

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *De Reyes v. Fabiszewski*,
2023 BCSC 996

Date: 20230609
Docket: M188773
Registry: Vancouver

Between:

Jeny Waldina Navarro De Reyes

Plaintiff

And

**Albert Fabiszewski, Ewa Palyska, Tyler Hagedor,
And RMC Ready-Mix Ltd.**

Defendants

Before: The Honourable W.A. Baker

Reasons for Judgment

Counsel for Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.
October 31, 2022
November 1-4 and 7, 2022

Place and Date of Judgment:

Vancouver, B.C.
June 9, 2023

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I. INTRODUCTION

[1] On September 7, 2016 Ms. Jeny De Reyes was a passenger in the front seat of a car driven by her husband, when their car was struck on the passenger side. Ms. De Reyes was injured in the accident. Liability has been admitted by the defendants. The only issue before me is the extent of her injuries, and the impact those injuries have had on her life.

II. ISSUES

[2] This case raises the following issues:

- a) Did the accident cause the injuries and pain which Ms. De Reyes suffers from today?
- b) Is Ms. De Reyes entitled to any damages?

III. ANALYSIS

A. Did the accident cause the injuries and pain which the Ms. De Reyes suffers from today?

1. Ms. De Reyes's abilities and health pre-accident

[3] Ms. De Reyes was born in Honduras and moved to Canada in 2001 to be with her husband. She attended an ESL program to allow her to find work. She began working as an office cleaner, working night shifts from 5pm to 1am. Her work was full time, and she stayed in her position for 13 years.

[4] Ms. De Reyes had a child while working as a cleaner, and was not happy with the way her work hours interfered with her time with her son. In 2014, Ms. De Reyes began working day shifts at Fresh Direct Produce, in Vancouver. Initially she worked a temporary seasonal position. Then towards the end of 2014, her employer offered her a permanent full time position as a produce grader, which she accepted.

[5] Ms. De Reyes worked 8:30 am to 4:30 pm, Monday, Tuesday, Wednesday, Friday and Saturday. She was also able to work overtime shifts, when it was offered to her.

[6] Ms. De Reyes's job as a produce grader was physically demanding. She was on her feet throughout her shift, and was required to lift and carry heavy boxes of produce. Some boxes weighed as much as 30 lbs. The boxes were stacked on pallets, sometimes as high as Ms. De Reyes's shoulder level. Rejected produce was placed in garbage bins, which were also heavy and were taken away and emptied by Ms. De Reyes as part of her job. Before the accident, Ms. De Reyes performed her work well, without limitation.

[7] Ms. De Reyes was well liked at Fresh Direct, and hoped to move to a Team Leader position in 2020 or 2021, when her daughter started grade one.

[8] In addition to her employment, Ms. De Reyes worked in the home. Her husband, Mr. Juan De Reyes, has been on disability since 2009. Ms. De Reyes was primarily responsible for the housework, including cleaning, vacuuming, cooking and grocery shopping. She was also engaged in child care. In addition, Ms. De Reyes sent money monthly to her family in Honduras.

[9] Ms. De Reyes's home life was focussed on her family. The family enjoyed spending time together, going to the park, eating with friends and family, and going to church.

[10] Ms. De Reyes had a second child in August 2015, by way of an unplanned caesarean section. Following the birth of her child, Ms. De Reyes suffered from some mild post-partem sadness, which did not meet the criteria for depression. Ms. De Reyes used Sertraline for one to two months, after which her symptoms passed. Ms. De Reyes did not need, and was not prescribed, any further mood medication before the accident.

[11] Mr. De Reyes described Ms. De Reyes as humble and honest. She did not have any physical limitations before the accident. She was affectionate towards him and they enjoyed a happy relationship.

[12] Ms. Alma Monterrosa worked with Ms. De Reyes for 10 years, as a cleaner. She testified that Ms. De Reyes was hard working, active, happy and responsible. She said Ms. De Reyes demonstrated no problems or physical limitations in her work as a cleaner.

