IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sevinski v. Vance,*
2011 BCSC 892

Date: 20110705
Docket: M090319
Registry: Vancouver

Between:

Twyla Dawn Sevinski

Plaintiff

And

Elizabeth Anne Vance, Robert Hornby Vance, Clark Mervin Bulloch, Applied Industrial Technologies Ltd. and PHH Vehicle Management Services Inc.

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:	Allison E. McLister
Counsel for the Defendants Elizabeth Anne Vance and Robert Hornby Vance:	Jeffrey A. Jakel
Place and Date of Trial:	Vancouver, B.C. April 11-15, 2011
Place and Date of Judgment:	Vancouver, B.C. July 5, 2011

[1] The plaintiff, Ms. Sevinski, was a passenger in a motor vehicle driven by the defendant, Ms. Vance, when she was involved in a motor vehicle accident. The accident took place on November 27, 2007 (the “Accident”). Liability for the Accident has been admitted. Ms. Sevinski maintains that she continues to suffer from various forms of functional impairment as a result of the Accident and that she now struggles with chronic pain syndrome.

[2] The central issues in this case are: a) whether or to what extent Ms. Sevinski suffers from the difficulties she claims, b) if so, what damages are appropriate to compensate her for her loss, and c) whether Ms. Sevinski has properly mitigated her losses.

[3] The Accident was serious. The vehicle that Ms. Sevinski was a passenger in was struck on the right front passenger side where Ms. Sevinski was seated. The relevant photographs and the evidence of Ms. Sevinski establish that there was considerable damage to that vehicle. Ambulances were summoned to the scene. The “Jaws of Life”, a device capable of cutting through metal, had to be used to extract Ms. Sevinski from her vehicle. She was originally transported to a hospital in Fernie. As a result of a concern over possible internal bleeding, Ms. Sevinski was then further transported by ambulance to Cranbrook. Ms. Sevinski was aware of pain in her back, neck, hip and right elbow. She had some facial bruising and says she had pain on much of her right side.

[4] Having said this, Ms. Sevinski was discharged from the hospital later that day. She stayed with her friend Ms. Vance for a few days, then with her uncle and still later with another friend. Within three to four weeks she was working at the Stafford Inn in Fernie.

Ms. Sevinski’s Background and History

[5] The plaintiff is a 29-year-old woman who has lived a troubled and turbulent life. This fact is central to many of the issues before me. It is relevant to the diagnosis that she has chronic pain syndrome. It explains, in part, the absence of

any third party evidence which would support the plaintiff's evidence, for the four or five year period before the Accident to the nine month period which followed it. It significantly informs both the plaintiff's claim for non-pecuniary loss and for future income loss. Finally, it underlies the significant failure of the plaintiff to mitigate her losses following the Accident.

[6] In her opening submissions, counsel for the plaintiff asserted that Ms. Sevinski had come from a troubled home. There was very little direct evidence of this. During the trial reference was made to the report of Dr. Côté Beck, a psychiatrist, who was not called to give evidence, Ms. Sevinski said, however, that most of the facts in his report were accurate though she disagreed with the diagnosis that she had been depressed for much of the past decade. The report indicates that the plaintiff's father drank heavily at one time, but has been sober for the past decade. Ms. Sevinski's parents divorced when she was 15. She began to move in and out of the family home when she was 14. She said she finished one-half of Grade 10. Her transcripts suggest she left school in Grade 11.

[7] When she was 18 she met Mr. Desjardin, who was working as a building contractor. She lived with him for the next six or seven years. Between 2000 and 2003, she worked intermittently in the construction industry and apparently enjoyed this work. In December 2003, the couple had a son, Drayten. Thereafter the plaintiff, at Mr. Desjardin's request, stayed home and no longer worked.

[8] Between 2003 and 2007, she drank heavily and developed a drug addiction. She was introduced to cocaine by Mr. Desjardin. Her addiction is described in the report of Dr. Côté Beck as a "five-year crack addiction". Ms. Sevinski said that during this period she would go on "binges". Ms. Sevinski also testified that Mr. Desjardin was physically abusive to her and that when she left him in February 2007, she initially stayed at a safe house. Apparently it was Mr. Desjardin who initially had custody of Drayten. This prompted Ms. Sevinski to address her addiction difficulties and in December 2007, she and Mr. Desjardin were granted joint custody of Drayten. The Accident, as I have said, occurred in November 2007.

[9] In 2008, Ms. Sevinski again faltered and began to drink and use drugs heavily. In July 2008, the plaintiff met and began spending time with her present common law spouse, Mr. Rambold. The couple began to live together in November 2009 and had a daughter, Tegan, who is presently 15-months-old. Ms. Sevinski testified that she last used cocaine in August 2008 after having had to go to the hospital for a drug related event. She further said that she was sober throughout the time that she was pregnant with Tegan. Nevertheless, she again began to drink after Tegan's birth and in November 2010, she enrolled in a 60 day rehabilitation program in Maple Ridge. She also attends weekly addiction counselling and has done so since May 2009. Still further, she has recently enrolled in school in order to complete her high school education. Both she and Mr. Rambold, who gave evidence, said that her relationship with Mr. Rambold provides her with a positive and stable influence.

[10] Apart from the foregoing difficulties, Ms. Sevinski has also struggled with depression. Though she disagreed with Dr. Côte Beck's diagnosis that she has suffered from chronic depression over the last decade, she accepts that she has struggled with depression at different times. She has taken medication for her depression in the past, although she stopped doing so in February 2011. She has had some difficulty with anxiety. She has at times struggled with her sleep habits. In 2009, she put on 40 pounds which, she said, affected her self-image.

[11] Ms. Sevinski has also been involved in two earlier motor vehicle accidents. The first such accident was in August 2001. At that time she sustained injuries to her back, neck and shoulders as well as ensuing numbness in her hands and feet. In February 2002, she continued to complain of "constant pain total spine 8/10" as well as poor sleep. Eighteen months after this first accident she continued to complain of pain.

[12] Ms. Sevinski was also in a further motor vehicle accident on October 24, 2007 -- a mere month before the Accident. As a result of this accident, the relevant clinical note indicates that she initially complained of "lots of neck pain/headaches/occasional nausea/muscle soreness in thoracic and lower back ...

pain/knees aching". Ms. Sevinski went to a series of chiropractic treatments and said that prior to the time of the Accident she felt "much better".

The Plaintiff's Injuries; Difficulties with the Evidence and Credibility

[13] The plaintiff asserts that as a result of the Accident she suffered from and continues to suffer from back, neck, hip and knee pain. She also says that her feet throb and burn. This symptom apparently developed some weeks after the Accident. She says that her back pain is far worse than it was after the earlier accidents and that it is is aggravated by virtually everything. This includes walking, sitting, exercising, lying down and all sorts of activities. She says her back pain is virtually constant.

