grew up in British Columbia, graduating from high school in 1996. In 2005 she and her husband moved to Saskatchewan in order for her husband to pursue a job opportunity. In the spring of 2007, several months prior to the accident, they returned to British Columbia.

[7] The plaintiff had no known health issues before the accident. She and her husband enjoyed a number of activities together including playing basketball, skiing, snowboarding, camping, hiking, going to the gym and golfing. She was described by her husband and others as being a self reliant "go and do it" kind of person. She was also a gardener and enjoyed crafts.

[8] She had been involved in an earlier motor vehicle accident in 2000, but was symptom free at the time of the current accident.

[9] The plaintiff became pregnant in late 2006. She was seven months pregnant when the accident occurred. She applied for and received employment insurance benefits when her daughter was born.

[10] Both she and Mr. Simmavong testified they relied on two incomes to "make ends meet" and to plan for the future.

THE PLAINTIFF'S WORK HISTORY PRIOR TO THE ACCIDENT

[11] Following her graduation from high school, the plaintiff worked in a number of jobs which included waitressing in a Chinese restaurant and working as a barista in a coffee shop. She then attended a business college for a year and obtained a certificate in travel and tourism, in 1999. She was unable to find work in that field and continued working at various restaurants, at times holding multiple jobs. She also worked for her aunt for a period before moving to Saskatchewan.

[12] The plaintiff's aunt, Ms. Monica Dowker, testified that before the accident the plaintiff was a "bubbly easy going, outgoing person", she was "very active" and was "hard working and bright."

[13] Ms. Dowker commenced building a personal care business providing raw materials to soap makers in or about 2001. She employed the plaintiff between 2001 and 2005 to assist her in invoicing, receiving, packaging and shipping various oils, salts and powders. She paid the plaintiff $10 per hour until the plaintiff moved to Saskatchewan.

[14] In Saskatchewan the plaintiff worked as a server in a Chinese restaurant before leaving to work for the Marriott hotels. Initially she worked in their reservations department at a call centre. Afterwards she worked as a trainer for new employees. She enjoyed her latter job and would likely have stayed employed with Marriot had she not moved back to British Columbia.

[15] When she did return to British Columbia, the plaintiff had hoped to find work with Marriott. She also hoped to work in the travel and tourism business.

THE PLAINTIFF FOLLOWING THE ACCIDENT

[16] As stated, the accident involved a significant head-on collision between the vehicle Ms. Simmavong was driving and the defendant's vehicle.

[17] The plaintiff was taken to the Mission Hospital where primary attention was focused on saving her child. The plaintiff suffered a placenta separation as a result of the accident. Her daughter Emily was born the next day, weighing some 4 pounds 2 ounces, after a caesarean section.

[18] The days immediately following the accident were very worrying for the plaintiff and her husband as shortly after her birth Emily was found to have blood in her bowels. Twelve days later she was transferred to BC Children's Hospital where she remained for five weeks.

[19] The plaintiff suffered multiple bruises and abrasions, as well as injuries to both knees, her right ankle and her left elbow. Most of these injuries are now resolved, although the scar on her knee remains painful if she kneels on it.

[20] The plaintiff alleges more lasting discomfort in her right pinky finger, ongoing neck and significant back pain which interferes with her ability to perform her duties at work and with her daily living activities. She also alleges ongoing anxiety and depressed mood resulting from her ongoing back pain.

[21] Her right pinky finger was broken and then dislocated at the proximal interphalangeal joint and is now permanently bent at the middle joint of the finger, making it difficult to use. She cannot extend it beyond 45 degrees. She is right-handed and occasionally drops or spills drinks in her work as a waitress as a result. She is embarrassed by the deformity and often holds her hand in a fist to hide her finger.

[22] Her main complaints, however, are with her neck and persisting back pain. She testified she could not hold Emily for long periods as too much sitting put pressure on her lower back. Her evidence is that her back pain bothers her every

day both at work and at home. It has not improved since the accident. She does not sleep well at night because of pain and when she wakes up she does not feel rested. She finds it draining on her energy level to have persistent pain. Sitting, lifting and bending aggravate her pain. She testified she is very careful with what she lifts. She finds it difficult to lift her daughter to give her a hug or to comfort her.

[23] Ms. Simmavong testified she takes up to six Tylenol 3 per day, as well as Advil, to dull the pain. However, she is careful how much she takes when she is at home as she has her daughter to care for and must remain alert. She testified she has little energy. Her mother assists her (as does her husband) in housekeeping tasks, but she says she does not like to ask for help. She is used to being self sufficient. Her mother comes to the house for two to three hours every week to assist in housekeeping.

[24] The plaintiff testified she feels her mood has changed as a result of the ongoing pain she is experiencing. She is not as optimistic or outgoing as she was and does not entertain as she did before the accident. She testified she is moody and often does not have the patience she had with her husband prior to the accident. She is now less tolerant of her husband's attitude toward household tasks. Much of this arises from the fact he is not able to perform a number of tasks to the standard she expects, which she acknowledged are high. Both she and her husband testified their sexual relationship had significantly declined since the accident.

[25] The plaintiff testified she has restricted her recreational activities since the accident as a result of her lower back pain, but does walk, when the weather permits, and she swims. She testified she has followed her physician's advice and exercises three times a week for thirty minutes. She testified she had tried to lose weight as recommended by her physicians, but had not noticed any change in her symptoms notwithstanding having lost 10 pounds in the last six months.

THE IMPACT OF THE PLAINTIFF'S INJURIES ON HER WORK

[26] The plaintiff testified that although her husband had a supervisory position at a packing plant, she needs to work to supplement the family income. This has always been the family's plan. Before her employment insurance benefits ran out in about May 2008, she started to search for employment. She searched for work in the travel and tourism industry without success. She had experience as a waitress and ultimately found work as a server at Sneakers, a pub-style restaurant, in August 2008.

[27] She initially started working eight-hour shifts four days per week (she was looking for full-time work but only four days was available), but found she was experiencing pain in her back. She tried this for two months but because of recurring lower back pain, with the agreement of her employer, reduced her work week to three shifts a week. She has worked three shifts per week since.

[28] As one would expect, her job entails being on her feet and carrying heavy trays of drinks and food, with considerable lifting and bending. When she commenced employment she was expected to work one day a week as a bartender. She had to give this work up as she was not able to perform the bending and lifting required. Her work as a waitress brings on her back pain, which then becomes progressively worse during her shift. She testified she is able to manage by resting and by taking Tylenol 3 and Advil. She works Mondays, Thursdays and Fridays. By Friday she says she feels exhausted from dealing with the pain and, at the same time, trying to deal with customers in a professional manner. She testified there were times at work when she would break down in tears.

[29] The plaintiff's evidence about her difficulties at work was supported by two fellow employees, Ms. Ellis and Ms. Johnstone. Both had worked full time for a number of years at Sneakers and were employed in supervisory positions. Each testified to the nature of work which was required of a server and to their observations of the plaintiff's difficulty performing her work. Each observed Ms. Simmavong appeared to be in pain and had seen her "teary eyed" during

portions of her shift. They testified that bar tending was an expected function of the plaintiff's position, but her employer was accommodating Ms. Simmavong by relieving her of those duties. Ms. Johnstone testified she thought the plaintiff was functioning at perhaps 60% of full capacity. Both colleagues testified that while the employer was prepared to accommodate the plaintiff, they would not hire an employee with her physical limitations.