[13] Ms. Wong and Ms. Zhou, superiors to Ms. De Reyes at Fresh Direct, both testified that before the accident Ms. De Reyes was a hard worker without limitations. Both witnesses said Ms. De Reyes's job was physically demanding, requiring her to lift and carry heavy boxes. Both said that Ms. De Reyes was regularly offered and took overtime work. Ms. Zhou estimated that a grader in Ms. De Reyes's position would be able to work 60 hours during the busy season, from August to February. The overtime hours offered were an additional two hours per day.

[14] I found Ms. De Reyes to be a credible and reliable witness, and I accept her evidence without qualification.

2. Ms. De Reyes's abilities and health post-accident

[15] Ms. De Reyes was in the front passenger seat, resting with her eyes closed, at the time of the accident. She was thrown forward and backward, and her head hit the headrest. She experienced pain and symptoms in her head, neck, upper back and shoulders, and down her arms. Her arms started to go numb, and she felt dizzy.

[16] Mr. De Reyes remembers Ms. De Reyes experiencing pain in her neck, shoulder and back, and needing to lie down once they got home.

[17] In the days after the collision, Ms. De Reyes continued to experience pain in her back, which moved down into her lower back, hips and legs. Ms. De Reyes's sleep was interrupted as she was awoken with pain, and she had a hard time finding

a comfortable position. Ms. De Reyes experienced headaches, which sometimes resulted in dizziness and nausea. Ms. De Reyes's pain began to affect her mood, as she became irritable and depressed.

[18] Mr. De Reyes testified that he saw his wife crying from pain, and in his view her injuries are getting worse overtime. She continues to lie on the couch when she is experiencing pain from her injuries.

[19] Immediately after the accident, Ms. De Reyes missed one day of work, and then returned to her position at Fresh Direct. Her work was modified, and she was placed on light duties. The weight of boxes she had to pick up and move were no more than 10-11 lbs. She no longer had to put the heavy boxes on pallets, pull the pallets, or take out the heavy garbage bins. However, even with this modified work, Ms. De Reyes still required assistance from her co-workers and had to take frequent breaks.

[20] Ms. De Reyes continued to work at Fresh Direct until October 2022. She was off work at the time of trial, but hoped to return to Fresh Direct. She expects that on her return she will only be able to work part time.

[21] Ms. De Reyes's ability to perform household tasks was impacted by her injuries. She could not vacuum, clean or cook as she had before. Ms. De Reyes experienced pain in picking up her baby to breast feed her. Ms. De Reyes no longer wished to socialize with friends or have them over to their house, or go out to do activities. Ms. De Reyes felt embarrassed by her low mood, and did not want to see people.

[22] Ms. De Reyes has experienced a serious impact in her mood since the accident. Her engagement in social activities is severely limited. She does not actively play with her children, but rather is a passive observer. She is not able to assist her child with homework without feeling irritable and angry because of the pain she experiences. She still goes on walks along the river to help her relax. Due

to her ongoing pain, Ms. De Reyes no longer attends church, which was previously a central part of her life. Her inability to attend mass has increased her depression.

[23] Since the accident, Ms. De Reyes's husband and children have had to take on the housekeeping tasks Ms. De Reyes is no longer able to do. These include cleaning the bathroom, fridge and stove, and vacuuming.

[24] Ms. De Reyes's relationship with her husband has deteriorated from an affectionate one, to one of distance. They no longer cook meals together, or go out socially. She feels she is not able to help him do things, and is irritable around him from the pain. She no longer wants to go out for dinners with him, even on special occasions. Mr. De Reyes sometimes has to move to the couch at night, so that Ms. De Reyes can try to find a position where she can sleep. Ms. De Reyes suffers from serious sleep disruption, estimating that she usually is able to sleep only three to four hours. Mr. De Reyes needs to help Ms. De Reyes with fastening her clothes, where the closures are on her back.

[25] Ms. De Reyes is worried about the impact on her husband, as he now has to take on a significant number of additional tasks and often looks exhausted.