[14] Her hips hurt when she sits. Her hips will also hurt when she tries to stand and she has trouble straightening up. She has, as a result of these difficulties, fallen over on occasion. Nothing other than Tylenol 3 alleviates her pain.

[15] Her knees feel as though they are grinding. Her pain is again aggravated by exercise, by walking and even by sitting. She finds it hard to hold her neck up. Her neck pain is also aggravated by many different types of activity and is virtually constant.

[16] Ms. Sevinski says the pain associated with each of these symptoms has been consistent since the Accident and that there have been no periods of time where she has felt better. She advised Dr. Finlayson, the expert called on behalf of the plaintiff that she has consistently struggled with pain which she rated as an eight or nine out of 10 with a rating of 10 being the worst pain imaginable. These various difficulties, both in the past and presently, interfere with most facets of her life. She is unable to play with her children. She struggles to lift her daughter. She cannot do housework properly. Mr. Rambold is a person who enjoys the outdoors and physical activity. He likes to hike, fish, dirt bike and ski-doo. She has tried, but is unable to join him in these activities. Her physical intimacy with Mr. Rambold is challenged as is her daily interaction with him.

[17] The defendants say that the plaintiff is a poor historian, that she is not credible and that her evidence should not be accepted.

[18] There is a proper basis for some of these submissions. The difficulties with the plaintiff's evidence fall into at least three categories. First, the plaintiff is a poor historian. Second, she has unreasonably ascribed many of her current problems to the Accident. Finally, there are several instances where she simply has not been forthright.

[19] There is no question that the plaintiff has a very poor memory of many things. Each of Dr. Finlayson and Dr. McDougall, the expert called by the defendants, made this observation in their respective reports. This difficulty was manifested repeatedly in the plaintiff's evidence. Apparently Ms. Sevinski had various short term serving positions or other jobs in the summer of 2008. She had no memory of what these jobs had been. Ms. Sevinski, when asked if she had knee pain prior to the Accident, said she could not recall. The medical records indicate that she had had such pain. The plaintiff advised Dr. Finlayson that she had not had any long-term problems with her previous accidents. It is clear, at least as it pertains to her 2001 motor vehicle accident, that she continued to have some pain for least two years after that accident. The plaintiff similarly advised Dr. Finlayson that she had not suffered from depression prior to the Accident. Both the report of Dr. Côté Beck and other clinical records referred to by Dr. Finlayson in her report established that this is not correct.

[20] This last matter leads to the second concern I alluded to earlier. Ms. Sevinski, who, as I have said, struggled with multiple issues for an extended period of time, often inaccurately attributed aspects of her present condition to the Accident. There are several examples of this. Ms. Sevinski told Dr. Finlayson and the Court that her social life was diminished or affected by the Accident. First, there was limited evidence before me of what level or nature of social interaction she had enjoyed prior to the Accident. If anything, she said that during her relationship with Mr. Desjardin she was often alone. Second, though this was not developed before

me, Dr. Finlayson's report identifies an earlier clinical note from October 3, 2003, which notes "sociopathic/antisocial behaviours".

[21] Ms. Sevinski had also told Dr. McDougall and gave evidence before me that she gained a significant amount of weight which had, in turn, affected her self-image. This weight gain prevents her, she said, from doing the things she used to do. The report of Dr. McDougall indicates, however, that the bulk of that weight gain took place after the birth of her daughter or more than two years after the Accident. The report of Dr. Côté Beck indicates that the plaintiff told him she was uncertain why she was gaining weight.

[22] Finally, the plaintiff was not forthright in her evidence. This goes well beyond having a poor memory. Some of these examples were of lesser importance. Thus, for example, she told me in her direct evidence that she had not used marijuana since 2008 when she became pregnant. During her cross-examination, when she was taken to a clinical record dated October, 2009 where she had acknowledged marijuana use, she responded that such use was not "regular".

[23] There are three other examples, however, which are more significant. Following the Accident Ms. Sevinski was employed at several different jobs for brief periods of time. She was, for example, employed at the Stafford Inn where she was a waitress and was required to do cleaning, at an A & W outlet in Fernie where she worked both as a cashier and as a cook, at a golf course and at an H & R Block office. Ms. Sevinski was fired after relatively brief periods from each of these jobs. She emphasized that she had very significant levels of constant pain when she was working. She also did not accept, in cross-examination, the extent to which her poor performance, her interactions with others, her tardiness and her drinking contributed to her inability to hold a job.

[24] The defendants called Ms. Joan Martins, who had been the plaintiff's supervisor at the Stafford Inn. Ms. Martin's confirmed that the plaintiff was fired because she was unreliable. There were days when she was late for work and other mornings when she simply did not show up. Ms. Martins was unaware of any drug

use on the part of Ms. Sevinski, but had smelled alcohol on her. Ms. Martins further confirmed that though she worked quite closely with the plaintiff, she was unaware that the plaintiff was injured and that Ms. Sevinski did not manifest any overt signs of pain.

[25] Mr. William Brown, a part owner of the A & W outlet which had employed the plaintiff, also gave evidence. He said that though the plaintiff performed well initially, she had difficulties with both customers and other staff. Her attitude was poor. There were concerns about her coming to work hung over. On one occasion, when she came to work drunk, she was sent home. She was provided an alternative opportunity and was moved to work in the kitchen. Though she began well, she was soon taking shortcuts and deviating from procedures relevant to food safety and hygiene. She was then fired. Mr. Brown, who saw the plaintiff for at least a few hours daily, also confirmed that he was unaware that the plaintiff suffered from any physical difficulty or dysfunction.

[26] Ms. Sevinski accepted that when, within the first week or two that she was employed by H & R Block, she called in to report that she would be late for work, she was told not to bother coming back.

[27] I accept the evidence of each of Ms. Thomas and Mr. Brown. It is important evidence. It is relevant to both the reliability of the plaintiff's evidence and helps place the severity of the plaintiff's symptoms, shortly after the Accident, into context.

[28] Next, Ms. Sevinski has had a family doctor, Dr. Forrest, for a number of years. Dr. Forrest was not called at trial. Her clinical notes for the relevant periods of time were, however, made available. Those clinical notes make virtually no reference to the plaintiff's injuries or to the difficulties she claims she has struggled with in the years since the Accident to the present time. There is similarly no record, for several years after the Accident, of the plaintiff seeking any physiotherapy, massage therapy or other assistance for her injuries.

[29] In her direct evidence, Ms. Sevinski was adamant that she raised the problems and symptoms associated with the Accident “every time” she saw Dr. Forrest, but that Dr. Forrest failed to take any notes of these concerns. Indeed, Ms. Sevinski said that at one point she expressly raised this failure with Dr. Forrest.