[30] Both Ms. Ellis and Ms. Johnstone testified that servers made approximately $100 per shift in tips and $9.50 per hour, amounting to an annual income for full-time work of $50,000 to $55,000. Each said the plaintiff was a conscientious, professional employee who related well to customers.

[31] Ms. Dowker testified the plaintiff worked for her again in January 2011 to assist her to do invoicing when Ms. Dowker was moving her shop. She testified the plaintiff could not do the job quickly enough, that she was in pain and could not sit for long or perform the work according to Ms. Dowker's requirements. Ms. Dowker told the plaintiff she would have to replace her. She did so, paying the replacement person $14 per hour.

MEDICAL EVIDENCE

Dr. Todorov

[32] Dr. Todorov has been the plaintiff's attending physician since a few months following the accident. Initially, she had been seen by another family physician who had prescribed physiotherapy. Dr. Todorov first saw the plaintiff for accident related complaints on October 15, 2007. At that time her main complaint was of pain in the right upper trapesius muscle. He sent her for massage therapy. She saw him again on January 18, 2008, complaining of a sudden onset of lower back pain. She told him she had had lower back pain after the accident, but it had improved with physiotherapy. Dr. Todorov continued to follow the plaintiff up to the present. His last office attendance on her was July 20, 2011. I pause to note here

Ms. Simmavong had seen Dr. Beytell immediately following the accident for lower back pain.

[33] In his medical legal report of July 21, 2011, Dr. Todorov noted the motor vehicle accident had "caused significant soft tissue injuries and changes in her lower spine, which have been the cause of ongoing pains and discomfort." He stated "Probably the accident has caused significant deterioration in pre-existing degenerative changes (seen on the MRI)". He noted the plaintiff had experienced lower back problems as a result of a motor vehicle accident in 2000, but had recovered fully and had not experienced lower back pains until the accident of 2007. He concluded his report with the following observation:

> Mrs. Simmavong will probably continue to experience frequent lower backaches and discomfort with periods of exacerbation. Prognosis is guarded at this time.

[34] Dr. Todorov testified the plaintiff's back pain had first been reported during a visit to him in January 2008. At that time, she was experiencing pain radiating down her legs. She reported increased back pain in September 2008 after returning to work. He prescribed Tylenol 3 and a muscle relaxant.

[35] He said her complaints of back pain were consistent during her visits to him thereafter, mostly brought on by carrying her daughter or by her work. Dr. Todorov considered referring her to an orthopaedic surgeon and an anesthetist for cortisone treatments (which the plaintiff initially declined, but later accepted although such treatment had not occurred as of the date of trial due to a scheduling problem). He ultimately referred her to a neurologist, Dr. Tanha, who sent her for an MRI. The results of the MRI are set out in the report:

> MRI from June 17, 2011 shows degenerative disc disease at L4-5 level with broad-based disc bulge and subtle suspected annular tear. L4 nerve root is contacted as it exists. Subtle compression of L5 nerve roots. L5-S1 disc bulge, contacting right S1 nerve root without compressing it. Degenerative changes of the facet joints at multiple levels. L2-3 disc bulge contacting right L3 and L2 nerve roots. Probable paravertebral muscle atrophy.

[36] When Dr. Todorov last saw the plaintiff in July 2011 she was still having ongoing back pain. He continued his recommendation of exercise and weight loss, but testified he was of the opinion while exercise and weight loss may help her improve her symptoms, she would not return to her pre-accident state.

[37] In cross-examination, he agreed Ms. Simmavong had not reported back pain to him during the period he saw her until January 15, 2008, when she had had a spontaneous onset of lower back pain while walking down a corridor.

Dr. McKenzie

[38] Dr. McKenzie, an orthopaedic surgeon, saw the plaintiff at the request of Ms. Simmavong's counsel. Dr. McKenzie prepared a medical report dated December 4, 2010, and testified at trial.

[39] He reviewed Ms. Simmavong's medical history and saw her on December 1, 2010. It was Dr. McKenzie's opinion that:

> She may indeed have some discogenic pain but the other pain generators include the myofascial structures, the facet joints and the right SI joint. In my opinion the causation is her motor vehicle accident. In my opinion the prognosis for resolution of this is poor. I base this on the fact that it has been basically 3 ½ years from the time of the accident and she has shown no trend or tendency towards improvement since the accident.

[40] Dr. McKenzie was also of the opinion the plaintiff's neck pain was the result of the accident and that the prognosis for resolution was "poor". He noted that her neck pain had improved significantly since the accident.

[41] With reference to her back pain, he stated:

> In my opinion the problems this lady is complaining of are consistent with a motor vehicle accident of this nature. In my opinion the difficulties that she is expressing with her work, household and recreational activities are also consistent with her injuries, particularly her lower back. It appears by her history that the major problems she is having with regard to pain and resultant disability is the lower back issue.

[42] Dr. McKenzie recommended managing her injuries with "ongoing core exercises and an attempt to lose weight back to her pre-pregnancy weight."

[43] In cross-examination, Dr. McKenzie agreed there were no neurological findings to support the plaintiff's complaints of pain. He said most patients plateau in their symptoms within two to two and one half years. He agreed that he had recommended core exercises and weight loss, but noted the plaintiff should only exercise within her pain level and that the best form of weight loss was diet.

Dr. Vaisler

[44] Dr. Vaisler, an orthopaedic and hand surgeon, saw the plaintiff at the request of her counsel on August 8, 2011. Dr. Vaisler prepared a report dated August 18, 2011 in which he noted:

> ... She will most probably notice improvement in the severity and frequency of her low back symptoms with the above noted treatment recommendations, [as per the Hunt report to be discussed later] but in view of her continuing to complain of low back pain for over four years after the motor vehicle accident, it is more likely than not that she is going to continue to complain of intermittent annoying and disabling low back pain with the above noted activities for the foreseeable future.
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> If she experiences acute exacerbations of low back pain, she may require repeat short sessions of physiotherapy, massage therapy or chiropractic treatments.
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> ...
>
> **Disability**
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> I reviewed the conclusions of Bruce Hunt in his Functional Capacity Evaluation Report dated July 7, 2011 and am in agreement with his conclusions and recommendations with respect to treatment and work. She will most probably have a permanent disability with respect to competitive full time employment involving prolonged standing, prolonged walking, sustained or repetitive bending, along with repetitive moderate lifting and heavy lifting and heavy labour. She was managing in her part time job as a server at the time of my seeing her, but will continue to require help with work activities involving any heavy lifting and moderate lifting above shoulder level for the foreseeable future.
>
> ...
>
> She is most probably going to require help with the heavier aspects of housework and gardening for the foreseeable future due to her low back symptoms. She will most probably experience an exacerbation of low back

> pain with repetitive bending and lifting if she has more children in the future. Her tolerance to snowboarding, hiking and dancing will most probably improve with the above noted treatment recommendations but she will most probably be left with some permanent limitation on account of her low back symptoms.

