IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Suthakar v. Humble,*
2016 BCSC 155

Date: 20160202
Docket: M134350
Registry: Vancouver

Between:

Thaneswary Suthakar

Plaintiff

And

Robert Humble and Sarah Natalie Afful

Defendants

Before: The Honourable Madam Justice Ballance

Reasons for Judgment

Counsel for Plaintiff:	P. Bisbicis
Counsel for Defendants:	A. Watchorn
Place and Date of Trial:	Vancouver, B.C. March 30 and 31, April 1, 2 and 7, 2015
Place and Date of Judgment:	Vancouver, B.C. February 2, 2016

INTRODUCTION

[1] On July 15, 2011, the vehicle driven by Thaneswary Suthakar, which was also occupied by her two sons, her mother and her friend, was struck twice in the rear while stopped at a red light at a major intersection (the “Accident"). Ambulance and police attended at the scene. Ms. Suthakar was taken to the hospital by ambulance where she was assessed and discharged.

[2] Liability for the Accident has been admitted. There is no dispute that the Accident caused soft tissue injuries to Ms. Suthakar’s neck, low back and left shoulder region. The contentious issues are the severity of her injuries and their impact on her functional abilities and work capacity.

BACKGROUND SUMMARY

[3] The following summary reflects evidence that was either not in dispute or, where it was in dispute, the factual findings I have made based on a consideration of the evidence as a whole. I have explained the reasoning underlying my findings where the evidence conflicted in a significant way on material points or a party has urged that a particular inference be drawn from the evidence.

[4] In June 2004, Ms. Suthakar immigrated to Canada from Sri Lanka to join her husband, Suthakar Jeyerrasa, who had relocated here some years earlier. She immersed herself in English lessons and, in 2005, secured a minimum wage, full-time job as a cashier at Tim Hortons. Later that year, Ms. Suthakar became pregnant with the couple's first child, who was born in July 2006. After taking a 12-month maternity leave, she returned to Tim Hortons in May 2007, working full-time, primarily as a baker. Her duties included lifting heavy trays of doughnuts, bagels and muffins, taking out the garbage, mopping the floors, washing the dishes and sometimes serving customers.

[5] Ms. Suthakar went on a second maternity leave in November 2008. Her mother had arrived from Sri Lanka approximately two months beforehand to reside with the young family and provide child care to enable her daughter to return to work

after her leave. In exchange, Ms. Suthakar and her husband supplied her mother with food, accommodation and clothing, and covered her medical expenses.

[6] When Ms. Suthakar's maternity leave finished in December 2009, she did not immediately return to Tim Hortons. Rather, she obtained a new job as a production line worker for Frankly Fresh Salads ("Frankly Fresh"). Her initial hourly wage at Frankly Fresh was $8.50 and increased to $10 the following month.

[7] Franca Berardi is the owner and general manager of Frankly Fresh, which employs about 18 people. Ms. Berardi is on the plant site about 30 hours each week where she interacts regularly with Ms. Suthakar. She described Ms. Suthakar as a responsible and diligent worker who has distinguished herself as one of the best employees she has ever had.

[8] Ms. Berardi explained that as a production worker, Ms. Suthakar is responsible for lifting boxes and containers weighing between 25 and 40 pounds, hosing down the produce containers and sweeping the floor. Her duties further require that she stand at an elevated workstation for between one and two hours at a time, looking down at the table as she peels, chops and packages the fruit. Another of her routine tasks is to load the containers of fruit into boxes for delivery to customers.

[9] In around the last week of September 2010, being approximately nine months after she started with Frankly Fresh, Ms. Suthakar resumed her job as a baker for Tim Hortons. Teuta Isaraj was Ms. Suthakar's manager at the time. She regarded Ms. Suthakar as a reliable and good worker who never complained or called in sick.

[10] Ms. Suthakar testified that, at the time of the Accident, she was working full time at both Frankly Fresh and Tim Hortons. She stated that she worked from 9:30 a.m. until 5:30 p.m., Monday through Thursday, as well as Sunday, at Frankly Fresh; at Tim Hortons, her shift went from 11 p.m. to 7 a.m. Monday through Thursday and Saturday. Fridays were her only day off. Ms. Suthakar said that she would occasionally work at Tim Hortons on her day off to cover a shift for an ill or otherwise

absent staff member. Ms. Suthakar's evidence concerning the extent of her hours of work at Frankly Fresh prior to the Accident, which was echoed by her husband, was not accurate.

[11] In 2010, Ms. Suthakar's monthly income from Frankly Fresh fluctuated from a low of $895 in June, to a high of $2,065 in May, with weekly average earnings of $324. At her applicable hourly rate, her earnings correspond to roughly 32 hours of work per week. In 2011, her average weekly pre-Accident earnings at Frankly Fresh declined to $242, reflecting an average of 24 hours of work per week.

[12] As Ms. Suthakar did not get rehired at Tim Hortons after her second maternity leave until late September 2010, she had only held two jobs for a period of 42 weeks before the Accident.

[13] The probabilities of the evidence as a whole, including Ms. Berardi's evidence and Ms. Suthakar's income tax information, demonstrate that before the Accident, Ms. Suthakar worked at Frankly Fresh an average of between 24 and 32 hours per week. Even allowing for two weeks of vacation (which the evidence indicates she did not take in those years), Ms. Suthakar's pre-Accident earnings at Frankly Fresh, especially those in the 28-week period in 2011 immediately preceding the Accident, reflect a pace that is substantially less than the full-time hours she claims to have worked.

[14] Ms. Suthakar's husband, Mr. Jeyerrasa, who was 39 years old at the time of trial, came to Vancouver from Sri Lanka in 1994. From the start, he proved to be an extremely hard-working and industrious man able to hold two jobs, mainly in the restaurant business, and survive with a minimum of sleep.

[15] Shortly after the birth of the couple's first child, Mr. Jeyerrasa was promoted to the position of chef at a high-end restaurant in the downtown area. Since then, he ordinarily works from 9:00 a.m. until 11 p.m. or midnight, five days per week, and more during the busy season which spans from October until December. Given his gruelling work schedule, he has not held a second job since becoming a chef.

Instead, several years ago he established a separate janitorial business with his brother. Because Mr. Jeyerrasa was concerned that his reputation as a chef might be sullied if it were known in the industry that he was associated with a “cleaner” job, he registered the business under his wife's name in order to “keep it in the family”. Mr. Jeyerrasa’s share of the business income was reported in Ms. Suthakar’s income tax return. She has no involvement in the business other than signing cheques at her husband’s direction.

[16] Ms. Suthakar explained that she was committed to working two jobs for financial reasons. She expounded that she and her husband each planned to work at a demanding pace for 20 years or so with the main objective of being able to cover the expenses of their children's education at private school and through university. Mr. Jeyerrasa credibly supported his wife’s testimony on this matter. He also noted that through their hard work they had been able to acquire an apartment and, with the financial assistance of his uncle, had purchased a home which they hoped to eventually renovate and move into from their cramped apartment.

[17] Also as a result of the couple's efforts, they have proudly managed to enroll both children in private school. The combined monthly tuition cost is between $1,300 and $1,500, plus administration fees, and is expected to increase in the future. The parents also make a sizeable annual charitable donation to the school, which the school encourages, and they incur expenses for private tutoring of about $300 per month.

[18] Before the Accident, Ms. Suthakar did not partake in any hobbies or recreational activities beyond taking her children to the park and watching movies and television. When she was not at work or sleeping, her time was largely taken up with cooking, which she enjoyed, cleaning and other domestic responsibilities. She indicated that her husband only occasionally assisted her with those chores. According to him, however, he frequently did household chores in order to allow his wife to catch some sleep before she headed off to one job or the other. He added

that his mother-in-law also pitched in and performed light housework such as sweeping, and that all three of them participated to one extent or another in meal preparation. The probabilities of the evidence satisfy me that before Ms. Suthakar assumed two jobs, she carried the lion's share of the domestic load and that even when she began her second job before the Accident, although she had assistance from her husband and, to a lesser extent, from her mother, the majority of the domestic tasks continued to fall to her.