[30] In her cross-examination, however, as she was taken to and through her numerous attendances before Dr. Forrest and others, her evidence changed. After first reconfirming that she consistently complained of her injuries to Dr. Forrest, the plaintiff then accepted that she was uncertain whether she had raised the issues associated with her injuries at numerous of these attendances. Still later, she said that she had not raised her concerns because she did not want to complain and that there was no purpose in her doing so.

[31] I do not accept that Ms. Sevinski consistently raised or sought to address the difficulties associated with the Accident with Dr. Forrest. This is so for several reasons. First, Dr. Forrest was her family doctor. Dr. Forrest assisted the plaintiff with her addiction issues, her pregnancy and multiple other problems. It was Dr. Forrest who provided the referral to Dr. Côté Beck. Her notes are filled with multiple references to problems of varying severity. On one occasion, in January 2009, some two months after Ms. Sevinski fell on some ice and hurt her elbow, she came to see Dr. Forrest. There is a note of this concern. If Ms. Sevinski had communicated the dramatic, debilitating and ongoing difficulties that she now asserts have existed throughout, I have no doubt that these problems would have been noted and, more importantly, would have been addressed or treated in some way. It is implausible that if Ms. Sevinski complained, as she says, on a consistent basis over some years in relation to the same acute difficulty, that those complaints would have been ignored.

[32] There is a further example of like nature. Ms. Sevinski undertook no rehabilitative physiotherapy or other treatment for at least two years following the Accident. She first obtained some massage therapy in or about November 2009. She thereafter attended a very few physiotherapy treatments. This is in marked

contrast to her having obtained physiotherapy following her first accident in 2002 and the chiropractic treatments she immediately obtained after her second accident in October 2007.

[33] Ms. Sevinski said she was unable to seek or obtain any treatment after the Accident because she could not afford to do so. Later, after Tegan was born, she said she was unable to go to physiotherapy because she could not take her daughter with her and because she could not arrange for child care. I do not accept either of these assertions.

[34] Though the precise nature of the plaintiff's relationship with her parents is unclear, she has, in the last several years, stayed with them at different times. She also has an uncle she has stayed with. She has been seeing Mr. Rambold since July 2008. He works full-time. He owns various outdoor recreational toys. It is again implausible that if the plaintiff suffered to the degree and in the manner which she describes, none of these people would step forward to assist her financially. This conclusion is reinforced by the relatively short course of physiotherapy that was recommended in the reports of Dr. Finlayson and Dr. McDougall and the relatively modest costs associated with such treatment.

[35] The assertion that a lack of access to child care interfered with her ability to seek physiotherapy is similarly unbelievable. When Ms. Sevinski was first injured in November 2007, she did not have custody of her son. Thereafter, for a further period of time, she had joint custody of her son. There were thus times when child care concerns would not have interfered with the plaintiff seeking or obtaining physiotherapy. When she was pregnant with Tegan, she was able to have her mother assist her. When she attended at an alcohol-treatment centre for a full 60 days, she was able to arrange for people to care for both her children. Now that she is enrolled in school, it appears that Mr. Rambold's mother assists with the children so that she can study. Thus, once again, if the issue of treatment was pressing and as important as she says, it is hard to imagine that some arrangement for temporary

child care could not have been made, on the few occasions where this would have been necessary.

[36] There also appear to have been instances where the plaintiff was not forthright with the independent experts she attended before. Three such examples will suffice. The plaintiff told Dr. Finlayson she had been able to go back to work as a carpenter after her earlier motor vehicle accidents and had never had any long-term problems related to pain from these accidents. The clinical records that Dr. Finlayson was directed to during her cross-examination establish that the plaintiff had significant pain for an extended period of time after her 2001 accident.

[37] Next, the plaintiff told Dr. Finlayson that she was fired from several jobs after the Accident “because of her pain with prolonged standing”. As I have said, the plaintiff was fired from these jobs for very different reasons.

[38] The plaintiff also told Dr. McDougall, when she attended before him in August 2010, that she used alcohol socially. Based on her evidence before me, she drank heavily in 2010, causing her to check into a rehabilitation program in the latter part of that year.

[39] The only third-party evidence which addressed the plaintiff’s condition post-Accident came from Mr. Rambold. Though Mr. Rambold had known the plaintiff in high school, he did not begin to interact with her socially until July 2008. Mr. Rambold, who briefly addressed the plaintiff’s troubled past, gave virtually no evidence about her activities prior to the Accident. He gave evidence about her condition and the difficulties she struggled with after he began dating her. That evidence largely supported the evidence of the plaintiff. He confirmed that she struggled with consistent pain and discomfort. He confirmed that that pain and discomfort was often severe. He further confirmed that it interfered with the plaintiff’s ability to engage in multiple recreational activities, to care for and play with her children, to take care of their home and that it impacted their personal relationship in various ways.

[40] Mr. Rambold's evidence reflected a propensity to downplay certain difficulties with the plaintiff's past lifestyle. That propensity detracted from the reliability of his evidence. When asked about the plaintiff's drinking when they met he said she would have one or two beers a week. This is inconsistent both with the clinical records and with the plaintiff's own evidence. Indeed, records from November 2008 indicate the plaintiff was drinking daily, a fact which she acknowledged. His evidence is also inconsistent with the need for the plaintiff to attend a rehabilitation program in November 2010. That need, Ms. Sevinski acknowledged, arose because her life was becoming "unmanageable". Similarly, when asked if she used marijuana, he asserted he was unaware of this. The plaintiff's evidence, as well as clinical records from October 2009, a time when the plaintiff already lived with Mr. Rambold, indicated that she did use marijuana at this time. It is hard to imagine that Mr. Rambold would be unaware of this drug use.

[41] The defendants have argued, as I have said, that as a result of these and other difficulties with the plaintiff's evidence, the Court should not accept her testimony. The defendants further argue that because the assessment of pain is subjective, an assertion accepted by each Dr. Finlayson and Dr. McDougall, the difficulties with the plaintiff's evidence also infuses and undermines the medical evidence before me.

[42] I am quite troubled by the plaintiff's evidence. Aspects of that evidence go well beyond a frailty of memory or a natural and excusable tendency to exaggerate or place given evidence in a positive light. Here the plaintiff sought to mislead and to create a history that is not forthright. Having concluded that significant aspects of the plaintiff's case, which are directly relevant to both the severity of her injuries and to her efforts to mitigate, are not reliable, where does the truth lie? This dilemma or difficulty was addressed by Southin J., as she then was, in *Le v. Milburn*, [1987] B.C.J. No. 2690:

> When a litigant practices to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the

> web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame. ...