[45] He further noted that with the treatment recommendations made by Mr. Hunt she "may be able to increase her work load as a server to full time, but this is too early to say for certain."

[46] In cross-examination (by deposition evidence read in at trial), Dr. Vaisler testified the range of motion in the plaintiff's finger could be partially corrected by a surgical procedure with a recovery period of possibly up to eight months to regain full strength in her hand. He testified when he examined her cervical and thoracic spine, she had a full pain-free range of motion. He noted that the bulging of the disk at L 4/5 "was more than what I would expect based on age"; however, he could not "definitely say that's associated with her symptoms". He confirmed the plaintiff's weight was 185 pounds which he agreed would put her on the "borderline between overweight and obese."

[47] He did recommend at his deposition that:

> ... she should be avoiding heavy lifting, heavy labour, repetitive bending, sustained bending, prolonged walking, prolonged standing, ideally a job with alternating periods of sitting and standing that is light to medium capacity. That's [what] I would recommend. And if she gets a job that involves more sitting then she would be best to have a contoured chair, an ergonomic assessment of her workplace to make sure she is in the right position with respect to the desk and computer and writing surfaces, and to be able to get up and move about for short periods if she experiences discomfort.

Dr. Devlin

[48] Dr. Devlin, a psychiatrist, saw the plaintiff on August 11, 2011, at the request of her counsel. He prepared a medical-legal report dated August 22, 2011, which was filed at trial. He noted the plaintiff had experienced "considerable emotional trauma, particularly regarding the birth of her daughter Emily, and the initial, extremely serious health problems the child endured after the emergency C-section."

He also noted that Ms. Simmavong remained concerned about how Emily might function at school because she was lagging in developmental milestones. Ms. Simmavong remained "considerably anxious" when driving and has occasional flashbacks about the accident.

Physiotherapy/Massage Therapy

[49] The plaintiff attended physiotherapy on the advice of Dr. Beytell, the family physician she saw before seeing Dr. Todorov. She was assessed at Glenn Mountain Orthopaedic and Sports Physiotherapy on August 22, 2007, with symptoms of pain in her neck, low back and soreness in both knees and right ankle. She had a number of physiotherapy treatments, initially attending three times per week. She also took massage therapy, which she later abandoned because her insurer would not cover the cost of treatment.

[50] In 2010 Ms. Simmavong returned to Glenn Mountain for a further session of physiotherapy. The therapist's consultation report, dated July 7, 2010, noted the plaintiff had not continued with the core strengthening exercises recommended in 2008. In 2010 Ms. Simmavong attended for a further nine treatments and was discharged July 7, 2010, with another program of home exercise. She was asked to return once those exercises became easy for her to do. The plaintiff has not returned. Her evidence at trial was that she is still performing core exercising three times a week at home.

Functional Capacity Evaluation

[51] Mr. Bruce Hunt of Ultima Health Assessments Corp. performed a Physical Capacity and Work Tolerance Assessment of the plaintiff on July 4, 2011. She was assessed performing various activities in a number of body positions and postures. I will set out Mr. Hunt's findings and recommendations in some detail. Mr. Hunt set out his clinical impressions in his report dated July 7, 2011, which included, at paras. 17 to 36:

17. Ms. Simmavong currently has sufficient body positioning, strength and stamina to meet the entry level physical demands of a part time Food & Beverage Server (NOC # 6453). She does not currently have sufficient body position stamina to manage the full time work demands of a Food & Beverage Server due to chronic central low back pain. She requires intermittent sit, stand and walk positional breaks and periodic time to lay down during an 8 hour work shift and will require some accommodation on a recurrent basis when she returns to full time work hours.

...

19. Ms. Simmavong is having moderate difficulty managing her chronic back pain symptoms. She became tearful during functional testing and required time to lie down and rest several times during the assessment. She was identified to have an elevated perceived pain response, scoring 26% and 36% on the neck and spine disability indices. Pain impacted on her ability to participate fully in the assessment. She took pain medication and recurrent sitting, standing and walking breaks and stretched her back various times for pain control.

20. Ms. Simmavong noted feeling fatigued and exhausted, described as "drained" after 5 hours of testing and following repeat walk testing. She attributed her symptoms of fatigue to persistent and recurrent back pain during test activity.

21. Ms. Simmavong rated her low back pain at 2/10, at completion of testing. She had taken two Tylenol 3 at 1pm, forty five minutes prior to the end of the assessment. She reported repetitive bending and waist to shoulder lifting and carrying to produce the greatest low back pain, described as "burning" in the central low back with symptoms radiating laterally across the hip crests.

...

25. She will likely experience progressive degenerative change due to the existing pathology and exposure to recurrent biomechanical loading of the lower spine. Her chronic lower back pain will impact on her ability to manage a second pregnancy and occupations involving bending, lifting, carrying and awkward unsupported body positioning. She is now susceptible to further degenerative lumbar spine changes. She will likely experience increased back pain with disease progression. She should be referred to a neurosurgeon or orthopaedic surgeon for prognosis of degenerative spine condition.

26. Ms. Simmavong's low and central mid back pain symptoms continue to impact on her ability to engage in home and domestic activities and restrict her to sedentary to entry level light occupations. She continues to break up routine domestic activities of cleaning due to ongoing pain. Her back pain is presently impacting on her ability to engage with her four year old daughter and restricts her from lifting and carrying the child for any length of time or playing in low level positions or on the floor. She has not returned to previous sport and

> recreational pursuits such as [snowboarding], running [and/or] water skiing. She would likely have considerable difficulty managing the more physically demanding aspects of sport, recreation and leisure pursuits due to chronic low back pain.
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> ...
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> 36. Ms. Simmavong is currently not suited to labour intensive occupations such as light house cleaning, [warehouse work/material handling], cashiering, assembly, cooking, data entry [and/or] filing clerk. She meets the entry level occupational demands for receptionist and secretary, provided the work does not involve prolonged static sitting, forward writing intensive posturing and computer data entry.

[52] Mr. Hunt made a number of recommendations including: a structured exercise program such as "pilates" based physiotherapy and one-to-one training to address core musculature; swimming lengths on a regular basis; the use of an SI joint and/or lumbar spine support belt when working; and a referral to a specialist for consideration of a localized injection and pain management counselling.

[53] Mr. Hunt considered the plaintiff's employment opportunities in the labour market to be limited due to her chronic low back pain, which impacted on her sitting, standing and walking tolerance. He considered her pain symptoms presented "moderate barriers for employment requiring light to entry level medium (9.5kg to 12kg) material handling and sustained outward unsupported arm reach."

[54] As to her present position as a server, he commented:

> 38. Ms. Simmavong is presently meeting the part time work demands of a Food and Beverage Server as the jobs physical demands are within her current positional and strength tolerance. She is presently not suited to full time restaurant server work due to the prolonged standing and walking demands. As she is not currently limited to sedentary and entry level light occupations, she should be referred for vocational testing to identify her aptitudes and interests and employment opportunities within this functional level. She would likely benefit from a job coach or career counsellor, [particularly] if her back pain increases and impacts her ability to work as a [pub/restaurant] server.