AFTERMATH OF THE ACCIDENT

[19] Approximately one week after the Accident, Ms. Suthakar saw Dr. Karim Harjee, who has been her family physician since May 2005. At that time, she complained of persistent neck and back pain as well as headaches. Dr. Harjee diagnosed soft tissue injuries to Ms. Suthakar's neck and back. He recommended that she take time off from work, apply heat to the affected areas, perform exercises, take Advil and Tylenol #3 as required, and be reviewed in two weeks' time.

[20] On Dr. Harjee's recommendation, Ms. Suthakar attended approximately 32 physiotherapy sessions between July 2011 and January 2012. They provided her with significant therapeutic benefit, however, the beneficial effects dissipated considerably after the treatments came to an end. The physiotherapist taught Ms. Suthakar to do certain exercises to relieve her symptoms and address her injuries. Since that time, she has performed them reasonably regularly.

[21] During Ms. Suthakar's visit to Dr. Harjee on October 25, 2011, he charted "some improvement (approx. 50%)" in respect of her Accident-related symptoms. Dr. Harjee was not able to confirm whether his recorded quantification of 50% improvement had been relayed by Ms. Suthakar or was a number that he had used to characterize her degree of improvement. In either case, I find that it accurately describes the extent of Ms. Suthakar's improvement at that point in time.

[22] Ms. Suthakar took between three and four months off from work immediately after the Accident. At the end of October or in early November 2011, she resumed her position at Frankly Fresh. She initially worked on a part-time basis but very

quickly assumed full-time hours. Both Ms. Suthakar and her husband were worried about the financial repercussions of Ms. Suthakar having missed several months of work, which prompted her to return to work sooner than she felt ready. Her husband subsequently took it upon himself to speak to Ms. Isaraj at Tim Hortons about rehiring his wife. It was indicated to Ms. Isaraj, either by Ms. Suthakar or her husband, that Ms. Suthakar did not feel able to perform the duties required of a baker and was instead seeking work in the less physically demanding capacity of a front-end cashier. Ms. Isaraj confirmed that in January 2012 she rehired Ms. Suthakar on the understanding that she was only able to work as a cashier two to three days a week.

[23] Before the Accident, Ms. Berardi encountered no performance issues with respect to Ms. Suthakar, did not observe her to exhibit behaviour consistent with experiencing pain and was not aware of her having any health conditions whatsoever. However, Ms. Berardi did notice changes after the Accident. In its aftermath, Ms. Suthakar, whom Ms. Berardi regards as a stoic person who does not complain, appeared to be in pain on the job and complained of pain, at times declaring that her back, neck and shoulders were "killing me". Ms. Berardi has seen Ms. Suthakar take Tylenol at work on a few occasions and often hears her mention that she needs to take one.

[24] Ms. Berardi confirmed that, despite Ms. Suthakar's pain, she remains a diligent and hard-working employee and has recently assumed supervisory duties on a temporary basis. In addition to her usual pre-Accident duties, Ms. Suthakar now also manually mixes the contents of dips and salsas by leaning over large vats and using her shoulders and arms to mix the ingredients for approximately 30 minutes for each batch.

[25] Regarding Ms. Suthakar's post-Accident work at Tim Hortons, Ms. Isaraj testified that, although Ms. Suthakar sometimes complained about her back hurting, the quality of her work did not decline and she continued to do a good job.

[26] Ms. Suthakar testified that in 2012 she worked full-time hours, four days a week at Tim Hortons. A careful reading of the evidence reveals that, once again, she overstated the hours she worked. From January until May 2012, Ms. Suthakar worked approximately 16 hours a week at Tim Hortons. That is plainly not the equivalent of full-time hours, four days a week. Thereafter, however, her weekly hours climbed to between 26 and 30, with two exceptions where her weekly hours in two separate intervals averaged 36 to 40.

[27] Despite the fact that Ms. Suthakar was eventually able to return to both jobs after the Accident, she regularly experienced bouts of symptom exacerbation and pain in performing her employment duties. Standing for prolonged periods of time, particularly on the days where she worked for both employers, was especially aggravating to her injuries. Ms. Suthakar was prescribed various anti-inflammatory and pain medications, however, she found that they often caused her stomach to be upset and therefore she opted to rely mainly on over-the-counter Tylenol and Advil to try to control her symptoms.

[28] Ms. Suthakar came to feel as though she was harming herself by continuing to work in pain and by regularly ingesting medication over a protracted period of time. Her husband could see the toll that working two jobs was taking on his wife and supported her leaving Tim Hortons. She quit there for good in December 2012. At that time, her hourly wage was $10.25, with an additional $1.00 per hour when she worked the graveyard shift.

[29] Since leaving Tim Hortons in December 2012, Ms. Suthakar has continued to work at Frankly Fresh. At some point after the Accident, her hourly rate increased to $12 and since assuming some supervisory duties, (on a date that was not made clear in the evidence), her hourly wage rose to $15.

[30] Ms. Suthakar's evidence concerning the extent of her Tylenol usage was inconsistent. She testified that she was able to manage her symptoms without Tylenol on the days that she was not working both jobs in 2012, but typically took eight tablets on the days that she worked two shifts. At another point in her direct

examination, Ms. Suthakar clarified that her pain usually increased after about six hours into her shift at Frankly Fresh and that she would take Tylenol at that juncture, even on days where she was not working the graveyard shift at Tim Hortons. In cross-examination, she testified that she took Tylenol every day of the week while she held down two jobs in 2012. She also testified that since quitting Tim Hortons, she has taken six Tylenol per day on her four most demanding work days of the week.

[31] I accept that Ms. Suthakar continues to regularly experience pain in her neck and back, and to a lesser extent in her left shoulder region, in performing certain of her work responsibilities at Frankly Fresh, especially those requiring her to stand for sustained periods. Mr. Jeyerrasa testified that on the occasions when he is able to take a break from his job to collect his wife after work, she appears to be visibly depleted and in pain to the point where she wants to lay down in the car on the drive home. Upon arriving home, her pattern is to take a hot shower and then rest on the couch with a hot pack (both of which help to temporarily soothe her symptoms), and watch television. At the end of her work day, Ms. Suthakar is usually too tired to play with the children and relies on her mother to tend to them. As her husband put it, “she doesn’t do anything anymore".

[32] Mr. Jeyerrasa’s tireless work ethic is shared by his brother, whose testimony assisted the Court in relation to the effect of the Accident upon Ms. Suthakar. For the past eight or nine years, he has worked at a foundry 40 hours a week and, over the last six years or so, has worked an additional four hours every day at the janitorial business that he owns with Mr. Jeyerrasa.

[33] Before the Accident, Mr. Jeyerrasa’s brother ordinarily saw his sister-in-law two or three times a week. He testified that she was a healthy woman who cooked, cleaned the house and enjoyed the children. She liked to watch movies and listen to music, and never complained. Mr. Jeyerrasa’s brother has tended to visit more frequently after the Accident and makes a point of joining the family each Sunday night in order to spend time with his young nephews. He testified that Ms. Suthakar

is often sleeping on the couch when he arrives. He has not noticed her cooking or cleaning at all anymore. His observation is that when Ms. Suthakar is awake, she is frequently stretching and/or rubbing her neck and back. It is his impression that she is often in pain, particularly in her neck area. He also testified that she can be quick to anger and becomes irritable with the children, which was never the case before the Accident.

EXPERT EVIDENCE

- **Ms. Suthakar's Medical Experts**

[34] Ms. Suthakar tendered expert reports from Dr. Harjee and from Dr. John Fuller, an orthopedic specialist, dated February 2, 2015 and May 28, 2014, respectively.

[35] Dr. Harjee diagnosed soft tissue, musculoligamentous strain-type injuries involving Ms. Suthakar's cervical spine, lumbar spine and left shoulder area. He opined that her injuries contributed to her headaches and poor sleep, and that her related inactivity contributed to some weight gain.

[36] Dr. Harjee stated that Ms. Suthakar had not achieved complete recovery as her symptoms were ongoing. He singled out her sustained standing while at work as being especially aggravating to her soft tissue symptoms. He considered her symptoms to be chronic in nature and prognosticated they would likely persist and continue to impact her function.