[43] The difficulties with the plaintiff's evidence are magnified because of the lack of objective evidence to support her injuries. McEachern, C.J.S.C., as he then was, identified the difficulties associated with assessing the extent of an injury without the benefit of objective evidence in each of *Butler v. Blaylok Estate* [1981] B.C.J. No. 31 (S.C.) at paras. 18-19 and *Price v. Kostryba* (1982), 70 B.C.L.R. 397 (S.C.) at para. 1-4.

[44] In *Maslen v. Rubenstein* (1993), 83 B.C.L.R. (2d) 131 (C.A.), Taylor J.A., at para. 15.1, said:

> ...there must be evidence of a "convincing" nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.

[45] More recently, in *Eccleston v. Dresen*, 2009 BCSC 332, at para. 66, Barrow J. accepted that claims supported by only subjective evidence should be viewed with a "skeptical eye". He further confirmed, however, that such claims can be supported by the "convincing force of collateral evidence".

[46] Two propositions emerge from these cases. First, there is an inherent level of frailty in the case of a plaintiff whose assertions of injury are not supported by any objective evidence or symptoms. Accordingly, it is appropriate, in such cases, to treat the evidence adduced by or on behalf of the plaintiff with caution. Second, either the evidence of the plaintiff or collateral corroborative evidence may be sufficient to persuade the Court of the plaintiff's position.

[47] In this case the usual difficulties associated with the wholly subjective complaints of a plaintiff are compounded by the reliability problems which are associated with the evidence of Ms. Sevinski.

[48] Notwithstanding some misgivings, however, I have accepted aspects of Ms. Sevinski's evidence and am satisfied that these portions of her evidence are supported by additional collateral evidence before me.

[49] During the course of argument I asked counsel for the defendants if it was the defendants' position that the plaintiff's evidence of her ongoing physical difficulties was, in its entirety, a fiction or fabrication. He conceded that the defendants' position did not go that far.

[50] I do not accept that the plaintiff suffers from the degree of unrelenting pain and disability that she describes. This description is not consistent with her ability to work in multiple jobs shortly after the Accident. It is similarly inconsistent with the fact that she was able to perform in those positions and the people who worked closely with her remained unaware of her professed difficulties. Finally, her description of her pain is inconsistent with her ongoing failure to discuss her difficulties with her family doctor as well as with her failure to seek any therapeutic assistance or physical treatment for an extended period after the Accident.

[51] On the other hand, I do find that the Accident has caused the plaintiff some physical difficulty of an ongoing or enduring nature.

[52] Thus, I am satisfied that, but for the Accident the plaintiff would not suffer from the pain that she presently does: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-14. The defendants, in arguing that the plaintiff has failed to establish causation have, to some extent, conflated the question of credibility with causation. They confuse the question of whether the plaintiff's evidence should be accepted with the question of whether that evidence, or part of it, once accepted, establishes that the plaintiff was injured by the negligence of the defendants.

[53] The conclusion that the plaintiff suffers from some level of ongoing pain is consistent with the opinions of each of Dr. McDougall and Dr. Finlayson. While both accepted that their opinions were based on what they were told by the plaintiff, both have available to them skills and means, based on their evaluations, of discerning

when they are being misled. Dr. Finlayson, in particular, testified that the plaintiff's Waddell signs were all negative. It is also consistent with the objective record of the plaintiff's periodic complaints of pain which she attributed to the Accident as well as to the fact that she has sought some assistance or relief through massage therapy and, to a lesser extent, physiotherapy. Finally, it is consistent with the evidence of Mr. Rambold.

[54] I further find and accept that the plaintiff's pain does impact, to some degree, on her daily life, on her ability to maintain her home, to care and play with her children and to join Mr. Rambold in various recreational activities. I do not accept that these consequences are as intense, wide-ranging or debilitating as the plaintiff asserts.

The Diagnosis of Chronic Pain

[55] There is a significant consistency in the opinions of Drs. Finlayson and McDougall. Both accept that the physical or objective symptoms of the plaintiff's injuries from the Accident have resolved. Neither suggests that the injuries the plaintiff suffered in the Accident are likely to give rise to or result in any future degenerative diseases. Importantly, both accept that certain psychosocial issues in the makeup of an individual can delay recovery from an injury. Specifically, Dr. Finlayson said:

> She has had widespread pain that has now been present for at least three years. Pain is considered chronic when it lasts beyond three to six months. Her pain is associated with low mood and poor sleep, which is consistent with a diagnosis of chronic pain syndrome.
>
> Ms. Sevinski was at increased risk for development of chronic pain syndrome based on her prior history of probable psychiatric disorders (addiction, anxiety, and depression) as well as significant social stressors including a dysfunctional and allegedly abusive relationship. Medical research has indicated that these factors put people at increased risk of chronic pain syndrome when they suffer injuries.
>
> Review of the clinical records indicates that Ms. Sevinski had a prior history of pain in her neck, back, and knees. It is my opinion that the MVA on November 27, 2007 was probably an exacerbator of her pre-existing pain, and caused her chronic pain syndrome

[56] Dr. McDougall also opined that the plaintiff's "psychosocial issues, substance abuse issues and mental health concerns" were all barriers to the plaintiff "completing a timely convalescence from any injury or illness". Dr. McDougall went on to say that the plaintiff's delayed convalescence from the Accident was "not unanticipated" given her multiple pre-existing medical conditions.

[57] Both physicians were relatively consistent in the prognosis they provided as well as in their proposed treatment programs. Dr. Finlayson said:

> There is potential for improvement in Ms. Sevinski's symptoms if she has the opportunity to engage in interdisciplinary pain management program. It is improbable that there will be complete resolution of her pain, but there is potential for her to develop coping strategies to manage her current level of pain. Engagement in a regular core strengthening and aerobic conditioning exercise program will probably also reduce but not eliminate her pain.

[58] The interdisciplinary pain management program referred to by Dr. Finlayson is one which would include "medical intervention, physiotherapy intervention and psychiatric/psychological support".

[59] Importantly, Dr. Finlayson acknowledged that just as Ms. Sevinski's pre-existing difficulties with depression, anxiety and substance abuse made her more vulnerable to her present chronic condition, those same difficulties constituted an impediment to her recovery. She also indicated that in instances where chronic pain persisted beyond two years, the prospect of its resolution was diminished.