[55] In cross-examination, Mr. Hunt agreed he did not go to the plaintiff's workplace, nor did he speak to her supervisors. He agreed she was competitive and on many of the tests performed above the standard of measurement he was using in

terms of her time measurement to perform the test. However, he noted such performance did not necessarily measure tolerance and that the plaintiff took medications around noon when she experienced pain.

POSITION OF THE PARTIES

The Plaintiff

[56] Counsel for the plaintiff argues the plaintiff suffers from ongoing chronic pain to her lower back which is likely permanent, has suffered neck, knee and ankle pain, and suffers from significant depression. Counsel says the plaintiff will suffer a significant loss of future earnings as she will not be able to tolerate full-time work in the future.

[57] Counsel says the plaintiff is entitled to non-pecuniary damages in the amount of $90,000; past wage loss of $43,000 (based on tips being $100 per hour) from September 1, 2008, to the date of trial, representing the difference in earnings between full time work, which the plaintiff says would have commenced September 1, 2008, had her daughter been born after a full-term pregnancy, and the plaintiff's actual earnings; loss of future earning capacity in the amount of $300,000; special damages and cost of future care, including compensation for lost housekeeping capacity. I will assess each of these heads of damages separately.

The Defendant

[58] The defendant acknowledges that while the plaintiff suffered a number of physical injuries as a result of the accident, the medical evidence indicates her injuries had improved significantly before the end of 2007. There are no neurological findings that warrant further treatment or surgical intervention and the plaintiff has sought minimal therapeutic treatment for her low back complaints.

[59] Mr. Walsh pointed out that the plaintiff's visits to Dr. Todorov during which she had specifically complained about lower back pain were sporadic after January 2008, occurring in September 2008 then February 2009, July 2009 and then March

2010. However, Dr. Todorov testified the plaintiff's complaints of lower back pain on each of the occasions she complained were consistent.

[60] The defendant says the plaintiff's subjective pain rating relating to her lower back has improved since the accident and that it continues to show a tendency to further improvement.

[61] The defendant acknowledges the plaintiff sustained a fracture of her right little finger, a laceration of her right knee, multiple contusions and soft tissue injuries to her neck, knees, right ankle and lower back. The defendant says the plaintiff's injuries improved significantly before the end of 2007, including her lower back complaints, although the defendant acknowledges she is left with some low back complaints. The defendant says the plaintiff's complaints with respect to her impaired capacity to perform household tasks and work full time are not supported by the evidence; the plaintiff has shown "an extremely high level of capacity and functionality" since September 2008 by working part time while at the same time being her daughter's primary caregiver and being largely responsible for the family's household tasks.

[62] The defendant argues the plaintiff and her husband were not able to afford the cost of day care and, accordingly, it was not likely the plaintiff would have worked other than part time, regardless of the accident. Further, she would have had to be at home during her husband's work hours. The defendant pointed to what counsel described as the plaintiff's "extraordinary" work schedule, arriving home at 2:00 a.m. following her night shift and then arising at 8:00 or 9:00 a.m. with her daughter. The plaintiff's husband left for work at 5:00 a.m. and worked to 3:30 p.m., arriving home just before the plaintiff left for work. Counsel suggested it was not sensible or realistic for the court to conclude the plaintiff would have worked full time on such a schedule. At best, she would have worked part time and the position she had at Sneakers was an optimal one, permitting her to make a good salary while working part time.

[63] The defendant submits the quantum of damages for non-pecuniary damages should be in the range of $50,000. He denies the plaintiff has suffered any loss of income as a result of the accident and should be awarded a modest amount for future income loss. The defendant also took issue with the plaintiff's claims for cost of future care, loss of housekeeping and special damages. I will consider these arguments under the heads of damage discussed below.

[64] The defendant also argued the plaintiff had failed to mitigate her losses by not following her physicians' recommendations to exercise and lose weight.

ASSESSMENT OF DAMAGES

Non-pecuniary damages

[65] Madam Justice Ker summed up the purpose of non-pecuniary damages in *Trites v. Penner*, 2010 BCSC 882 as follows:

> [188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties ...
>
> [189] For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts ...
>
> [Citations omitted.]

[66] The principles underlying an award of non-pecuniary damages were discussed by Madam Justice Gray in *Dikey v. Samieian*, 2008 BCSC 604:

> [139] Non-pecuniary damages are those that have not and will not require an actual out-lay of money. The purpose of such an award is to compensate Mr. Dikey for such things as pain, suffering, disability, inconvenience, disfigurement, and loss of enjoyment of life. The award is to compensate him for losses suffered up to the date of trial and that he will suffer in the future.
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> [140] As stated by the Supreme Court of Canada in *Lindal v. Lindal (No. 2)*, [1981] 2 S.C.R. 629 at 637:
>
> > Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular

> situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).
>
> [141] Prior to the accident, Mr. Dikey was a social and athletic young man with the ambition to work in the hotel industry and the courage to come to Canada to pursue his education. He was independent and showed initiative.
>
> [142] Mr. Dikey's life has changed profoundly as a consequence of the accident. He is unlikely to work, and has lost the self-esteem, enjoyment and income that is available from work. ...

[67] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages, at para. 46:

> The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
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> (a) age of the plaintiff;
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> (b) nature of the injury;
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> (c) severity and duration of pain;
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> (d) disability;
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> (e) emotional suffering; and
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> (f) loss or impairment of life;
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> I would add the following factors, although they may arguably be subsumed in the above list:
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> (g) impairment of family, marital and social relationships;
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> (h) impairment of physical and mental abilities;
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> (i) loss of lifestyle; and
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> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, ... 2005 BCCA 54).

[68] The assessment of non-pecuniary damages is necessarily "influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, as well as the plaintiff's ability to articulate that experience": *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[69] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) by McEachern C.J. In referring to an earlier decision, he said at 399:

> In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:
>
> > I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.
> >
> > An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

See also *Edmondson v. Payer*, 2012 BCCA 114.