[37] Dr. Harjee recommended that Ms. Suthakar attend an active rehabilitation program that focused on strengthening and stabilizing her core and which required her direct participation in exercises much like having a personal trainer. He also recommended that she have a pass to a gym and a pool to enable her to continue with an independent recovery program. Dr. Harjee planned to continue to offer gentle analgesics and night time medications aimed at settling some of her chronic pain and facilitating restful and restorative sleep which, he opined would improve her

daytime function. He believes that the physical rehabilitation he recommends, coupled with modifications to her workplace, will be beneficial to Ms. Suthakar**.**

[38] Dr. Harjee holds the view that Ms. Suthakar may no longer be suited to her current employment. He thinks that alternate or more sedentary work that does not require standing for long periods at a time, awkward positions or repetitive and forceful arm and shoulder activities may be a better match. He recommended engaging the services of a vocational counsellor to explore Ms. Suthakar's options.

[39] Dr. Harjee testified that the acute phase of Ms. Suthakar's injuries came to an end four to five months after the Accident. Thereafter, there are increasingly fewer references to her injuries in her medical chart. The defendants emphasize the lengthy gap between May 1, 2012 and June 20, 2014 where, with one or two exceptions, Ms. Suthakar did not complain about her injuries during her appointments with Dr. Harjee. They urge that this gap supports the inference that by May 2012, Ms. Suthakar's symptoms had settled down considerably and no longer required medical attention. When cross-examined about this matter, Dr. Harjee responded that some of his patients like to come in every two weeks to discuss their pain, whereas others do not want to talk about things they cannot do anything about. As well, his records indicate that as of October 2014, Ms. Suthakar continued to report persistent neck and back pain, and that she had been sleeping poorly and taking Tylenol frequently.

[40] In *Edmondson v. Payer*, 2011 BCSC 118, aff'd 2012 BCCA 114, N. Smith J. provided instructive commentary on the evidentiary use of clinical records including the relevance of their absence. At paragraph 37 he remarked:

> [37] The same applies to a complete absence of a clinical record. Except in severe or catastrophic cases, the injury at issue is not the only thing of consequence in the plaintiff's life. There certainly may be cases where a plaintiff's description of his or her symptoms is clearly inconsistent with a failure to seek medical attention, permitting the court to draw adverse conclusions about the plaintiff's credibility. But a plaintiff whose condition neither deteriorates nor improves is not obliged to constantly bother busy doctors with reports that nothing has changed, particularly if the plaintiff has no reason to expect the doctors will be able to offer any new or different treatment. Similarly, a plaintiff who seeks medical attention for unrelated

> conditions is not obliged to recount the history of the Accident and resulting injury to a doctor who is not being asked to treat that injury and has no reason to be interested in it.

[41] I have concluded that nothing of importance turns on the absences in Ms. Suthakar's medical chart of complaints to Dr. Harjee about her ongoing symptoms.

[42] Dr. Fuller assessed Ms. Suthakar on May 7, 2014. His clinical diagnoses of her injuries caused by the Accident aligned with those made by Dr. Harjee. Specifically, he opined that her musculoskeletal symptoms included musculoligamentous injury to her neck, headaches secondary to her neck injuries, and low back pain involving the sacroiliac complex secondary to sacroiliac dysfunction, with displacement and restriction of passive motion to her sacroiliac joint.

[43] Dr. Fuller helpfully discussed a reasonable analysis of the mechanics of the Accident (assuming a rear-end collision with two impacts) and the resultant forces endured by Ms. Suthakar. He explained that her neck and back would likely have been subjected to a physical load, initially in the form of backward bending, and perhaps followed by more significant forward bending. He pointed out that the seatbelt would not have protected Ms. Suthakar's cervical spine from the type of overload that he believes she sustained.

[44] Dr. Fuller expounded that the sacroiliac complex is below the spine and above the tailbone and is inherently unstable. He explained that an individual's entire body weight sits on the tailbone and the sacroiliac joint supports that weight. In his experience, rotation in the sacroiliac complex is very common in motor vehicle accidents and is essentially untreatable because the joint remains permanently unstable.

[45] Although Dr. Fuller offered a guarded, if not poor, prognosis for any further spontaneous recovery of Ms. Suthakar's neck, he did not exclude entirely the possibility for some additional marginal improvement in the future. With reference to

her low back/sacroiliac system, he concluded there was a persistence of displacement stemming from the Accident, which would cause some persistent dysfunctional loading of the ligaments supporting her sacroiliac joints. His prognosis for Ms. Suthakar's low back symptoms was similarly guarded, if not poor. In Dr. Fuller's view, modalities of treatment such as sacroiliac support or remedial exercise tended to be of limited benefit and he recommended they be used as an adjunct to manual therapy only.

[46] To Dr. Fuller's mind, treatments, such as acupuncture, chiropractic and physiotherapy would likely be ineffective for Ms. Suthakar's type of soft tissue injuries or effective only to relieve her symptoms temporarily and would not cure her chronic condition. He added that the long-term use of Tylenol was not ideal because its effectiveness dissipates over time and it is very toxic to the liver.

[47] Dr. Fuller considered it noteworthy that Ms. Suthakar had been relatively functional after the Accident, although he observed that her ability to manage her home was markedly restricted. That being said, he noted that she had remained employed at considerable personal cost in light of her ongoing exacerbation of symptoms which eventually resulted in her leaving her job at Tim Hortons as she was unable to tolerate the long periods of standing. He continued that Ms. Suthakar's symptoms were similarly exacerbated by her employment at Frankly Fresh and that given the status of her compromised musculoskeletal system, those exacerbations would probably persist.

[48] Dr. Fuller believes that Ms. Suthakar is ill-suited to any occupation requiring significant lifting, repetitive lifting, rapid movement, or working in an awkward or confined space. Given that her sitting tolerance is compromised, Dr. Fuller, unlike Dr. Harjee, does not consider her a good candidate for a sedentary occupation either. He also endorses the carrying out of a vocational assessment.

[49] When Dr. Fuller assessed Ms. Suthakar on May 7, 2014, she reported that her symptoms had become worse and more significant in the months leading up to his assessment. In cross-examination, Dr. Fuller was questioned about whether it

was unusual or illogical for her symptoms to increase after Ms. Suthakar had given up her second job and was, therefore, no longer doing as much prolonged standing as in 2012. Dr. Fuller agreed that may be unusual, but added that people with soft tissue injuries do not necessarily follow stipulated recovery patterns and that each injury is unique. He would not agree with the proposition that, in light of Ms. Suthakar's complaints, it was "strange" that she had been able to work two jobs that primarily involved standing. He testified that she had simply been physically capable of doing so in pain for a finite period of time. He also observed that it was normal for people to become fatigued with chronic injury and face increased difficulties with their symptoms over time.

[50] To my mind, Dr. Fuller's responses satisfactorily addressed the defendants' line of inquiry and neutralized the cogency of any submissions flowing from it.

- **The Defendants' Medical Expert - Dr. Kenneth Kousaie, Orthopedic Surgeon**

[51] Dr. Kousaie performed an independent medical assessment of Ms. Suthakar on December 9, 2014. She told him that she was currently experiencing a 50% improvement in her symptoms as compared to the time of the Accident, and that she had an even greater improvement (closer to 90%) during the period she was undergoing physiotherapy. It would seem from Ms. Suthakar's self-reports to Dr. Kousaie that her symptoms had improved since being assessed by Dr. Fuller some six months earlier, or at least were no longer worsening.

[52] Dr. Kousaie diagnosed moderate soft tissue injury to the left side of Ms. Suthakar's neck area including her paravertebral muscles and trapezius (shoulder area) muscle, and to her left lower back in consequence of the Accident. He shared the view of the other medical experts to the effect that her headaches were more than likely related to the soft tissue injury to her neck area. Dr. Kousaie concurred with Dr. Fuller's opinion that there is no evidence of any previous symptomology or pre-existing condition that would have led to Ms. Suthakar's current complaints.

[53] Despite the fact that Dr. Kousaie's clinical examination of Ms. Suthakar proved to be normal, he confirmed he had no reason to doubt that her symptoms eventually prevented her from working the long days she endured while employed at two jobs in 2012. He reported there were no positive findings to suggest that the symptoms she described were "anything but true".