[60] Dr. McDougall provided the following opinions:

> ...The patient now presents as a deconditioned and depressed patient. The major barriers to this patient completing her convalescence are, in my opinion, those of her mood disorder and, of course, her deconditioned status. The other major problem has been the patient's struggles with drug addictions, specifically alcohol and cocaine. I also note that marijuana has been referenced in the clinical record. ...
>
> ... Again, in my opinion, the prognosis for this patient is favourable. In my opinion, this patient can be better than she is. This goes to what in my opinion, are the recommendations for this patient with respect to her past medical problems, i.e. her substance abuse issues and the ongoing treatment for her mood disorder. I note, however, that the mood disorder will almost certainly be resistant to treatment until the substance abuse issues are under long-term in total control, i.e. abstinence. It is also my opinion that this patient

> is deconditioned. This goes to the delayed convalescence for the patient from these extensive soft tissues injuries. A short course of physical therapy, more in line with an athletic therapy model is recommended. In my opinion, the patient should attend at a physical therapy program, which must be active, going twice a week for another six weeks. ... Pending a resolution and completion of an active physiotherapy program and ongoing support with respect to the patient's substance abuse and mental health issues, a more positive prognosis can be given. I do not expect this patient to have permanent clinical impairments as a result of injuries from this motor vehicle accident. In my opinion, the patient is an otherwise healthy young lady. This goes to your further question with respect to my recommendations for any further treatments. This goes to avoiding the use of pharmaceuticals. There is no evidence this patient needs any surgical resolution to her current problems. Again the physical therapy model is in my opinion, the most appropriate methodology to help the patient complete her recovery.

[61] I accept the conclusions of each of Dr. Finlayson and Dr. McDougall. In particular, I accept that the plaintiff's pre-existing mental condition, her addiction disorder and her history of abuse and difficult relationships all contributed to her delayed recovery and to her present condition.

[62] There is no doubt and the defendants did not contest that a plaintiff is to be compensated for her injuries even where, owing to some unusual or unique attribute of the plaintiff, the injury was greater or of a different type than one would expect an average person to sustain and the extent of the damage could not reasonably have been foreseen by the tortfeasor. The last aspect of the foregoing proposition was confirmed by Rowles J.A., in *Yoshikawa v. Yu* (1996), 21 B.C.L.R. (3d) 318 (C.A.) at para. 115:

> The thin skull principle itself embodies a policy, as Wilson J.A. said in her concurring reasons for judgment in *Cotic v. Gray* (1981), 17 C.C.L.T. 138, (Ont. C.A.) when she was considering the concept of foreseeability in relation to the thin skull rule (at 178):
>
> ...
>
> > *The concept that the wrongdoer takes his victim as he finds him has little to do with foreseeability. It has a great deal to do with who, as a policy matter, should bear the loss when for reasons of peculiar vulnerability the victim of the defendant's negligence suffers greater injury or a different type of injury than the average victim would have suffered. It premises, as it were, a norm of vulnerability of the average person and makes the wrongdoer rather than the victim bear the damage suffered by those falling short of the norm.*
>
> [Emphasis added by Rowles J.A.]

Mitigation

[63] The parties agree that the following comments of Rowles J.A. in *Graham v. Rogers*, 2001 BCCA 432, concisely capture the respective obligations of the parties when the issue of mitigation is raised in a personal injury case:

> [35] Mitigation goes to limit recovery based on an unreasonable failure of the injured party to take reasonable steps to limit his or her loss. A plaintiff in a personal injury action has a positive duty to mitigate but if a defendant's position is that a plaintiff could reasonably have avoided some part of the loss, the defendant bears the onus of proof on that issue. ...

[64] The defendants argue that the plaintiff has failed to mitigate her losses by failing to:

a) engage in a proper exercise routine program;

b) engage in a proper physiotherapy program;

c) take steps to enrol at the free chronic pain clinics at Vancouver General Hospital or St. Paul’s Hospital;

d) take steps to address her depression; and

e) address or seek treatment for her addiction issues.

[65] The plaintiff raises several arguments in response. First, she argues that the defendants failed to lead any evidence that the plaintiff's condition could or would have been improved through treatment of her substance abuse and mental health issues. I do not accept this. Both the portions of the report of Dr. McDougall which I referred to and the evidence of Dr. Finlayson which I have alluded to emphasize that the plaintiff’s failure to address her addiction and mental health issues were and continue to be an impediment to her restoring her physical well-being.

[66] Second, the plaintiff argues that the defendants must establish that she failed to follow a recommended course of medical treatment. Cases such as *Chiu v. Chiu*, 2002 BCCA 618 at para. 57 and *Gregory v. Insurance Corporation of British*

Columbia, 2011 BCCA 144 at para. 56, both relied on by the plaintiff, deal with whether a plaintiff has acted unreasonably in eschewing a recommended course of treatment from a qualified medical practitioner. In *Niloufari v. Coumont*, 2009 BCCA 517, the Court concluded that there was no evidence that a referral or recommendation was made by the family doctor, no evidence that the appellant failed to follow her recommendation, and no evidence that his pain and suffering would have been reduced if he had seen another psychiatrist. Accordingly, the deduction made by the trial judge for the plaintiff's failure to mitigate was improper.

[67] These cases do not state or suggest, however, that the doctrine of mitigation is not relevant in a personal injury action unless the defendant can establish that a formal medical recommendation for a prescribed course of conduct was made to the plaintiff. This is simply the factual context within which the issue of mitigation frequently arises.

[68] Instead, the proper starting point is the obligation of an injured plaintiff to seek appropriate medical assistance. The failure to seek such assistance cannot and does not displace or diminish the plaintiff's obligation to mitigate his or her loss. Thus, in Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages,* 2nd ed. (Toronto: Irwin Law, 2008) at 389, the authors state:

> Plaintiffs who are tortiously injured have an obligation to take reasonable steps to mitigate their injuries and cannot collect damages for losses that could be avoided. Mitigation in the circumstances ordinarily requires the plaintiff to seek appropriate medical treatment ...

[69] Similarly, in S.M. Waddams, *The Law of Damages,* looseleaf (Aurora, Ont: Thomson Returers, 1991) at 15.260 the author states:

> In personal injury cases, the plaintiff is obligated to submit to reasonable medical treatment and to seek and follow medical advice where appropriate.

[70] I have said that I do not accept that the plaintiff sought adequate assistance for or described the nature and extent of her difficulties with any medical practitioner and, in particular, with her family doctor, Dr. Forrest. I view this failure as significant. Had the plaintiff acted as she reasonably should have, I am satisfied that Dr. Forrest

would, in the first instance and at a minimum, have prescribed some form of exercise or other rehabilitative program. If the plaintiff's condition persisted, I am satisfied that the plaintiff would have been referred to an individual with increased or more focused expertise. I believe this is a reasonable inference or conclusion and it is consistent with Dr. Forrest's earlier practice. It is she, as I have said, who referred the plaintiff to Dr. Côté Beck for her depression. It is also clear from Dr. Forrest's notes that she referred the plaintiff to other specialists when it was appropriate to do so. Finally, it is clear that Dr. Forrest and the plaintiff discussed her substance abuse and the need for her to obtain treatment, albeit not in the specific context of her physical injuries and the Accident.