[70] The plaintiff relies on *Dikey*, *Stapley* and *Lindal v. Lindal*, [1981] 2 S.C.R. 629, for a discussion of the general principles underlying an award of non-pecuniary damages and on: *Beaudry v. Kishigweb*, 2010 BCSC 915 (chronic pain in neck, back and shoulders, headaches, anxiety and dizziness: non-pecuniary damages - $85,000); *Kosugi v. Krueger et al.*, 2007 BCSC 278 (disc herniation, chronic low back pain, foot weakness and depression: non-pecuniary damages - $110,000); *Pett v. Pett*, 2008 BCSC 602 (concussion and chronic low back pain: non-pecuniary damages - $85,000); *Predinchuk v. Spencer*, 2009 BCSC 1396 (chronic pain, soft tissue injury to neck, back and shoulders and headaches: non-pecuniary damages - $80,000); *Prince Wright v. Copeman*, 2005 BCSC 1306 (severe chronic neck pain, headaches and depression: non-pecuniary damages - $100,000); *Smusz v. Wolfe Chevrolet Ltd.*, 2010 BCSC 82 (disc herniation in neck, bulging lumbar disc, chronic pain in neck and lower back, post-traumatic stress disorder and depression: non-pecuniary damages - $100,000); *Murphy v. Jagerhofer*, 2009 BCSC 335 (chronic pain in neck and back, sleeplessness and hearing loss: non-pecuniary damages - $100,000); *Notenbomer v. Andjelic*, 2008 BCSC 509 (aggravated pre-existing disc

herniation and second disc herniation, both operated on, and low back pain and depression; plaintiff working four days a week at time of trial: non-pecuniary damages - $100,000) *Schnare v. Roberts*, 2009 BCSC 397 (various soft tissue injuries with significant SI joint issues causing chronic back pain: non-pecuniary damages - $85,000) *Pham-Fraser v. Smith*, 2010 BCSC 322 (TMJ problem, aggravation of carpel tunnel, ongoing lower back pain with radiation into left leg and loss of some bladder control: non-pecuniary damages - $95,000).

[71] The defendant relies on: *Day v. Nicolau*, 2011 BCSC 490 (lifeguard suffered soft tissue injuries to back, neck and shoulders. Diagnosis of chronic pain, but that with further active exercise program and proper back care could have further improvement; plaintiff unable to return to life guarding: non-pecuniary damages - $50,000); *Thauli v. Gill*, 2009 BCSC 1929 (plaintiff waitress suffered multiple soft tissue injuries to neck, shoulders, back and knees, leaving her with chronic pain. Pain was largely improved within two years of accident, but left her with residual symptoms; court felt with continued treatment she would continue to improve. Plaintiff never returned to position as a waitress: non-pecuniary damages - $50,000); *Chalmers v. Russell*, 2010 BCSC 1662 (pregnant plaintiff school teacher with injuries to neck, back, chest and shoulders; injuries exacerbated by second accident. Court accepted plaintiff's evidence that ongoing symptoms and injuries caused her to curtail former active lifestyle: non pecuniary damages - $50,000); *Runghen v. Elkhalil*, 2009 BCSC 467 (29-year-old plaintiff four and a half months pregnant suffered cramping and bleeding, soft tissue injuries in her neck and lower back and headaches. Court accepted medical evidence that if plaintiff undertook an active exercise program her lumbar condition would substantially improve: non-pecuniary damages - $40,000).

Discussion: Non-pecuniary Damages

[72] The evidence establishes that prior to the accident Ms. Simmavong was a vigorous and energetic person. She had a "go and do it" attitude and enjoyed participating in a wide variety of activities, including camping, hiking, skiing and

going to the gym. She had a strong and stoic personality. It was her plan to have a family and at the same time to work to improve the family's fortune. Regrettably, her life changed dramatically as a result of the accident of June 24, 2007.

[73] She has been significantly impacted by the accident. Instead of being able to enjoy a full-term pregnancy of her daughter, she was faced with the worry, at least initially, of whether her daughter would survive, followed by a forced premature delivery and now concerns over her daughter's health and development.

[74] Ms. Simmavong sustained multiple bruises and abrasions, a broken and disfiguring finger injury, an injury to her right ankle, both knees, left elbow, neck pain and persisting lower back pain. Her ankle, elbow and abrasions have resolved, but she remains with a tender right knee when she kneels on it, as well as the occasional recurring pain in her neck and shoulder. She also has constant chronic back pain, which bothers her daily and is particularly troublesome for her at work. In addition, she suffers from anxiety and depressed mood which resulted from the trauma of the accident and her ongoing pain. Her relationship with her husband has been negatively affected as she becomes easily agitated at home. Their sexual activity has suffered as a result of her ongoing back pain and her depressed mood.

[75] The defendant suggested in argument that the plaintiff's back pain had improved significantly since the accident and that it continues to show a tendency toward improvement. In support of this argument, Mr. Walsh referred to the evidence of Dr. McKenzie and to the testing done by Mr. Hunt. Dr. Mackenzie had noted her pain level at 9/10 in the acute stages of her injury; 6/10 in late 2010; and 4/10 in the summer of 2011. While the plaintiff's pain level undoubtedly fluctuates with her activity level, particularly at work, the plaintiff is left with substantial and disabling pain in her lower back. Having said that, several of the plaintiff's physicians were of the view her back pain would improve if she exercised to strengthen her core muscles and lost weight.

[76] The evidence of the plaintiff, her husband Mr. Simmavong, Ms. Ellis; Ms. Johnstone and Ms. Dowker supports the fact the plaintiff is having ongoing

significant back pain. She functions working part time as a waitress, but with difficulty. If anything, my view of the evidence is that the plaintiff's pain level has, at this time, reached a plateau; it is not improving. I draw this conclusion from the opinions of the various physicians who have seen her. Dr. Todorov said she would "probably continue to experience frequent lower backaches." Dr. McKenzie said "In my opinion the progress for resolution of this is poor." Dr. Vaiser opined "(I)t is more likely than not she is going to complain of intermittent, annoying and disabling low back pain with the above noted activities for the foreseeable future."

[77] I accept Ms. Simmavong gave her evidence in an honest and forthright manner.

[78] The defendant argues the plaintiff has failed to follow her physician's recommendations to exercise and lose weight and, therefore, she has failed to mitigate her losses. I am of the view there is some merit in this argument and have taken it into account in my assessment of non-pecuniary loss. Had the plaintiff kept up with the set of core exercises recommended to her following her first set of sessions and had she undertaken a diet or other weight loss program she may well have improved her tolerance at work. Those recommendations by her physicians and the physiotherapists she has seen have been consistent throughout her course of treatment.

[79] On the other hand, the evidence is that the plaintiff has been performing some exercises at home following the advice of her physiotherapist. She also walks regularly, a recommendation made by Dr. McKenzie. The plaintiff also testified she has recently lost 10 pounds. Furthermore, it should be noted that not only does the plaintiff work, her husband works an opposing shift. She has a young child to attend to and a household to maintain.

[80] The defendant argued the plaintiff had twice not taken a cortisone injection recommended by Dr. Todorov. Dr. Todorov explained there was an administrative error which caused her to miss the appointment to have this assessment done.

[81] I have reviewed the cases cited by each counsel. Each case, of course, is dependent on the particular facts. I have found the cases useful to give me a general guide of the range of damages appropriate in this case. I assess non-pecuniary damages at $75,000.

Lost Wages

[82] The plaintiff claims lost wages from September 1, 2008, (the date she expected to return to work following a full-term birth of her daughter) to the date of trial. The amount claimed is $43,000.

[83] The plaintiff based her claim for both past and future lost income on a report dated August 12, 2011, prepared by Mr. Benning, an economist, who was called for cross-examination at trial.

[84] For the purposes of his calculations, Mr. Benning assumed that had the plaintiff worked full time as a server at Sneakers she would have earned $9.50 per hour and $75 per shift in tips.