[26] Mr. De Reyes testified that he has seen a change in his wife's mood and personality. She is often angry and irritable, which she was not before. He observes that she cannot do as much as she did before the accident. She is constantly complaining about her pain, and needing to sit down due to the pain. Mr. De Reyes also testified that Ms. De Reyes is now forgetful and distracted.

[27] Ms. Monterrosa testified that she saw Ms. De Reyes having physical problems after the accident. Ms. De Reyes had trouble bending over, pain in the back of her neck, and pain sitting down. Ms. Monterrosa saw Ms. De Reyes rubbing her neck and back when she was in pain. Ms. De Reyes no longer wants to go out with Ms. Monterrosa, is often in a bad mood, and does not want to talk anymore. Ms. De Reyes is very different now.

[28] Both Ms. Wong and Ms. Zhou testified that Ms. De Reyes has had to work light duties since the accident. At times she has to leave early because of her pain, and she has had to take days off because of her injuries. Ms. Wong has observed Ms. De Reyes demonstrating pain behavior, including rubbing her neck and back, and showing expressions of pain on her face. Ms. Wong has seen changes in Ms. De Reyes's mood and personality, as she is not as open and happy as she was before. While before the accident, Ms. De Reyes willingly took on overtime, after the accident Ms. De Reyes seldom took overtime hours and in recent years would often have to leave early due to her pain.

a) Dr. Lisa Caillier

[29] Dr. Caillier was qualified as an expert in physical medicine and rehabilitation.

[30] Dr. Caillier was of the opinion that Ms. De Reyes suffered injuries in the accident which may be summarized as:

- a) Soft tissue injuries to her neck, upper back, shoulder girdle, and lower back, resulting in chronic pain,
- b) Chronic post-traumatic headaches, likely secondary to neck pain,
- c) Mental health symptoms, including depression, reduced interest and motivation, fear and nervousness in vehicles, pain worry, irritability, short temper, and lack of patience,
- d) Cognitive complaints likely secondary to pain, fatigue, poor sleep, headaches and mental health symptoms.

[31] The soft tissue injuries resulted in a number of secondary symptoms, including:

- a) Altered sleep,
- b) Physical deconditioning,

- c) Pain radiating into her arm and leg, numbness and tingling
- d) Fatigue.

[32] In addition, Dr. Caillier diagnosed Ms. De Reyes with central sensitization of pain, resulting in pain hypersensitivity in both injured and uninjured muscles. This results in increased pain with range of motion, movement of the joints, and superficial touch.

[33] Dr. Caillier described the work limitations Ms. De Reyes experiences as a result of the injuries she suffered in the accident:

In my opinion, Ms. De Reyes's main limiting factors preventing her from returning to her pre-MVC level of function (pre-September 7, 2016) are pain, physical deconditioning, lack of restorative sleep, headaches, depression, fatigue, irritability, lack of interest and motivation for activities, as well as cognitive dysfunction.

In my opinion, there is likely reduced endurance and tolerance for sustained posturing, repetitive bending, lifting and carrying, pushing and pulling, repetitive actions through the arm regions particularly at or above shoulder level, as well as reduced endurance and tolerance for typical home, work, and recreational activities. In my opinion, her pain, physical deconditioning, headaches, emotional and psychological symptoms, cognitive dysfunction, fatigue, and poor sleep negatively impacts her ability to be employed as she was prior to the motor vehicle collision of September 7, 2016.

[34] Dr. Caillier was of the view that Ms. De Reyes would be able to work consistently part time (two to three days of 8 hour shifts), with modified work duties.

b) Dr. Misri

[35] Dr. Misri was qualified as a psychiatrist. Dr. Misri diagnosed Ms. De Reyes with the following:

- a) Persistent depressive disorder, onset post-MVA, and following a fluctuating course, presently severe in its presentation, and closely linked to pain symptoms.
- b) Generalized anxiety disorder, onset post-MVA, now chronic in intensity, and complicated by excessive anxiety around pain.

- c) Somatic symptom disorder, onset post-MVA, fluctuates moderate in its clinical manifestation.

[36] Dr. Misri attributes all three diagnoses to the accident. All three are related to the pain Ms. De Reyes has experienced, and have worsened overtime due to the persistence of Ms. De Reyes's pain symptoms. They have resulted in a decreased quality of life for Ms. De Reyes.