[54] Apparently on the footing that Ms. Suthakar was able to perform her pre-Accident duties at Frankly Fresh since returning to that position late in 2011, Dr. Kousaie reasoned there was no total or partial disability for that type of work at the time of his assessment. He expressed this view while, at the same time, acknowledging that Ms. Suthakar experienced pain at the end of each workday at Frankly Fresh and opining that it was unlikely she would be able to return to her second job or resume housework or the cooking and shopping chores that she had performed prior to the Accident. The concept of "disability" that Dr. Kousaie applied in this context was not explained in his report and he did not testify at trial. The only reasonable interpretation is that he construed the term "disability" in the narrow sense to mean that Ms. Suthakar's injuries did not preclude her from doing her job at Frankly Fresh. To interpret his statement otherwise would place it in conflict with his acknowledgement of the adverse impact her symptoms have had and will continue to have on her employment at Frankly Fresh and with respect to holding a second job.

[55] From Dr. Kousaie's standpoint, the sole means available to Ms. Suthakar to improve her symptomology is for her to participate in an exercise program. He noted that she may require physiotherapy on a very short-term basis to reinforce the physical exercise that will be required to decrease her symptomology. Dr. Kousaie thinks that participation in such a program may improve Ms. Suthakar's tolerance to physical activities at work and at home. However, he cautioned that, in light of the length of time that had now passed since she sustained her injuries, it was also possible that she would not enjoy any further improvement.

- **Expert Evidence of Occupational Therapists/Certified Work Capacity Evaluators**

[56] Ms. Suthakar tendered the report of Edgar Emnacen, a senior consultant occupational therapist and certified work capacity evaluator, containing his evaluation of her functional abilities and limitations conducted in October 2014.

[57] Mr. Emnacen appeared to have a thorough appreciation of Ms. Suthakar's current work responsibilities at Frankly Fresh. He concluded that a comparison of her demonstrated level of functioning in relation to her job demands indicated that her abilities closely matched the physical demands of her work. His testing confirmed that Ms. Suthakar has the reaching, handling and standing capacities to do her job; however, he found that her tolerances for those demands were negatively impacted by her symptom reactivity. More specifically, he found limitations with regard to her sustained neck flexion and extension positioning, left side forward and overhead reaching tolerances, and her sustained sitting, standing, crouching and kneeling tolerances.

[58] In Mr. Emnacen's opinion, the pain in Ms. Suthakar's neck, left shoulder and left low back would likely be aggravated by certain movements and postures required by her employment at Frankly Fresh. Additionally, he noted that her global strength capacity fell below the 25 pound lifting demands of her work. He stated that lifting 25 pounds or more on a repeated basis would likely exacerbate her symptoms, as well as potentially compromise her safety in the workplace.

[59] Mr. Emnacen's understanding was that Ms. Suthakar currently performs a mix of supervisory duties with production line tasks at Frankly Fresh. He commented that the task rotation between supervisory duties and production line work may provide her with some symptom relief. Even with the benefit of that relief, his view is that she will likely continue to experience increasing symptom levels with the continued exposure to functional stressors over the course of her shift. It would seem that Mr. Emnacen was not aware that Ms. Suthakar's supervisory duties were temporary in nature. Thus, his opinion is formulated, in part, on his understanding

that her job would continue to encompass the supervisory elements that allowed her to take breaks from the fast-paced production line work. It was not clear on the evidence just how much longer Ms. Suthakar would be carrying out supervisory tasks.

[60] In the end, Mr. Emnacen concluded that Ms. Suthakar has the capacity to work in her current position at Frankly Fresh, although he predicts that her overall tolerance will likely be affected by her symptom reactivity. He expressed concern about her ability to remain performing her work on a full-time basis, noting that it would depend on how much longer she is able to tolerate pushing through her shift while experiencing pain. Mr. Emnacen also opined that the accumulation of Ms. Suthakar's symptoms would likely place limitations on her tolerance for working additional or longer hours on a regular basis. In his opinion, in the event that she has to seek alternative employment, her employability has been reduced.

[61] To assist Ms. Suthakar in maintaining and possibly improving her tolerances and maximizing her durability for her current work, Mr. Emnacen recommended that she undergo a course of active rehabilitation with a physiotherapist or kinesiologist. He shared Dr. Harjee's view that the program should focus on core strengthening, as well as improving her reaching and sustained neck and back postural tolerances.

[62] Mr. Emnacen also:

- concurred with Dr. Harjee's recommendation that Ms. Suthakar have a personal trainer and a gym pass;
- recommended that she participate in ten to 12 kinesiology sessions to establish a new exercise program that she can complete independently, along with an annual gym pass;
- believed she would benefit from a job site visit/ergonomic analysis of her work by an occupational therapist to determine whether there were any strategies in work style and/or work station adaptations that could be implemented to minimize aggravation of her symptoms. He envisioned that the occupational therapist would also discuss

strategies that Ms. Suthakar could use at home to re-engage in activities of daily living; and

- endorsed her receiving education about active pain management principles such as pacing her work and home activities.

[63] At the outset of Mr. Emnacen's approximate eight-hour assessment, he identified that Ms. Suthakar exhibited a low effort during her initial first grip test. After confronting her with the inconsistencies related to that test, he concluded that her subsequent level of effort on testing was high overall. That said, Mr. Emnacen did find it unusual that on testing of her repetitive movements, Ms. Suthakar's performance at the end of the day was superior to her performance at the beginning, despite significant increases in her reported pain levels. He commented that her symptom reports at the close of the day did not correlate well with some aspects of her demonstrated function. He also concluded that Ms. Suthakar both reasonably estimated and underestimated her global strength capacity.

[64] In Mr. Emnacen's words:

> Overall, Ms. Suthakar's presentation suggests reasonably accurate disability reports in the presence of lower symptom levels; with increasing perceived symptoms and disability reports towards end of day testing, the reliability of her reports diminished.
>
> Please note that the aforementioned statements are in no manner meant to imply intent. Rather, it is simply being stated that Ms. Suthakar is capable of greater than she states or proceeds at times.

[65] The defendants rely on the responsive report of their expert, Paul Pakulak, who is also an occupational therapist and a certified work/functional capacity evaluator. Mr. Pakulak did not conduct an independent assessment of Ms. Suthakar. His report took the form of a critique of certain features of Mr. Emnacen's opinion.

[66] The thrust of Mr. Pakulak's opinion is that, relying as he did on Ms. Suthakar's symptomatic reports, Mr. Emnacen could not accurately gauge her level of capacity in light of:

- the low effort demonstrated by Ms. Suthakar in her initial grip test;
- the variable levels of effort recorded by Mr. Emnacen throughout the testing; and
- the inconsistent and/or unreliable reported levels of symptoms and degree of disability documented by Mr. Emnacen.

[67] According to Mr. Pakulak, when self-reports of symptoms and reported levels of disability are found to be unreliable, which he urges is the case here, opinions concerning an individual's physical abilities and limitations ought to be based primarily on objective test data, which was not adequately done in Ms. Suthakar 's case.

[68] In responding to Mr. Pakulak's report, Mr. Emnacen emphasized that the grip test, on which Ms. Suthakar exhibited low effort, was merely one of a number of metrics that he administered to assess her effort and that, except for her flawed effort on that initial test, she demonstrated a reasonably high effort throughout testing. He also explained that his handwritten notes, which recorded the placebo tests he had carried out on Ms. Suthakar, were consistent with her demonstrating a reasonable or high effort on testing and had been overlooked by Mr. Pakulak.

[69] As to the fact that Ms. Suthakar was better able to perform repetitive movement tests later in the day even though she reported heightened pain when doing so, Mr. Emnacen speculated that her poor baseline results at the start of the day might have been due to factors such as pain early in the day and/or performance anxiety, but agreed he was simply not able to say one way or the other. His reasoning does not adequately address the fact that Ms. Suthakar reported pain at lower levels – not higher ones – on her baseline testing.

[70] I am not prepared to conclude that Mr. Pakulak's criticisms call into question the reliability of the entirety of Mr. Emnacen's conclusions concerning Ms. Suthakar's abilities and limitations. However, the Court cannot disregard his opinion that some of his own testing showed that Ms. Suthakar's symptom reports appeared to be high, or that her symptoms are not as disabling as she perceives and reports her function

to be. Attention must likewise be paid to his view that the reliability of her reports was diminished by the disjuncture between her improved performance towards the end of the testing day and her concurrent reports of heightened pain and disability. Mr. Emnacen's own findings decrease to some extent the weight the Court can confidently place on his opinion concerning Ms. Suthakar's abilities and limitations and the effect they may have on her current and future employment and general function.