[85] The defendant says it is most unlikely, given the plaintiff's prior work history of low paying jobs and part-time work, as well as with the birth of her young daughter, that the plaintiff would have worked full time commencing in September 2008. The defendant also refers to the "extraordinary" stress and strain put on the plaintiff and her husband by her part-time work schedule, to which I have referred earlier, and the fact both the plaintiff and her husband have acknowledged the cost of day care for them would have been prohibitive.

[86] I find on the evidence the plaintiff has established a claim for wages lost to the date of trial. The issue to be determined is the quantification of such loss.

[87] I am satisfied that absent the accident, the plaintiff would have returned to full-time employment. She had been engaged in full time employment with the Marriott prior to returning to British Columbia. There was no challenge to her evidence, or that of her husband, that the couple's financial position required her to

work full time. When employment insurance benefits expired in May 2008, Ms. Simmavong commenced looking for full-time employment. She was looking for full-time employment when she became employed at Sneakers. She started at Sneakers working four shifts per week only because full-time employment was not available. Both Ms. Johnstone and Ms. Ellis testified full-time work was available, although the evidence was unclear when such work would have become reasonable for Ms. Simmavong subsequent to September 2008, had she been able to perform a full five-day per week shift. It was only as a result of her recurring back pain she felt it necessary to reduce her shifts to three shifts per week.

[88] It may be true, as suggested by defence counsel, that she and her husband have an "extraordinary" schedule. That is a sacrifice Ms. Simmavong and her husband chose to make in order to meet their financial commitments. It is a schedule that will become less rigorous on Ms. Simmavong as her daughter approaches her school years. While their work schedules may be "extraordinary" to some, there are many who make such sacrifices to improve their financial positions for the future.

[89] Mr. Walsh took issue with Mr. Benning's assumption the plaintiff worked only three shifts per week based on calculations of her annual income since she commenced working at Sneakers. I accept the evidence provided by the plaintiff and her co-workers that the plaintiff was working three shifts per week. Her wages varied as she was sometimes paid overtime if she worked longer hours on a shift. As well, her paycheques included holiday pay and uniform cleaning.

[90] Ms. Simmavong's earnings from employment while employed at Sneakers have been:

2008	$4,526 (five months)
2009	$13,127
2010	$13,551

[91] These amounts include an allowance for laundry expense, holiday pay and some overtime.

[92] The evidence of the amount of tips earned varied. The plaintiff testified her tips averaged between $50 and $100 per shift, but in cross-examination acknowledged they could be as low as $40. The plaintiff's husband thought they were between $60 and $80 per shift. Ms. Ellis and Ms. Johnstone testified servers earned approximately $100 per shift although neither knew what amount the plaintiff accurately earned in tips.

[93] In my view, an amount of $70 per shift fairly represents the evidence of the average tips received by the plaintiff and is an amount which represents her loss of income from tips. Taking into account Mr. Benning's assessment of past wage loss at approximately $42,000, as well the vagueness of the evidence as to when a full-time position may have been available to the plaintiff, and my finding that the plaintiff averaged $70 per shift in tips, I set her loss of wages to the date of trial at $38,000.

[94] The fact the plaintiff did not declare her tips as income does not prevent recovery of her loss of income: *Iannone v. Hoogenraad* (1992), 66 B.C.L.R. (2d) 106 (C.A.); *Bain v. Nanji et al.*, 2000 BCSC 103.

Loss of Future Income

Discussion of Law

[95] A claim for loss of future earning capacity raises two key questions:

(1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so,

(2) what compensation should be awarded for the resulting financial harm that will accrue over time?

[96] The assessment of loss must be based on the evidence and is a matter of judgment. It is not an application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British Columbia*

(1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232; *Rosvold v. Dunlop*, 2001 BCCA 1.

[97] The essential task of the court is to compare the "likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened": *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32. I also note that "insofar as is possible, the plaintiff should be put in the position he or she would have been in if not for the injuries caused by the defendant's negligence": *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.

[98] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

> The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, ... 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79. ...

[99] The test is set out in *Perren v. Lalari*, 2010 BCCA 140 at para. 32:

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

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

[100] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" discussed in *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 (C.A.); and the "capital asset approach" discussed in *Brown*. As noted in the above quote from *Perren*, both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measureable way: at para. 32.

[101] The earnings approach and the capital asset approach were described in *Gilbert v. Bottle*, 2011 BCSC 1389, by Madam Justice Dickson, at para. 233:

> In *Perren v. Lalari*, 2010 BCCA 140, Garson J.A. identified the two approaches to assessment of loss of future earning capacity commonly adopted by courts in British Columbia. One is the "earnings approach" described in *Pallos*; the other is the "capital asset approach" described in *Brown*. The earnings approach involves a form of math-oriented methodology such as i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value or ii) awarding the plaintiff's entire annual income for a year or two. The capital asset approach involves considering factors such as i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to herself as a person capable of earning income in a competitive labour market.

Discussion of the plaintiff's loss of future income

[102] The plaintiff's monetary claim is based in part on the evidence of Mr. Benning who assumed the plaintiff would have worked full time, five days a week as a server, until she reached the age of 65. Mr. Benning assumed that as a result of the motor vehicle accident she would continue in part-time employment working three shifts

per week and assumed she would continue to earn $9.50 per hour and $75 per shift in tips. Based on these assumptions, Mr. Benning calculated her future wage loss at slightly in excess of $200,000.

[103] Mr. Stanley argues this figure is conservative and seeks an award of $300,000 future wage loss. He bases his argument on the following:

1. Ms. Simmavong may have found more lucrative work. He noted that her interest was in the tourist and travel industry and that while employed at the Marriott she had been earning $11 per hour;

2. Mr. Benning's calculations did not take into account the possibility Ms. Simmavong might not be able to work three shifts in the future or that she might lose or be unable to perform her job as a result of her injuries in the future;

3. Mr. Bennings' assumptions did not account for the contingency that should Ms. Simmavong lose her position as a server, she would be limited to "sedentary to entry level light positions and will also have problems with a desk job" as noted in Mr. Hunt's evidence. In argument, counsel notes that "the Court must query the extent to which this situation [working three shifts a week] is sustainable for the Plaintiff";

4. but for the accident, there might have been an increase in the plaintiff's real earnings;

5. the evidence establishes the plaintiff would have performed better than the average British Columbia female in the labour market; and

6. the plaintiff may lose three to four months earnings if she has an operation on her finger.

[104] The defendant says it is unlikely the plaintiff would have worked more than the hours she is presently working even had the accident not occurred. As stated

earlier, I do not accept this argument. The plaintiff started working at Sneakers four shifts per week, although she had intended to work full time. No full-time positions were available at that time but did, subsequently, become available. The only reason she cut back to three shifts was because she could not tolerate working four shifts with her back pain.