[37] Dr. Misri described Ms. De Reyes's persistent depressive disorder as worsening overtime with the persistence of her pain symptoms, "There is a bidirectional relationship between pain and depressive [sic] with one set of symptoms amplifying the other." The depressive symptoms were mild to moderate following the accident, but with the Ms. De Reyes's ongoing pain and complicating additional psychological conditions, the depressive condition has become persistent.

[38] Under cross examination, Dr. Misri confirmed that Ms. De Reyes's post partum condition after the birth of her daughter in 2015 did not meet the DSM diagnostic criteria for depression, the medication prescribed was not at a dosage level for anxiety or depression, and Ms. De Reyes's presentation after the accident was a completely different presentation. Dr. Misri stated that Ms. De Reyes's post partum condition had no relationship to the psychological conditions suffered by Ms. De Reyes after the accident.

[39] Dr. Misri described Ms. De Reyes's generalized anxiety disorder as creating in Ms. De Reyes a constant state of worry and anxiety. She worries about her pain constantly, to the point she is incapacitated by it. She is short tempered, fearful, and cannot relax.

[40] Dr. Misri explained her diagnosis of somatic symptom disorder in Ms. De Reyes as follows:

...With Jeny [Ms. De Reyes], this disorder is primarily pain-focused and the persistent course of it has been characterized by marked impairment and overall dysfunction. Absent the accident, it is unlikely that Jeny would have suffered from Somatic Symptom Disorder. This particular condition is a

complex clinical entity that impacts individuals who have persistent pain. In the case of Jeny, there has been ultrasound and MRI confirmation of areas impacted. The pain which has been present post-MVA, especially in both shoulders, has been primarily responsible for developing pain-focused behaviour overtime. Generally, in patients with Somatic Symptom Disorder, this type of suffering is not confined just to the physical symptoms themselves but it eventually impacts the psychological and behavioural aspects of the patient, and this seems to be the case with Jeny. Her unusual and persistent preoccupation with pain was obvious to me throughout our interview. Sometimes, there are cultural predispositions that could potentially explain the somatic behaviours. It is easier to explain pain symptoms than mental health symptoms. However, Jeny has been quite vocal about her depression and anxiety in addition to her pain symptoms. It has now been almost six years, and the vicious cycle that has been set up between the pain and mental health symptoms has been significant and caused a great deal of dysfunction.

[41] Dr. Misri noted that the pain associated with Ms. De Reyes's somatic symptom disorder began primarily in her shoulders and base of her neck, as well as down her arms. After a number of years, the pain was affecting her hips and legs. The pain symptoms Ms. De Reyes experiences throughout her body are associated with chronic pain and central sensitization. Dr. Misri explained that central sensitization is a condition which occurs in conjunction with somatic symptom disorder.

[42] Dr. Misri described the impact of Ms. De Reyes's condition on her ability to work. She noted that Ms. De Reyes worked less after the accident due to pain. With respect to her abilities in 2022, Dr. Misri stated:

She is having trouble working fulltime hours because she is not able to concentrate. She is not able to lift anything moderately heavy. Because she is in pain, she is afraid that she might have an accident at work. Panic attacks at work have being quite upsetting. She has to often run to the bathroom to deal with nausea and vomiting. Her motivation is low, so she is worried about her productivity. She is fatigued and lacks the energy to finish tasks in a timely manner. She is worried about being let go from her job because of excessive anxiety.

[43] Under cross examination, Dr. Misri confirmed that Ms. De Reyes had been compliant with her doctors' advice regarding medications. While Ms. De Reyes had trialed a number of different drugs, Dr. Misri confirmed that Ms. De Reyes could not tolerate different drugs at higher doses. Ultimately, Ms. De Reyes and her doctors

had not found a drug which resulted in a good long lasting response to her complex array of three psychological conditions.

c) Dr. Gray

[44] Dr. Gray is a physician with a specialty in physical medicine and rehabilitation, and electrodiagnostic medicine, qualified to assess, diagnose and treat people with musculoskeletal problems and chronic pain.