[71] The probabilities of the evidence taken as a whole indicate that Ms. Suthakar is capable of somewhat greater function and higher tolerances with respect to certain movements, and possibly with respect to her global strength, than she portrayed to Mr. Emnacen on testing or perceives that she possesses, or both.

MS. SUTHAKAR'S CREDIBILITY

[72] Although Ms. Suthakar was a credible witness on most issues, there were some notable exceptions in addition to the concerns raised by Mr. Emnacen's findings. Most troubling was that both she and her husband exaggerated the hours she worked at Frankly Fresh before the Accident and overstated those that she worked at Tim Hortons afterward. In addition, her evidence concerning her Tylenol usage was unreliable which, in turn, raised concerns about the key issues of the frequency and intensity of her residual symptoms and their functional impact upon her. In my view, her testimonial shortcomings were not the result of being a sincere but poor historian or due to any problems stemming from the fact that her evidence was given through an interpreter.

[73] While I do not consider these deficiencies to justify an outright rejection of Ms. Suthakar's evidence in the absence of independent corroboration, they are of sufficient concern to require that her evidence be assessed with extra caution.

CAUSATION

[74] As mentioned, there is consensus among the medical experts that the Accident caused Ms. Suthakar headaches and soft tissue injuries primarily to her low back, neck and left shoulder area.

[75] The *but for* test of causation articulated in *Athey v. Leonati,* [1996] 3 S.C.R. 458 and its lineage does not require the court to accept or find a particular medical diagnosis. Even so, I accept Dr. Fuller's more fulsome opinion as it concerns Ms. Suthakar's low back injury, which was not contradicted by Dr. Kousaie, to the effect that she probably sustained an injury to her sacroiliac complex as a result of the Accident.

DAMAGES

- **Loss of Income-Earning Capacity**

[76] The legal framework that informs an award for loss of earning capacity was instructively summarized by Dardi J. in *Midgley* at paras. 236-240:

> [236] The recent jurisprudence of the Court of Appeal has affirmed that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an earnings approach or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Regardless of the approach, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19; *X. v. Y* at para. 183.
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> [237] As enumerated by the court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45, the principles which inform the assessment of loss of earning capacity include the following:
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> > (i) The standard of proof in relation to hypothetical or future events is simple probability, not the balance of probabilities: *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.
> >
> > (ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.). Evidence which supports a contingency must show a "realistic as opposed to a speculative

> possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).
>
> (iii) The court must assess damages for loss of earning capacity, rather than calculating those damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43. The assessment is based on the evidence, taking into account all positive and negative contingencies. The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

[238] Although a claim for "past loss of income" is often characterized as a separate head of damages, it is properly characterized as a component of loss of earning capacity: *Falati* at para. 39. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32; *X. v. Y* at para. 185.

[239] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27.

[240] This court in *Falati* at para. 40 summarized the pertinent legal principles governing the assessment of post-accident, pre-trial loss of earning capacity and concluded that:

> [40]...the determination of a plaintiff's prospective post-accident, pre-trial losses can involve considering many of the same contingencies as govern the assessment of a loss of future earning capacity. As stated by Rowles J.A. in *Smith v. Knudsen*, 2004 BCCA 613, at para. 29,
>
> > "What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events."

[77] In advancing a claim for the loss of income-earning capacity, the plaintiff must prove a real and substantial possibility of such loss, as opposed to a theoretical one. In other words, the award cannot be based on speculation: *Rosvold v. Dunlop*, 2001 BCCA 1 [*Rosvold*]; *Perren v. Lalari*, 2010 BCCA 140. Where a real and substantial possibility of loss has been established, compensation is awarded based on an estimation of the chance that the event leading to such loss will occur: *Steward v. Berezan*, 2007 BCCA 150. As was recently observed by the Court of Appeal in

Kim v. Morier, 2014 BCCA 63 at para. 7, the onus on the plaintiff is not a heavy one but must nonetheless be met in order to justify a pecuniary award.

[78] Quantification of loss is an assessment meant to reflect the non-speculative positive and negative contingencies at play. As quantification is not a strict mathematical calculation, there is no particular formula or methodology to be employed: *Rosvold* at para. 11; *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36.

[79] Evidence of ongoing pain may be sufficient to ground a substantial possibility that a plaintiff's pain will adversely affect his or her future ability to work. This may hold true even where, at the time of trial, the plaintiff has not missed work due to the injury: *Clark v. Kouba*, 2014 BCCA 50 at para. 33; see generally, *Williamson v. Suna*, 2009 BCSC 576 at paras. 52, 55 and 62.

(i) Ms. Suthakar's Past Loss

[80] Ms. Suthakar contends that, due to her injuries, she lost 3.5 months of work from Frankly Fresh and slightly more from Tim Hortons, curtailed her hours at Frankly Fresh in December 2011 and worked fewer hours than she otherwise would have when she resumed employment with Tim Hortons in 2012. She also attributes the loss of her job at Tim Hortons to her Accident-induced injuries.

[81] The defendants concede that Ms. Suthakar incurred some pre-trial wage loss as a result of the Accident. In terms of quantifying her loss, they assert it should be determined by reference solely to her 2011 annualized pre-Accident earnings from Frankly Fresh and Tim Hortons, which they calculate to be $33,696, less her actual earnings in any given year during the pre-trial period. Ms. Suthakar counters that the losses she sustained should be quantified in relation to each employer separately and compared against her corresponding actual earnings from each such employer.

[82] There is more than one way to fairly assess Ms. Suthakar's pre-trial loss. In my view, the model of assessment she advocates poses too great a danger of overstating her loss. The problem inherent in her approach is that it does not

adequately balance the loss she incurred in relation to Tim Hortons against her significant upswing in hours and earnings at Frankly Fresh during the same period. In the result, her analysis produces a pre-trial loss that is unfairly skewed to her advantage. In the circumstances, I prefer an analysis that calculates Ms. Suthakar's global earnings within the 42-week period immediately before the Accident during which she held both jobs, and uses that figure as a comparative benchmark.

[83] Ms. Suthakar's average combined weekly earnings from Tim Hortons and Frankly Fresh during the 42 weeks immediately preceding the Accident, which is the only pre-Accident period in which she held two jobs, was $689. That corresponds to an annualized income of $35,828. In 2011, Ms. Suthakar's total earnings of $22,420 fell $13,408 short of the annualized amount she was on track to achieve from both jobs. A comparison of her actual employment earnings in 2012 ($34,537) against the projected benchmark of $35,828 results in the significantly smaller discrepancy of $1,291.

[84] In 2013, Ms. Suthakar's employment income was $30,128, yielding a negative difference of $5,700 when measured against the benchmark. In 2014, the difference was $6,485 ($35,828 - $29,343) and for the three months prior to trial in 2015, the difference was $670 ($8,957 - $8,287).

[85] The foregoing calculations result in an arithmetical calculation of loss in the amount of $27,554. A considerable upward adjustment ought to be made to reflect the fact that Ms. Suthakar's hourly wage at Frankly Fresh increased to $12 and then to $15 at certain points after the Accident, as those raises are not encompassed in the benchmark. Here, I would add, that although Ms. Berardi testified that Ms. Suthakar was performing supervisory duties on a temporary basis, there was no suggestion that when she is no longer responsible for those duties, her current hourly wage of $15 will decrease. Additionally, very minor adjustments should be taken into account for the two weeks of work that Ms. Suthakar missed in 2012 and was not paid for while convalescing from her carpal tunnel surgery unconnected to

the Accident, and to address the two- or three-week vacation to Sri Lanka she took in 2014 that was not entirely covered by her holiday pay.

[86] The defendants challenge Ms. Suthakar's assertion that had the Accident not happened, she would have continued to work two jobs until her sons had completed university. Their argument is tied to Ms. Suthakar's evidence given in cross-examination that it was a "financial necessity" for her to have two jobs. Building on that theme, the defendants elicited evidence pertaining to the couples' combined income and the family expenses. The defendants contend that the family's expenses would be adequately covered by Mr. Jeyerrasa's income, the income from his janitorial business and Ms. Suthakar's income from Frankly Fresh alone. They estimate the aggregate income from those sources to be approximately $120,000 in 2013, and between $122,343 and $131,343 in 2014 and 2015. This evidence, say the defendants, shows that the family would be financially comfortable without Ms. Suthakar carrying a second job, and thus there is no financial need *per se* for her to hold down two jobs.