[105] The defendant also says that in the absence of "any serious rehabilitation program" in the past three and one-half years the plaintiff has demonstrated "an extremely high level of capacity and functionality." The defendant's argument ignores the fact the plaintiff has attended for some physiotherapy as recommended by her attending physician and physiotherapist and is doing the exercises recommended by her physiotherapist. I accept she probably could have done more in this area. I do not accept the defendant's argument the plaintiff has demonstrated a high level of capacity and functionality. In my view, such an argument is inconsistent with the evidence of the plaintiff and her husband and, more importantly, with the observations of her co-workers, aunt and the opinions of her attending physicians as to her present and future limitations.

[106] The accident has had and will continue to have a significant effect on the plaintiff's earning capacity going into the future.

[107] In assessing her loss in this area I have based my award of damages on a number of conclusions I have drawn from the evidence.

[108] First, Ms. Simmavong's motivation for working is to provide financial security for her family. She appears to me to be a highly motivated person. Her resolve is shown by her perseverance at work notwithstanding the obvious discomfort she is experiencing.

[109] Next, as much as she may have had an interest in the travel and tourism industry, her qualifications in that field are limited and dated. She has also maximized her income working in her present position. She is likely earning more waitressing at Sneakers three shifts per week than she would earn working full time

elsewhere. I conclude that unless she is able to do so because of her back pain, she will likely continue to work three shifts per week in her present position for a number of years. I do not believe she will seek out other work in the near or medium term.

[110] In addition to providing her with optimal earnings for part-time work, the shifts the plaintiff presently works fit well with those worked by Mr. Simmavong. It is not likely she could or would change those arrangements, given the age of her young daughter.

[111] The physicians and others who have assessed Ms. Simmavong have recommended various programs to mitigate against worsening of the plaintiff's lower back pain and which may even assist her to tolerate a move toward more full-time work as a server. As stated, Dr. Todorov has recommended a program of exercise and weight loss. Dr. McKenzie recommends exercise within her pain level and weight loss through dieting. Dr. Vaisler agrees with Mr. Hunt's recommendations, as I have set out earlier in this decision.

[112] I have made provision for the cost of such programs in this decision. There is reason to believe, based on those opinions, and assuming Ms. Simmavong follows the recommendations of Mr. Hunt, her pain will be alleviated to some degree and she will be able to continue working in her part-time position as a waitress for some number of years, if not, as stated, move toward more full-time work.

[113] It is also likely the plaintiff's family circumstances will change as her daughter attends full-time kindergarten and then school, thereby reducing her childcare obligations and the stress on her at home.

[114] The family's financial circumstances may also improve as time progresses, making it less necessary for her to engage in heavy work or full-time work. I conclude, however, had she not been involved in the accident it is likely Ms. Simmavong would have engaged in some type of work until she was 60 or 65

years of age, and that given the treatment recommendations she will continue to be involved in the work force in some manner until she reaches that age.

[115] I have considered Mr. Stanley's arguments that Mr. Benning's assessment of Ms. Simmavong's loss of future earning capacity is "conservative and understates her loss". I have also considered Mr. Stanley's submissions that Mr. Benning did not take into account the fact Ms. Simmavong may lose her job or be unable to work three days a week in the future, that she is not physically suited for work as a server, that she may be "consumed" by her symptoms and that she may have to take time off to have surgery on her finger.

[116] I do not accept it is likely Ms. Simmavong would have been able to find more lucrative work in the future. In my view, she is optimally positioned for income and flexibility of her shifts in her present employment, with the ability to align her work with that of her husband.

[117] However, I do agree that while Ms. Simmavong is currently 33 years old, it is reasonable to assume that as she progresses in age, even if for a period she is able to increase her work load as a server to full time, it will be more difficult for her over the longer term to perform the heavy duties required in her present position due to her existing pathology and her exposure to repetitive bio-mechanical loading of the lower spine (see Mr. Hunt's report). She will at some stage in the future likely have to look for other work.

[118] I do not accept Mr. Stanley's suggestion that the plaintiff will be consumed with her injuries.

[119] Mr. Walsh suggested Ms. Simmavong would be out of the work force for a period and not earning an income should she have another child. Ms. Simmavong was not cross-examined on this issue and, given her ongoing back pain, I consider the possibility she will have another child to be remote. There was simply no evidence from either Ms. Simmavong or her husband they were planning to have another child.

[120] In my view, the plaintiff has established a real and substantial possibility she will lose income in the future as a result of injuries she suffered in the accident. Given the uncertainties present in this case, the most appropriate method of assessing such loss is the capital asset approach set out in *Brown.* In this case, the four factors to be addressed must, on my view of the evidence, be answered in the affirmative. She has been rendered less capable overall from earning income from all types of employment; she is less marketable as an employee to prospective employers; she has lost the opportunity to take advantage of all job opportunities which would have been open to her had the accident not occurred; and she is less valuable to herself as a person capable of earning income in a competitive labour market: see *Brown*, at para. 8. At the same time, she is able to coordinate her shifts with those of her husband and maximize her income for the number of hours she does work. The plaintiff is, for the present and immediate future, in an optimal employment position.

[121] Although the income approach is not one I am using, it is useful to note that Mr. Benning assumed the plaintiff would have earned roughly $42,000 per year as a server based on working five days a week, earning $9.50 per hour and earning $75 per shift in tips. Mr. Benning applied a 30% "negative contingency" for economic factors and a 6% negative contingency for reduced life expectancy and disability factors.

[122] Ms. Johnstone and Ms. Ellis each earned in the vicinity of $50,000 a year working full time, but each was paid a greater hourly rate and a management bonus. The plaintiff earned approximately $22,550 per year including tips, which I have determined to be $70 per shift.

[123] Balancing all the factors, including the medical opinions that the plaintiff's prognosis regarding her lower back pain is poor or "guarded", with Dr. Vaisler's opinion that if the plaintiff embarks on core strengthening program she may, in the future, be able to return to some full-time light to medium heavy-duty work, I assess the plaintiff's loss of future income at $150,000.

Cost of Future Care

[124] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.

[125] In his text *The Law of Damages*, loose-leaf ed. (Toronto: Canada Law Book, updated November 2011, release 20), Professor Waddams states, at 3-63:

> . . . the tenor of Dickson J.'s judgment in *Andrews v Grand & Toy* makes it clear that the court will lean in favour of the plaintiff in judging the reasonableness of his claim. The court made it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for insuring the adequacy of pecuniary compensation.

[126] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification; and (2) the claims must be reasonable: *Milina*, at 84. Furthermore, future care costs must be likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.

[127] Contingencies must also be considered when assessing cost of future care. In *Gilbert*, the court discussed adjusting for contingencies at para. 253:

> The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required: see *Spehar (Guardian ad litem of)*. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the

> prospect that additional care will be required: see *Morrison (Committee of)*. Each case falls to be determined on its particular facts.

[128] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[129] Ms. Scullion, an occupational therapist, prepared a cost of future care report following an in-home assessment of the plaintiff on August 15, 2011. The premise of the report was based on the plaintiff being able to sustain her part-time position as a server, as well as being a mother, wife and homemaker. She performed a physical assessment of the plaintiff, reviewed the medical reports and Mr. Hunt's report and prepared a list of recommendations for the plaintiff's future care and the costs attached to those recommendations. I will discuss each of her recommendations in turn.