[71] Had the plaintiff been directed to or sought assistance from someone who had the skills of either Dr. Finlayson or Dr. McDougall, I am satisfied and find that she would have been told that in order to address her ongoing pain she would have to participate in a course of physiotherapy as well as address her ongoing substance abuse and mental health issues. This conclusion is reasonable because it is the very advice both doctors are providing at this time. Dr. Finlayson would also have recommended that the plaintiff attend an interdisciplinary pain management clinic.

[72] Finally, the plaintiff argues that her substance abuse and mental health issues existed prior to the Accident and that this fact informs the reasonableness of her efforts to mitigate. The plaintiff drew an analogy with cases that address morbid obesity, a medical condition that is neither caused nor exacerbated by a tortious incident, but which can nevertheless contribute to an injury. Thus, in *Humphrey v. Rancier*, [1985] B.C.J. No. 835 (S.C.) the plaintiff was injured in a motor vehicle collision and suffered injury to her hip, tibia, wrist and back. The plaintiff was obese and was advised to reduce her weight to diminish her disability and pain. McLachlin J., as she then was, stated:

> The question is whether the plaintiff has taken reasonable steps to minimize her loss. The court must assess whether this test has been met by looking at all the circumstances of the case. Here we have an obese lady before the accident — someone who had been obese all her adult life. Her brother and sister are both obese. She appears, as her counsel put it, to be a weak woman in the sense that she has not

> had very good success at controlling her smoking or her eating on a consistent basis in the past despite medical advice and despite her clear efforts. She has tried to lose weight and has succeeded to an extent, at least temporarily. She is still trying, she says.
>
> Of equal importance to the principle that the plaintiff must act reasonably in minimizing her loss and her damages, is another principle, namely that the defendant takes his victim as he finds him or her. In the circumstances in this case, given the plaintiff's pre-accident history of obesity, given her particular personality, given her honest efforts from time to time to lose weight and to keep it off, I am not satisfied that it can be said that the plaintiff has acted unreasonably and has failed to mitigate her damages, with the result that her damages should be lessened because she has not lost weight.

[73] The plaintiff argues that *Humphrey* establishes that she is only expected to go so far as honest effort permits, given her pre-existing and underlying condition. In order to address this last submission, I must distinguish between the plaintiff's efforts to address her injuries with some type of physical therapy or exercise and her efforts to address her addiction and mental health issues.

[74] As it pertains to this first category of activity, the plaintiff testified that she first sought, after getting a referral from Dr. Forrest, to attend physiotherapy in January 2008. She said she could not afford the cost of the session and did not go. There is no record of any such referral in Dr. Forrest's notes. Ms. Sevinski made no further effort to obtain treatment until September 2009. Thereafter, she went to some massage therapy and to a few physiotherapy sessions. She did not go to any sustained course of physiotherapy partly, as I have said, because she said she could not get child care and partly because she did not believe it helped her. She has also engaged in various forms of exercise. None of this appears to have started until relatively recently. It also appears to have been both modest and sporadic in nature. Ms. Sevinski said she did not do more exercise either because it was painful or because, in her view, it was not very useful.

[75] The value of such treatment is emphasized in each of the reports of Drs. Finlayson and McDougall. Each emphasized the ongoing importance of such treatment even at this point in time. Dr. McDougall, in particular, placed significant

emphasis on the plaintiff's deconditioned state and on the relevance of that status to her present difficulties.

[76] At bottom, the plaintiff did virtually nothing to address her injury and ongoing difficulties until late in 2009, more than two years after the Accident and at the point at which, based on Dr. Finlayson's evidence, reversal of some of these difficulties would be more challenging. Even since that date her efforts have been sporadic and without any real focus. I do not accept that Ms. Sevinski could not afford these treatments or that a lack of child care presented an obstacle to treatment for the reasons I have stated. Instead, the plaintiff had options available to her had she asked reasonably and attached appropriate importance to her physical well-being and physical rehabilitation.

[77] I am satisfied that had Ms. Sevinski acted reasonably and undertaken a focused course of physiotherapy treatment and/or a sustained exercise regimen, she would have received substantial benefit from such treatment: *Gregory* at para. 56. Again, the evidence of both doctors supports this inference.

[78] The plaintiff's efforts to address her substance abuse and other issues fall into a somewhat different category. Here the plaintiff, to her credit, has made significant progress albeit incrementally and over a three and one-half year period. Prior to the Accident, the plaintiff had a longstanding problem with drug and alcohol addiction. At the time of the Accident the plaintiff was sober. Thereafter she relapsed. She has not used cocaine since August 2008. During the period when she was pregnant with Tegan, she was again sober. Thereafter she relapsed. She has attended weekly drug and alcohol counselling since May 2009 and has completed the 60 day inpatient alcohol rehabilitation program to which I referred. The report of Dr. Finlayson indicates that the plaintiff has declined to see a mental health advisor but that she has taken antidepressants.

[79] In *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, the Court dealt with various pre-existing conditions or attributes in a plaintiff's make-up which influenced her or his ability to obtain or pursue some objectively reasonable course of treatment. In

addressing a pre-existing psychological infirmity, Wilson J., for the Court, said at 159:

> The other element that has to be considered in determining whether the objective test of reasonableness applies to the decision made by the alleged thin skulled plaintiff is the *nature* of the pre-existing psychological infirmity. It is evident that not every pre-existing state of mind can be said to amount to a psychological thin skull. It seems to me that the line must be drawn between those plaintiffs who are capable of making a rational decision regarding their own care and those who, due to some pre-existing psychological condition, are not capable of making such a decision. As pointed out by Professor Fleming, a plaintiff cannot by making an unreasonable decision in regard to his own medical treatment "unload upon the defendant the consequences of his own stupidity or irrational scruples": Fleming, *The Law of Torts* (6th ed. 1983), p. 226. Accordingly, non-pathological but distinctive subjective attributes of the plaintiff's personality and mental composition are ignored in favour of an objective assessment of the reasonableness of his choice. So long as he is capable of choice the assumption of tort damages theory must be that he himself assumes the cost of any unreasonable decision. On the other hand, if due to some pre-existing psychological condition he is incapable of making a choice at all, then he should be treated as falling within the thin skull category and should not be made to bear the cost once it is established that he has been wrongfully injured.
>
> [Emphasis in original.]

[80] I accept that I have no evidence before me which addresses whether a plaintiff's pre-existing drug and alcohol addiction constitutes a psychological or physical obstacle to their acting reasonably and desisting in an ongoing pattern of harmful behaviour. I consider, however, that I can take notice of the significant and serious challenges which exist when a drug addict or alcoholic struggles to achieve sobriety.

[81] The plaintiff's efforts to achieve sobriety and to address her mental well-being have not been perfect, but I find that they have been reasonable which is the legal standard required of her.