[87] The defendants' line of argument on this issue founders on their unduly narrow interpretation of the evidence about the financial rationale driving the couple's strong work ethic and their common intention that Ms. Suthakar would contribute to the family's resources by working two jobs long into the future. Although Ms. Suthakar agreed in cross-examination that having two jobs was a "financial necessity", when she used her own words to describe her motivation, she repeatedly said it was for "financial reasons". As noted previously, she elaborated that those financial reasons were primarily that she and her husband were determined to provide their sons with a superior education by sending them to private school and continuing to support them financially through university. Mr. Jeyerrasa credibly corroborated his wife's evidence and expanded upon it by speaking about their desire to raise their sons in a nice home and detailing the concrete steps they had taken in that regard. The tenor of the whole of the evidence on the issue was not that Ms. Suthakar was driven to obtain a second job due to financial necessity in the sense that the family would not be able to afford basic

necessities or to meet their current ongoing annual expenses if she did not do so. Rather, the evidence persuasively establishes that before the Accident, Ms. Suthakar had implemented and was committed to following, as best she was able, the intense work ethic exemplified by her husband and brother-in-law to ensure that her sons received the most privileged education and best lifestyle that she and her husband were able to supply. For her, that commitment meant that she would work two jobs into the foreseeable future.

[88] What Ms. Suthakar's life held in store had the Accident not happened can never be precisely known. At the time of the Accident, she was 27 years old and had the Canadian equivalent of a grade 11 education. She was in good health and determined to work to the limits of her capacity. I find a strong chance of a real and substantial possibility that she would have continued to hold two jobs in the pre-trial period, with a relatively low likelihood that within that timeline, she may have found the pace to be too much, and dropped a shift or two at one of her jobs. There is no real and substantial possibility that Ms. Suthakar would have quit one of her jobs entirely in the pre-trial scenario. I also find no real and substantial possibility that she would have augmented her total weekly work hours had the Accident not happened.

[89] Assessing, in the context of the whole of the evidence, the relative chances of the real and substantial possibilities of what would have happened in the past but for the Accident, together with the pertinent contingencies, there can be no doubt but that Ms. Suthakar's diminished capacity from the Accident has resulted in a pecuniary loss.

[90] Aiming for overall fairness between the parties, I quantify Ms. Suthakar's loss to trial as **$32,000** (gross).

[91] Counsel are directed to make the necessary calculations to determine Ms. Suthakar's net loss, with liberty to apply if they are unable to reach agreement.

(ii) Ms. Suthakar's Future Loss

[92] In a nutshell, my task is to compare the likely future of Ms. Suthakar's working life if the Accident had not happened, to her likely future working life in light of its occurrence: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 [*Gregory*] at para. 32.

[93] Many of my findings that bear on Ms. Suthakar's loss before trial also have application to the assessment of her future loss.

[94] The defendants assert that Ms. Suthakar has failed to prove a real and substantial possibility of a future event leading to an income loss and, consequently, is not entitled to an award under this head. That is a puzzling assertion in light of the opinion of the defendants' own medical expert, Dr. Kousaie, and the preponderance of the balance of the evidence, all of which cogently points the other way.

[95] Ms. Suthakar is in her prime working years. The expert medical evidence, including that of Dr. Kousaie, establishes that the lingering after-effects of the Accident will likely continue to pose a barrier to Ms. Suthakar's capacity to return to Tim Hortons or take on a second job into the future. I find a likelihood of a real and substantial possibility that the Accident has foreclosed those opportunities altogether and that Ms. Suthakar will not be able to manage an additional job, even on a part-time basis, in the food service or preparation industry or in any occupation that requires her to stand or sit for sustained periods of time or assume the relatively innocuous postures or movements that exacerbate her symptoms.

[96] Through sheer grit and determination and to her credit, Ms. Suthakar has continued to work at Frankly Fresh largely on a full-time basis, except for taking time off from work in the immediate aftermath of the Accident when her injuries were especially acute. Many of her compulsory work tasks and activities aggravate her symptoms. During the majority of her shifts those setbacks cause her pain that can become intense and functionally limiting – yet still she pushes through.

[97] Ms. Suthakar's injuries have improved considerably since the Accident. I accept the medical evidence that indicates further improvement is possible and note in this regard that, despite experiencing a worsening of symptoms for a time prior to her appointment with Dr. Fuller, her condition improved when she subsequently saw Dr. Kousaie. I accept the expert evidence that indicates there is some prospect that the rehabilitation exercise program, followed by a consistent independent gym program along with ergonomic improvements in her workplace, may help Ms. Suthakar better manage her symptoms and could improve her condition overall. Although the potential for additional improvement may be on the horizon, there is also a likelihood that the degree of any further improvement would be relatively marginal. There is little prospect of Ms. Suthakar's injuries resolving completely, and I accept that her prognosis is guarded.

[98] The evidence supports the finding of a strong chance of a real and substantial possibility that Ms. Suthakar will regularly be confronted by episodic flares of her symptoms throughout her future tenure with Frankly Fresh, and in any similar position she may obtain. It is a matter of common experience that, over time, ongoing pain can have a detrimental effect on a person's ability to work. This holds true even in circumstances where the employer is prepared to make accommodations that may help to ameliorate the pain: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. The logical extension of that common experience is that the detrimental effect may be accelerated or more profound where an employer is not prepared to make workplace accommodations, or the accommodations do not provide the beneficial effects to the extent expected.

[99] The Accident is plainly responsible for an impairment of Ms. Suthakar's future earning capacity, with a good chance of a real and substantial possibility that her diminished capacity will continue to manifest into the future indefinitely. That being said, for the reasons already given, I am not prepared to accept that Ms. Suthakar's physical tolerances and capacity are as compromised as Mr. Emnacen's report would suggest.

[100] The evidence also amply demonstrates a real and substantial possibility that Ms. Suthakar's impaired earning capacity, caused by the Accident, will generate a pecuniary loss into the future. How then to fairly quantify her loss?

[101] I share Ms. Suthakar's view that this is not an appropriate case to engage the "earnings approach" to assess her damages. It is instead preferable to quantify her loss by taking into account the factors that inform the capital asset approach laid out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*]. That assessment involves considering factors such as whether she: (i) 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 to her; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market. All of these factors have application to Ms. Suthakar.

[102] Ms. Suthakar does not have her grade 12 equivalency and her only work experience in Canada has been in the food preparation/service industry. It is therefore reasonable to predict a good chance that her future employment opportunities will entail some physical elements. As a result of her residual symptoms from the Accident, she has become less marketable and less attractive as an employee in that industry, and has lost the ability to avail herself of all job opportunities that might otherwise have been open to her.

[103] As was noted in *Sevinski v. Vance*, 2011 BCSC 892 at para. 105 it is reasonable to infer that:

> [105] …an employer who is aware that an employee suffers from some level of chronic pain may be less likely to employ that person. This is particularly so… when that employment is likely to have some physical component attached to it.

[104] As a person who had previously succeeded in holding two jobs based on her admirable work ethic and lack of any physical limitations, the Accident has rendered Ms. Suthakar less capable overall of earning income from all types of employment and less valuable to herself in a competitive market.

[105] When I assessed Ms. Suthakar's pre-trial loss, I estimated a low likelihood that she would have scaled back her work hours at the second job in the absence of the Accident. However, even if the Accident had not occurred, as time marched on and she aged, the chances of that real and substantial possibility coming to pass would have risen appreciably. In my view, it is highly likely that Ms. Suthakar would not have been able to maintain her demanding pre-Accident work pace for 20 years, as she and her husband intended. It is also worth noting in this regard that she had only endured working two jobs for 42 weeks and was in her 20's at that time. There is a high chance of a real and substantial possibility that she would have chosen to work less or given up her second job altogether for any number of reasons.

[106] On the other hand, however, Ms. Suthakar's track record as a driven, stand-out employee supports a likelihood that she may have received promotions at one or both jobs and enjoyed higher earnings, employment benefits and further employment opportunities as a result.

[107] Bearing in mind the applicable legal principles, including the *Brown* criteria, in light of the evidence and weighing the pertinent contingencies, I conclude that the sum of **$120,000** is the present value of a fair and reasonable measure of Ms. Suthakar's loss of future income-earning capacity.