(a) *Psychological Counselling*

[130] Ms. Scullion considered it to be "critical" Ms. Simmavong be provided with psychological counselling services because of what she described as the "complexity of her presentation." Such services were not specifically included in any recommended course of treatment by any of the physicians who saw her, including her family physician or Dr. Devlin, the psychiatrist who saw her August 11, 2011. A reading of Dr. Devlin's report, however, provides a foundation for providing for such counselling. Dr. Devlin had "no doubt" the motor vehicle accident "has had a significant effect on Ms. Simmavong's recent and ongoing health history": the "diminished ... joy" of Emily's birth; the baby's subsequent serious health problems; the strain from concerns about how Emily will function at school; the considerable anxiety when driving and the flashbacks; and occasional bad dreams about the accident.

[131] Ms. Scullion recommends 25 sessions at a cost of $175 per hour for a total cost of $4,375.

(b) *Vocational Assessment/Counselling*

[132] I do not consider a vocational assessment or vocational counselling as recommended by Ms Scullion to be appropriate given my conclusion Ms. Simmavong is optimally employed in her present position.

(c) *Occupational Therapy Assessment*

[133] Such services would facilitate Ms. Simmavong's functional abilities and would likely assist her to manage her pain better in her work as a server. Ms. Scallion estimates an initial assessment cost of $270 and the cost of four treatment sessions to be $360, for a total of $630.

(d) *Physical Therapy/Supervised Exercise Program*

[134] Ms. Scallion recommends a physical therapy assessment on a periodic basis over the plaintiff's lifetime as well as a one-to-one supervised exercise program for a period given her limitations. Given the recommendation of the physicians that exercise programs and core strengthening may well prolong the plaintiff's ability to work in her current capacity, if not increase that capacity, I accept Ms. Scallion's recommendation. Using her average costs, I award $4,567.50 representing seven assessments and six sessions for each of the seven assessments.

[135] I am satisfied it is not also not necessary to make provision for a supervised exercise program as recommended by Ms. Scullion in addition to the above program.

(e) *Massage Therapy*

[136] Ms. Scullion recommends the plaintiff be provided with 10 massage therapy sessions at a cost of $700. Given the plaintiff did find such sessions helpful but discontinued them when her insurer stopped covering the cost, I award this amount.

(f) *Housekeeping Costs*

[137] Ms. Scallion recommends Ms. Simmavong be provided with housekeeping services as she is unable to meet the physical demands associated with the completion of homemaking tasks. She had assessed the plaintiff's need at one to two hours per week at an average cost of $98.25 per week.

[138] In support of their respective arguments under this heading of cost of future care, both counsel rely on *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.), but for different propositions. The plaintiff says *Kroeker* stands for the proposition a claim for housekeeping services may be advanced even though the services have been replaced gratuitously from within the plaintiff's family.

[139] The defendant says the case stands for the proposition others with whom the plaintiff shares accommodation are expected to make a contribution to maintenance of their joint household. In this case, the defendant says a combination of the plaintiff's high expectations for housekeeping along with a requirement her husband contribute more effort to housekeeping should negate any award for housekeeping costs.

[140] After a review of *Kroeker*, I agree with the plaintiff's interpretation of the decision.

[141] The plaintiff and her husband live in a two-bedroom condominium. The plaintiff testified, and I accept her evidence, that her mother attends her residence once a week for two to three hours to perform housekeeping tasks. I am also satisfied her husband assists as he is able. The plaintiff's husband testified he did about 25% of the housework before the accident and was now doing about one-third of it. I also find the plaintiff is particular about housework.

[142] I accept the plaintiff's injuries are such she finds it difficult to perform such tasks, particularly after working the three shifts per week she currently works. The measure of damage, of course, must take into account what the plaintiff's circumstances would have been had she not been injured in the accident.

[143] In this case, the assessment is not straight forward. Both the plaintiff and her husband have testified their financial position makes it necessary for them both to work. They cannot afford daycare or a nanny. Accordingly, they have had to organize their lives around their respective work schedules. This has resulted in the extraordinarily long days for the plaintiff as, upon returning home early in the morning hours after conclusion of her shift she must, on at least three mornings of the week, arise early to look after Emily before her husband leaves for his work. While the plaintiff's tenacity must be admired, it is little wonder she is exhausted. These factors would have existed notwithstanding the accident. It will be recalled the plaintiff would have been working full time.

[144] In my view, it is likely the plaintiff's mother would have assisted the plaintiff with housekeeping chores regardless of the accident. Nonetheless, I am also satisfied there are tasks the plaintiff cannot perform as a result of her injuries and that some of the assistance her mother provides is intended to compensate for those tasks. The plaintiff claims the cost of two hours per week for housekeeping at $25 per hour for 52 weeks or $2,600 per year. The plaintiff claims $11,000 for housekeeping as special damages from the date of the accident to date of trial and $57,000 for housekeeping as part of its claim for cost of future care.

[145] Taking into account the above findings and discussion, I award $5,000, which will be added in below to the calculation under the head of special damages, for past loss of housekeeping capacity. I also award $25,000 for the cost of future care for housekeeping expenses which amount includes the cost of any periodic heavy cleaning.

(g) *Handyman services*

[146] I make no allowance under this head as there is no justification in the evidence to make such an award. Mr. Simmavong is able to perform whatever handyman chores there may be in the couple's two-bedroom condominium.

(h) *Pain Medications*

[147] The plaintiff takes four to six Tylenol 3 per day, as well as extra-strength Advil to control her back pain. Ms. Scullion has costed these medications at $1,029.61 annually or $24,095. I allow this amount for medications

(i) *Equipment*

[148] I consider Ms. Scullion's recommendations for a bath tub wall bar, hand held shower, Obus Forme Back support and an ergonomic chair to be reasonable and allow those items for an aggregate amount of $2,568.

(j) *Summary of Costs of Future Care*

[149] In summary, the items allowed for cost of future care are:

Psychological Counselling	4,375.00
Occupational Therapy	630.00
Physical Therapy	4,567.50
Massage Therapy	700.00
Housekeeping (Future)	25,000.00
Pain Medications	24,095.00
Equipment	2,568.00
TOTAL COST OF FUTURE CARE	**$61,935.50**

Special Damages

[150] The plaintiff claims $2,918 for special damages in addition to the amount discussed above for past loss of housekeeping capacity. The defendant admits all expenses but $480.90 (mileage, wear and tear and gas) which is in addition to an amount claimed for gasoline and $193.45, which are for unrelated prescriptions. Taking these deductions into account, I allow special damages of $2,243.65. With the $5,000 I have allowed in special damages for past loss of housekeeping capacity, the total for special damages is $7,243.65.

SUMMARY

[151] In conclusion I award the following:

Non-pecuniary damages	75,000.00
Lost Wages	38,000.00
Loss of future income	150,000.00
Cost of future care	61,935.50
Special damages	7,243.65
TOTAL	**$332,179.15**

[152] The parties may speak to the issue of costs should they be unable to agree.

"GREYELL J."