[82] Similarly, I do not consider that the plaintiff's failure to attend one of the free chronic pain clinics at Vancouver General Hospital or St. Paul's Hospital constituted a failure to act reasonably or that any such failure constitutes a failure to mitigate her losses. The plaintiff would not reasonably have sought to go to such a centre for some time after the Accident and until it became apparent that her difficulties were

enduring in nature. Dr. Finlayson testified that there is a two or three-year waiting list to attend these facilities. With these timelines in mind, the plaintiff would not, acting reasonably, have yet had access to the facilities in question.

[83] In summary, I find the plaintiff's failure to raise her difficulties at an early stage and/or on an ongoing basis with appropriate medical advisers, her failure to obtain guidance or advice on the treatment of those difficulties, and her failure to engage actively and diligently in a course of physical or rehabilitative treatment, together constitute a failure to mitigate her losses.

Non-pecuniary Losses

[84] I have described the plaintiff's various injuries, her evidence on the intensity and consequence of such injuries and my conclusions on the extent to which I accept that they impact on her day-to-day life. The assessment of Ms. Sevinski's general loss is rendered much more difficult by the very limited evidence which addressed her activities and life prior to the Accident. Thus, for example, the plaintiff says she is now limited in her ability to participate in various forms of outdoor and recreational activity. I have no sense of how often or whether Ms. Sevinski participated in any such activities in the past. If so, was it monthly or annually? Certainly I have no evidence that the plaintiff historically engaged with any sort of regularity in various past-times, hobbies or activities that are now rendered more difficult for her.

[85] The brief description given by Ms. Sevinski of the three or four year period prior to the Accident painted a grim picture. She was in an abusive relationship, had developed and struggled with serious addiction disorders and spent much time by herself. Some of those realities continued to some extent after the Accident. If anything, the plaintiff's life has, in many respects, improved and is much better today than it was prior to the Accident.

[86] Having said this, the medical evidence establishes, and I have accepted, that the plaintiff does struggle with chronic pain syndrome. Her ability to function normally

and to engage in the breadth of activities which she would like to, as well as to interact with her children and Mr. Rambold in a pain-free way, is diminished.

[87] Looking into the future there were various contingencies which are relevant. There is no medical evidence which suggests that Ms. Sevinski's condition will deteriorate, that the Accident gave rise to the prospect of any degenerative condition or that it adversely impacted on her addiction and mental health issues. Thus, the primary and more difficult question is the extent to which her present physical condition will improve. Dr. McDougall has said that the plaintiff "can be better than she is", that the "prognosis for this patient is favourable" and that with proper treatment "there is an expectation of recovery". Dr. Finlayson was somewhat more reserved in stating that the "complete resolution" of the plaintiff's pain is improbable.

[88] All of this is premised on the plaintiff addressing her addiction and depression disorders, on her engaging on a sustained basis in a physical therapy and exercise program and on other treatment. Whether the plaintiff can achieve and sustain these various changes, and in particular her sobriety, is uncertain. However, there is a substantial possibility that she will be able to. She has, to her great credit, made significant and positive steps forward. She is also now in a much more positive and nurturing home environment. She has access to ongoing counselling.

[89] Based on these considerations I assess Ms. Sevinski's non-pecuniary damages at $60,000. This is without taking the question of mitigation into account. This figure recognizes and accounts for the various non-exhaustive factors that are identified in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have also been guided by the results in each of *Beaudry v. Kishigweb*, 2010 BCSC 915, *Jackson v. Mongrain*, 2010 BCSC 1866 and *Jokhadar v. Dehkhodaei*, 2010 BCSC 1643.

[90] Each of these cases has its own unique considerations and my award recognizes this. For example, the prognosis for the plaintiff's recovery in *Jackson* was worse than that of Ms. Sevinski. In *Jokhadar*, the plaintiff's injury also caused a worsening of her bipolar disorder. In reaching this figure I have also considered the various and severe limitations on the plaintiff's lifestyle and condition prior to the

Accident. I have placed little weight on the cases provided to me by the defendants. In my view, these cases address circumstances where the plaintiffs suffered injuries of a very different nature.

[91] Finally, I consider that an adjustment of 25% should be made to the award that I otherwise would have made. In arriving at this figure I am particularly influenced by the fact that the pain and discomfort that Ms. Sevinski has struggled with over the past three and one-half years as well as the prospect of her making a full recovery are both significantly affected by her failure to take those reasonable steps that I have identified. Therefore, the plaintiff's award for her non-pecuniary losses is reduced to $45,000 as a result of her failure to mitigate her losses.

Future Wage Loss

[92] The plaintiff's case for future wage loss was directed, in the main, to establishing that she will be unable, in the future, to work in the construction industry. The plaintiff was employed in this trade as a very young woman from 2000 to 2003. Mr. Doucet, a carpenter, who worked with and oversaw the plaintiff's work during this period, described the nature of her work and abilities during these years. He described her as competent, hard-working and reliable. She progressed from being a labourer, to putting walls together and to enjoying a "small supervisory role" wherein she oversaw the work of other labourers. The plaintiff confirmed that the work was very physical in nature. It required much lifting, the days were long and the plaintiff was on her feet all day. The work, however, was intermittent in the sense that the crew moved from job to job in different towns and there were periods of time when there was no work.

[93] The plaintiff confirmed that she enjoyed this work and that it gave her a sense of self worth. Her hourly wage during this period increased from $10 to $18 per hour. Shortly after the plaintiff became pregnant, she stopped doing this work and, for a variety of reasons, never returned to it.

[94] The plaintiff's claim for future wage loss is difficult. The most the plaintiff ever earned, as a construction worker, was in 2002 when she earned approximately $14,000. For all practical purposes, the plaintiff has not worked on any regular or sustained basis in the past eight years. She has generally been on welfare. She held a few jobs as a clerk or server in 2007-2008 for a few weeks or months at a time. Furthermore, the plaintiff does not intend to return to work for at least the next five years or until her daughter is in school.

[95] At that point the plaintiff will be 35 years old. She will not have worked in any capacity in almost a decade. She has a very limited work history, little education and limited skills.

[96] The suggestion that she would, but for the Accident, have returned to the construction industry is very questionable. The plaintiff acknowledged that in 2002 and 2003 she smoked marijuana daily. She said that in large part this was to deal with the neck and back pain she had from working such long hours. Why she would be better able to do this work, at the age of 35 or older, is not clear. Furthermore, the plaintiff accepted that there was little construction work in Fernie or the surrounding area. She admitted that in the past she was reluctant to pursue this work because it would have required moving about. These factors would be still greater impediments to pursuing such work now that she has young children and a family.