- **Loss of Housekeeping Capacity**

[108] In *McTavish v. MacGillivray*, 2000 BCCA 164, Huddart J.A. comprehensively surveyed the majority and minority decisions in *Kroeker v. Jansen* (1995), 4 B.C.L.R. (3d) 178 (C.A.), a decision of a five-member panel of the Court of Appeal, as well as other pertinent jurisprudence, and summarized the essential principles in relation to claims for past and future loss of housekeeping capacity. At para. 43, her Ladyship emphasized the vital point that claims for loss of housekeeping capacity are distinct from claims respecting the plaintiff's future cost of care:

> [43] As I have noted, the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had

> been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely.

[109] Because an award for the loss of housekeeping capacity reflects the loss of personal capacity, which is an asset, the issue of whether the plaintiff had used replacement services or is likely to hire such assistance in the future does not inform the analysis. That is a crucial distinction between those damages and awards for a plaintiff's future cost of care as affirmed in *O'Connell v. Yung*, 2012 BCCA 57 at para. 67:

> [67]…Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). Determining the amount of a reasonable cost of future care award entails a unique set of considerations, as Professor Cooper-Stephenson explains at 416:
>
> > It is clear that both the *need* and the *opportunity* for the expenditure of moneys is relevant to the assessment. Therefore, if the plaintiff's medical condition may require care of a less expensive nature – such as institutional care – then the award for future cost of care should reflect that possibility. Equally, it would seem, if the evidence is not conclusive that more expensive care will be available, or that the plaintiff will find such care to be physically and emotionally satisfactory, then the award should reflect those possibilities; the reduced award will then reflect the best estimate of what will be reasonably necessary to provide optimum care. In this sense, the court is bound to look to the actual spending potential of the plaintiff. [Emphasis by Professor Cooper-Stephenson]

[110] Relying principally on the approach of assessment adopted by this Court in *Yip v. Saran*, 2014 BCSC 1283, Ms. Suthakar seeks an award of $13,500 for her pre-trial loss of housekeeping capacity. That sum is calculated on the footing of 20 hours of housekeeping per month at a cost of $15 per hour. She requests an additional $76,143.60, representing the present value of an amount tabulated on a similar premise, which extends 20 years into the future as she raises her sons through university.

[111] While her husband and mother helped with the domestic chores before the Accident, Ms. Suthakar performed the majority of the laundry, cooking and heavy cleaning. While the Accident has not incapacitated her from carrying out domestic chores, her residual injuries have placed real limitations on her ability to continue to perform them, either entirely (e.g. vacuuming and scrubbing/mopping the floors) or to the same extent or with the same efficiency that she was able to prior to the Accident (e.g. meal preparation and laundry). Although certain of Ms. Suthakar's physical limitations are likely not quite as impairing as she believes or as she portrayed them to be to Mr. Emnacen, the evidence nonetheless demonstrates that in the foreseeable future it is unlikely that she will be able to perform household chores on the physically demanding end of the spectrum, or to do all of the less demanding domestic tasks with the regularity that they require. This is particularly so if the family moves into their larger home as is intended. On the other hand, Ms. Suthakar may experience additional improvement, whether spontaneously or as a result of the future care items I have ordered.

[112] All things considered, the nature and extent of Ms. Suthakar's diminished housekeeping capacity would not be fairly compensated by encompassing it within the damages awarded for her non-pecuniary loss. It is worthy of a stand-alone award.

[113] An award for the loss of housekeeping capacity is meant to compensate Ms. Suthakar for her diminished loss of capacity – the loss of her asset. The award is not a precise mathematical calculation, although the approach adopted by Ms. Suthakar is effectively that. Bearing in mind the animating principles and taking into account the relevant contingencies supported by the evidence as best I am able, I conclude that the sum of **$35,000** is a fair award to reflect the entirety of Ms. Suthakar's loss of housekeeping capacity.

- **Non-Pecuniary Damages**

[114] Ms. Suthakar seeks an award for non-pecuniary damages in the range of $75,000 to $85,000. The defendants counter that a non-pecuniary award of between $40,000 and $45,000 would be fair in the circumstances.

[115] Non-pecuniary damages are intended to compensate a plaintiff for the pain, suffering and loss of enjoyment of life and of amenities experienced as a result of the defendant's negligence. They are meant to encompass such damages suffered up to the date of trial and those that the plaintiff will suffer into the future.

[116] The award should be fair and reasonable for both parties, as those concepts are measured against the adverse impact of the particular injuries on the particular plaintiff: *Hunt v. Ugre*, 2012 BCSC 1704 at para. 176. While fairness is assessed by reference to awards made in comparable cases, because each case is decided on its own unique facts and calls for an individualized assessment, it is neither possible nor desirable to develop a "tariff": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Dilello v. Montgomery*, 2005 BCCA 56 at paras. 39-43. The process is one of assessment and is not amenable to mathematical precision: *Miller v. Brian Ross Motorsports Corp.,* 2015 BCSC 1381.

[117] In *Stapley v. Hejslet*, 2006 BCCA 34 [*Stapley*] at para. 46, Kirkpatrick J.A. set out a non-exhaustive list of factors to be considered in awarding damages under this head. They include: the plaintiff's age; the nature of the injury; the severity and duration of the pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism.

[118] For several years now Ms. Suthakar has struggled with residual symptoms in her neck, left shoulder and low back. Although her symptoms have improved over time and she may enjoy some modest additional improvement in the next while, they have nonetheless persisted and are susceptible to being exacerbated as a result of her work activities and daily domestic duties. Her nagging pain leaves her exhausted at the end of her work shift. When she arrives home, she is usually not

able to do much of anything beyond taking a hot shower and resting on the couch with a hot pack. Fortunately for Ms. Suthakar, her symptoms are manageable without medication on her days off.

[119] The ill-effects of the Accident have adversely impacted the quality and enjoyment of Ms. Suthakar's interactions with her sons. She is not able to play with them in the same way as before and is quick to anger. Also of significance for this young woman is that her injuries have interfered with her intimate relationship with her husband.

[120] In prior cases, I have observed that enduring pain, even when it is intermittent and mostly low-grade, can compel unwelcome adjustments to one's work life and lifestyle and cloud the pleasures of life, as it has in Ms. Suthakar's case. Working in pain during the majority of her shifts has become part of Ms. Suthakar's everyday work life and is likely to continue for many years to come, if not indefinitely.

[121] I have reviewed the authorities placed before me by counsel. The cases submitted by Ms. Suthakar's counsel are more instructive than those relied on by the defendants. In any event, the case law only provides general guidelines for what is, at its core, a highly individualized assessment.

[122] Having regard to the *Stapley* factors and the other case authorities in the context of the evidence in the case at hand, in my opinion, a fair and reasonable award for Ms. Suthakar's non-pecuniary damages is **$70,000**.

- **Cost of Future Care**

[123] The approach to be taken in assessing future care costs was settled by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22:

> [21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of

> providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.
>
> [22] The resulting award may be said to reflect the reasonable or normal expectations of what the injured person will require. Jane Stapleton, "The Normal Expectancies Measure in Tort Damages" (1997), 113 L.Q.R. 257, thus suggests, at pp. 257-58, that the tort measure of compensatory damages may be described as the "'normal expectancies' measure", a term which "more clearly describes the aim of awards of compensatory damages in tort: namely, to re-position the plaintiff to the destination he would normally have reached ... had it not been for the tort". The measure is objective, based on the evidence. This method produces a result fair to both the claimant and the defendant. The claimant receives damages for future losses, as best they can be ascertained. The defendant is required to compensate for those losses. To award less than what may reasonably be expected to be required is to give the plaintiff too little and unfairly advantage the defendant. To award more is to give the plaintiff a windfall and require the defendant to pay more than is fair.

[124] Damages for the cost of future care are meant to compensate for the financial loss to be reasonably incurred by an injured plaintiff to sustain or promote his or her mental and physical health: *Bystedt (Guardian ad litem of) v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124; *Gignac v. Insurance Corporation of British Columbia,* 2012 BCCA 351 at para. 30 [*Gignac*]. The claimed services and items must be medically justified. Being medically justified is not synonymous with the more stringent requirement of being medically necessary: *Aberdeen v. Township of Langley, 2007 BCSC 993 at 198,* rev'd on other grounds *Aberdeen v. Zanatta*, 2008 BCCA 420; *Chow v. Nolan*, 2013 BCSC 1383 at para. 71: *Lane v. Pedersen*, 2014 BCSC 1302 at para. 397.