[45] Dr. Gray examined Ms. De Reyes on behalf of the defendants.

[46] Dr. Gray opined that Ms. De Reyes suffered grade 1 to 2 soft tissue injuries to her neck and mid-back region in the accident. In his report, he noted that the medical records did not record any low back injuries immediately post accident, and he was of the view that later low back pain was secondary to the chronic pain syndrome experienced by Ms. De Reyes. Under cross examination, Dr. Gray agreed that if Ms. De Reyes experienced low back pain immediately following the accident, he would agree that there was a soft tissue injury component to Ms. De Reyes's low back pain.

[47] Dr. Gray noted that Ms. De Reyes suffered from chronic pain syndrome and central sensitivity, and continues to have a significant psychological and emotional overlay to her symptoms. In his report, Dr. Gray stated that in his view it was not clear how the accident which caused the initial whiplash injury could have resulted in Ms. De Reyes's present chronic pain and associated symptoms. He noted that a psychiatrist's opinion was needed to understand the development of Ms. De Reyes's central sensitization and chronic pain syndrome, and under cross examination agreed he would defer to a psychiatrist.

[48] Under cross examination, however, Dr. Gray agreed that Ms. De Reyes suffers from chronic myofascial pain as a result of the accident, and that her somatic symptoms are pain based and of the type associated with central sensitization. He agreed that a feature of central sensitization was that pain was experienced beyond

the site of the initial injury, and the sensitization Ms. De Reyes experiences can lead to wide spread pain. He agreed that Ms. De Reyes presents with a very complex constellation of symptoms. He further agreed that the accident, and its resulted soft tissue injuries, contributed to Ms. De Reyes's ongoing central sensitization and chronic pain syndrome.

3. Causation

[49] The defendants did not advance a serious challenge to causation in this case. There is no dispute that Ms. De Reyes suffered soft tissue injuries to her neck, upper back, and shoulder girdle in the accident. Dr. Gray agreed that if Ms. De Reyes suffered pain in her lower back and hips in the days following the accident, this would indicate a soft tissue injury associated with the accident, a finding made by Dr. Caillier. Ms. De Reyes testified that she experienced pain in her back immediately following the accident, and in the days and weeks following the accident she experienced pain in her back, hips and legs. I accept the evidence of Ms. De Reyes, and am satisfied that she did experience pain in her lower back, which moved into her hips and legs, as a result of the accident.

[50] The defence argues that Ms. De Reyes's pain complaints are subjective and therefore not reliable. I do not agree. Pain is always subjective, and the medical experts are well qualified to assess pain reporting by patients. In this case, there is no suggestion by any of the experts that the pain experienced by Ms. De Reyes is fabricated, or that Ms. De Reyes has been untruthful in her pain reporting. I accept Ms. De Reyes's testimony as to her pain experience. Dr. Misri was the only psychiatric expert called in the case. I find her to be extremely well qualified, and I accept without hesitation her findings on Ms. De Reyes's psychological conditions, which I find were caused by the accident.

[51] As such, I am satisfied that the accident caused the following injuries to Ms. De Reyes:

- a) Soft tissue injuries to her neck, upper back, shoulder girdle, and lower back, resulting in chronic pain,
- b) Cognitive dysfunction,
- c) Persistent depressive disorder, presently severe in its presentation, and closely linked to pain symptoms,
- d) Generalized anxiety disorder, chronic in intensity, and complicated by excessive anxiety around pain, and
- e) Somatic symptom disorder.

4. What is Ms. De Reyes’s prognosis?

[52] It was Dr. Caillier’s opinion that given the chronicity of Ms. De Reyes’s physical symptoms, the likelihood of her becoming pain free is poor. It was her view that Ms. De Reyes’s mental health is one of the main limiting factors preventing her recovery to her pre-accident function. Dr. Caillier stated:

In my opinion, even with the best case scenario of optimization of physical conditioning, she is not going to become pain free and will likely continue to have pain daily with intermittent flares depending on the activities that she is engaged in.