[97] Still further, the plaintiff's employability is complicated by the various other health issues that she has only recently begun to control and address. Dr. McDougall, in his assessment of August 30, 2010, said:

> In my opinion, this patient is currently not fit for employment. The patient is significantly deconditioned and then note the patient's mood disorder. I have already referenced the patient's substance abuse issues and psychosocial issues above. Given however the patient's current physical deconditioned status, particularly with respect to her weight gain and mood disorder complicated by the body image or dysphoria issue, there is very little likelihood that this patient will achieve success in employment at this time. Again, however I think that this is a temporary issue and that pending completion of the patient's recovery, there is an expectation that the plaintiff will be able to return employable status.

[98] The evidence of each of Mr. Brown and Ms. Martins also informs the extent to which the plaintiff's pre-existing health issues interfered with her ability to maintain any form of employment.

[99] Thus, there are numerous contingencies which are relevant to her employability. There is a substantial possibility that the plaintiff will be able to maintain her sobriety. There is similarly, based on history, a substantial possibility that she will relapse. There is a substantial possibility that her recent efforts to improve her education will open doors and create new opportunities for her. There is a substantial possibility, though not a probability, that with treatment her pain will fully resolve.

[100] The test for loss of income earning capacity was recently clarified by the Court of Appeal clarified in *Perren v. Lalari*, 2010 BCCA 140:

> [32] A plaintiff must *always* 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.]

[101] The various means of potentially arriving at a dollar value for the loss of capacity to earn income were addressed by Finch J.A., as he then was, and for the majority, in *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) at para. 43:

> The cases to which we were referred suggest various means of assigning a dollar value of the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award

> the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income, in the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. In all the circumstances, I would regard a fair award under this head to be the sum of $40,000.

[102] Here the plaintiff's lack of both an earning history and any past earning achievement renders reference to a mathematical framework unrealistic. Though provided with actuarial evidence I do not consider such evidence useful. In the present case calculating a fixed annual loss, based on an assumed retirement age is completely artificial and does not even serve to provide a framework for an assessment. As indicated in *Perren* at para. 11, the four factors set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 8, are more useful when the plaintiff's loss is not easily measurable. The four factors are:

1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
2. The plaintiff is less marketable or attractive as an employee to potential employers;
3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[103] Here the plaintiff suffers from some pain when she stands, lifts, bends or sits. These symptoms will be impediments to her securing the types of waitressing or other jobs that she has historically held.

[104] The defendants argue that in order to establish a "real and substantial possibility of future income loss, there must be some expert medical evidence in support of the claim". The excerpt from the report of Dr. McDougall that I referred to, though it addresses the plaintiff's difficulties at large, provides some such support. So too does the report of Dr. Finlayson in its conclusion that the plaintiff will likely continue to struggle with pain into the future. The prospect of the plaintiff living with some level of ongoing pain, even if manageable, has a real and substantial

possibility of rendering the plaintiff less able to earn income. This is particularly the case when the employment options available to her are predominantly physical in nature.

[105] I also note that Ms. Martins confirmed that had she known the plaintiff had been injured she would have been less likely to hire her. This evidence supports the reasonable inference that 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, again, when that employment is likely to have some physical component attached to it.

[106] I consider that the amount of $30,000 properly accounts for the various considerations I have described. I note that this figure would reflect approximately two years of income, without any inflationary adjustment, at the highest level of income Ms. Sevinski has ever achieved. I would also reduce this figure by 25% to recognize Ms. Sevinski's failure to mitigate her losses and to reflect the fact that the prospect of her suffering future income loss is directly affected by that failure. Therefore, the plaintiff's award for future income loss is reduced to $22,500.

Past Wage Loss

[107] The parties have agreed on an amount of $1,500 for such loss.

Special Damages

[108] The defendants admit that the plaintiff has expended $2,019.25 for various categories of special damages, but dispute that the special damages claimed relate to any injury sustained in the Accident. I do not accept that this is so. The funds in question were spent by the plaintiff for massage therapy and physiotherapy treatments. Those treatments were necessitated by the Accident. Therefore, the plaintiff is awarded $2,019.25 in special damages.

Cost of Future Care

[109] Future care claims should be assessed by asking what expenses would be incurred by a reasonable person to obtain medically recommended treatment. In *Bystedt v. Hay*, 2001 BCSC 1735, Madam Justice D. Smith, as she then was, observed:

> [163] Thus, the claim must be supported by evidence that establishes the proposed care is what a reasonable person of ample means would provide in order to meet what the plaintiff "reasonably needs to expend for the purpose of making good the loss".... It must also be based on objective test of what is moderate and fair to both parties. ...

[110] In her report Dr. Finlayson suggested three forms of care for the plaintiff:

a) Interdisciplinary Pain Management: Dr. Finlayson opined that Ms. Sevinski would benefit from attending an intensive therapy clinic. Such clinics consist of physiotherapy, medication and psychological counselling. They usually consist of a six-week inpatient program. The cost of a private clinic is approximately $12,000. Public clinics, as I have noted, often have waiting lists of two to three years. None of this evidence was contested and I consider the expense reasonable under the circumstances.

b) Physiotherapy: Dr. Finlayson has proposed that the plaintiff engage in a core strengthening and general aerobic conditioning program. This program would initially be prescribed by a physiotherapist and thereafter followed-up on by a kinesiologist or personal trainer. Dr. Finlayson considered that the plaintiff would benefit from six to twelve physiotherapy sessions. I note that this is consistent with the 12 such sessions which were proposed by Dr. McDougall. Dr. Finlayson also considered that these physiotherapy sessions should be followed by a further six to twelve sessions with a kinesiologist or personal trainer and that there should be a further follow-up every three to six months on an indefinite basis thereafter.

> The evidence before me establishes that the cost of a single physiotherapy treatment is $50. No amount was provided to me as to what the cost of a session with a personal trainer would be. I have assumed a like amount. I have concluded that an amount of $1,500 would properly and fully cover the costs associated with this proposed regimen.

c) Psychological Support: Dr. Finlayson indicated that the plaintiff required further psychiatric and psychological assessment and management. No evidence was provided, however, of how extended a course of treatment was required or of what the cost of such treatment might be. Any attempt on my part to fix an appropriate amount would be entirely speculative and accordingly I decline to do so: *Job v. Van Blankers*, 2009 BCSC 230 at para. 147.

[111] I have awarded Ms. Sevinski the amount of $84,519.25. This figure is comprised of the following distinct amounts:

a) non-pecuniary damages of $45,000.00;

b) future wage losses of $22,500.00;

c) past wage losses of $1,500.00;

d) special damages of $2,019.25; and

e) future care costs of $13,500.00.

[112] I am satisfied this global amount fairly compensates the plaintiff for her losses.

[113] The parties asked that I defer dealing with the issue of costs. The parties can either deal with this issue in writing or, alternatively, contact the Registry to fix a convenient date to speak to the matter before me.

"Voith J."