[125] Recommendations made by physicians and other health care professionals such as an occupational therapist, are relevant in determining whether an item or service is medically justified: *Gregory* at para. 38; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.), quoted with approval in *Gregory* at para. 38. However, to successfully advance a future cost of care claim it is not necessary that the health care provider testify to the medical justification of each and every item of care being claimed. What is required is some evidentiary link between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: *Gregory* at para. 39; *Gignac*

at paras. 31-32. General contingencies and those specific to the plaintiff are to be taken into account where and as appropriate: *Gignac* at para. 52. The amount of the award is necessarily affected by the nature of the future care and its anticipated duration.

[126] The standard of proof for an award for future care is the determination of the real and substantial future possibilities: *Anderson v. Rizzardo*, 2015 BCSC 2349 at para. 209.

[127] Whether a plaintiff is prepared to accept care that is in his or her best interests is a relevant factor. Where the plaintiff testifies that he or she will not submit to the recommended treatment, even though it is medically justified on the evidence, the court may decide that an award ought not to be made or may discount the quantum of it: *Coulter (Guardian ad litem) v. Leduc*, 2005 BCCA 199 [*Coulter*]; *O'Connell v. Yung*, 2012 BCCA 57 [*O'Connell*]. Additional material considerations would include: (i) whether the plaintiff's judgment on the question of whether he or she will adhere to the recommendation has been impaired by the injuries inflicted by the tortfeasor; and, (ii) whether the evidence establishes that the plaintiff may ultimately be forced by circumstances to participate in treatment that he or she has expressed a desire to avoid, especially if the injuries are grave: *O'Connell* at paras. 61-62; *Van v. Howlett*, 2014 BCSC 1404 at paras. 78-79.

[128] There is a distinction between a case where there is evidence that the plaintiff will not follow the recommended treatment (as in *O'Connell* and *Coulter*) and a case where no evidence has been led one way or the other. The Court of Appeal recently addressed this nuanced point in *Lo v. Matsumoto*, 2015 BCCA 84, at paras. 20-21:

> [20] I agree with counsel for the plaintiff that there is no hard and fast rule that requires a plaintiff to testify that he intends to use every item in the "wish list" of an occupational therapist in order to justify some award. On the other hand, a plaintiff must prove his case, both in terms of need and the likely utility of the item sought: see *O'Connell v. Yung*, 2012 BCCA 57 at para. 68. Where the costs claimed are not matters of absolute necessity, a plaintiff cannot assume that the court will simply accept the recommendations of occupational therapists or even of medical practitioners. Unfortunately in this case, Mr. Lo was not closely examined in chief or cross-examined on every

> item in the therapist's report or on any discrepancies between his own testimony and what he had told the therapist.
>
> [21] Considering, however, the seriousness of Mr. Lo's back injury and the fact that it is expected to cause him pain or discomfort indefinitely, I believe that the trial judge should have made some allowance for physical therapy sessions (costed at $600 per year) in the long term; a facility fee to pursue an exercise program (costed at $357 per year until age 65 when it would drop to $250); some yard maintenance (costed at $100 per year); non-prescription medications for back pain ($400-$500 per year); and something for the possibility that he would use the "Intimate Rider" equipment that might assist with his sexual function. Doing the best that I can with the evidence to which we were referred, I would increase the award for future care costs by $7,000.

[129] The court, therefore, should be cautious about reducing or eliminating altogether an award for the cost of future care simply on the basis that the injured plaintiff has not confirmed a willingness to participate in a medically justified course of care, or currently says that he or she will not follow the recommended treatment. The court should act with similar circumspection where the plaintiff has not previously used the recommended type of treatment. This is because fairness requires that the court be alive to the prospect that an injured person's disposition may change, or that he or she may not have had the means or ability to follow certain courses of treatment in the past**.**

[130] The defendants assert that the evidence supports a modest award for the cost of Tylenol over the short term and to cover ten kinesiology sessions. My understanding of defence counsel's oral closing submissions was that the defendants also support a one-time gym pass for Ms. Suthakar. A fair assessment of the evidence as a whole and the proper application of the law warrants a considerably more expansive award.

[131] In evidence were Mr. Emnacen's separate report summarizing the cost of the care recommendations and an economist's report setting out the process for calculating the net present values of such costs.

[132] Applying the applicable principles in light of my findings of fact pertinent to the issue, I conclude that Ms. Suthakar is entitled to an award for the cost of her future

care (expressed in present value dollars, as applicable), comprised of the treatments and medications referred to below:

(i) Tylenol. As a matter of common sense, it is apparent that Mr. Emnacen's cost of care report contains an error in the costing of Tylenol. Ms. Suthakar seems content with recovery of the costs of a generic brand of acetaminophen. As well, Mr. Emnacen calculated Ms. Suthakar's usage on the basis of six tablets every day of the week, whereas she testified that she takes Tylenol about four days a week. An award of **$1,800** is fair and reasonable.

(ii) Active rehabilitation program with a kinesiologist or physiotherapist. Except for the quantum, this care item is agreed to by the defendants. I award **$1,260**.

(iii) Annual gym pass. Ms. Suthakar has carried out the exercises she learned from her physiotherapist with reasonable diligence. I am confident that she will make good use of an annual gym pass as recommended by Dr. Harjee and Mr. Emnacen, and that her attendance will enhance her exercise regime and be of benefit. Indeed, the beneficial value of her adherence to an appropriate exercise regime is considered to be crucial by Dr. Kousaie. However, a lifetime award for that item would be excessive. An award of **$4,000** is fair and reasonable.

(iv) Vocational Assessment. A vocational assessment as recommended by Dr. Harjee and Dr. Fuller is reasonable. An award of **$2,000** is granted.

(v) Ergonomic Analysis/Occupational Therapist. The evidence also supports the reasonableness of: (1) an on-site ergonomic analysis of Ms. Suthakar's workplace completed by an occupational therapist; and (2) intervention by an occupational therapist to inform her of the various strategies to employ at home to re-engage her in her activities of daily living. The sum of **$924** is awarded.

- **Special Damages**

[133] The defendants agree that Ms. Suthakar is entitled to reimbursement of her physiotherapy sessions in the amount of **$825**. That is ordered.

[134] The parties disagree on the amount she is entitled to be reimbursed for the Tylenol purchased before the trial. As best as I can discern, Ms. Suthakar's calculation is based on the ingestion of 12 pills per day, four days per week. That high a dosage is not supported on the evidence. I conclude that Ms. Suthakar is entitled to reimbursement in the amount of **$300** for this item.

[135] The chief point of contention under this head is whether Ms. Suthakar ought to be reimbursed the sum of $350, representing the cost of the taxi ride (including a $50 tip) she took to Chilliwack to attend Dr. Kousaie's office in order to undergo an independent medical evaluation. The defendants assert that it was unreasonable for Ms. Suthakar to take a taxi on such a long trip and suggest that she should have arranged for her husband to drive her (evidently the appointment was scheduled on his day off) or taken a bus to Chilliwack and a taxi from the bus depot to and from Dr. Kousaie's office. Had she travelled that way, the total cost of the trip would have been about $58.

[136] I would not endorse, as a general proposition, that a plaintiff's choice to take a taxi for a long-distance trip to facilitate attendance on an independent medical appointment is necessarily unreasonable on its face. After all, the defendants chose to retain a medical expert whose practice is located in Chilliwack to examine a plaintiff whom they knew lived in Vancouver and did not herself own a vehicle. The difficulty I have in the case at hand is that the evidence on this subject was not sufficiently developed at trial to explain Ms. Suthakar's rationale beyond saying she did not 'know Chilliwack" so as to satisfy me of the reasonableness of her course of action. In light of the paucity of evidence, I am only prepared to grant compensation to Ms. Suthakar in the amount of **$58** to reflect the modes of transportation suggested by the defendants.

[137] The defendants agree to Ms. Suthakar being reimbursed for the towing charges in the amount of **$139**, to remove the rental car she was driving at the time of the Accident from the scene. I make that order.

COSTS

[138] If the parties are unable to agree about costs, they may file written submissions implementing a timetable of their choosing that incorporates a final deadline of March 25, 2016.

Ballance J.