...

her cognitive dysfunction will likely continue even with improved management of her pain, sleep, mental health symptoms and headaches.

[53] Dr. Caillier noted that Ms. De Reyes’s headaches began after the accident and have not improved. She opined that the likelihood of Ms. De Reyes becoming headache free is poor.

[54] Dr. Misri was of the opinion that all of the three conditions she diagnosed Ms. De Reyes with had a poor prognosis for recovery.

[55] With respect to the depressive disorder, Dr. Misri observed that Ms. De Reyes had had multiple trials of medications, which have not been successful. She allowed that more aggressive treatment may result in improvement, but complete recovery was unlikely.

[56] With respect to the generalized anxiety disorder, Dr. Misri opined that the disorder is difficult to treat and coexists with Ms. De Reyes's somatic symptom disorder, depression and pain. Pharmacological treatments have not been successful. Dr. Misri recommended cognitive behavioral therapy, which may produce some positive results, but was of the view that complete symptomatic and functional remission was unlikely.

[57] With respect to the somatic symptom disorder, Dr. Misri noted that Ms. De Reyes had been treated in the St. Paul's Hospital pain program, but there had been no significant change in her symptoms. Ms. De Reyes has now plateaued, and complete remission is unlikely.

[58] Dr. Gray noted that chronic pain, central sensitization, and somatic symptom disorder are all associated with a poor prognosis. He opined that he expected Ms. De Reyes to have chronic pain for the remainder of her life. However, he expected that if she responded to treatment of her somatic symptom disorder, Ms. De Reyes would likely see an improvement in her pain symptoms and perceived disability. Her myofascial pain would continue to have mild limitations due to intermittent flareups and exacerbations with more strenuous activities.

[59] On a balance of probabilities, I am satisfied that Ms. De Reyes will not return to her pre-accident health. Her myofascial pain will continue, as will her chronic pain, cognitive dysfunction, and psychological conditions. While there is a possibility that her psychological conditions will improve in the future, thus improving her pain symptoms as well, I do not find the likelihood of this occurring is probable. Rather, it is more likely that treatment will prevent any further deterioration, and will assist in managing her ongoing symptoms.

B. Is Ms. De Reyes entitled to damages?

[60] The plaintiff claims non-pecuniary damages, and the following pecuniary damages: loss of income earning capacity (past and future), cost of future care and special damages.

1. Non-pecuniary damages;

[61] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. As stated by our Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd* [*Boyd v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[62] Ms. De Reyes seeks \$165,000 in non-pecuniary damages. The defence agrees some non-pecuniary damages are properly awarded, but submits the correct award is \$100,000.

[63] Ms. De Reyes relies on *Redmond v Krider*, 2015 BCSC 178, *Cumpf v. Barbuta*, 2014 BCSC 1898, and *Sebaa v Ricci*, 2015 BCSC 1492 where awards ranged from \$167,000 to \$215,000 (adjusted to 2022 dollars) for plaintiffs suffering

myofascial and chronic pain with resulting psychological injuries including depression and somatic pain disorder.

[64] The defence relies on *Danroth v. Dufresne*, 2021 BCSC 864, *Elpel v. Glover*, 2018 BCSC 1404, *Leung v. Draper*, 2020 BCSC 219, and *Singh v. Storey*, 2021 BCSC 1825 where awards ranged from \$81,000 to \$115,000 for non-pecuniary damages for plaintiffs with myofascial and chronic pain, depression, anxiety, and somatic symptom disorders.

[65] Each case is unique. Non-pecuniary damages must be assessed by taking into account the unique factors arising in the case at bar. Of the cases noted above, I find the following to be useful comparators: *Elpel v. Glover* and *Redmond v Krider*.

[66] At the time of the accident, Ms. De Reyes was a hard working provider for her family. She had been worked since she was a teenager. She was a mother to two children, and her husband was on disability. She assisted her family in Honduras. She was the primary bread winner for the family, and was a happy and social person in her personal life. She enjoyed spending time with family and friends, and was a strong participant in her church.

[67] As a result of the accident, Ms. De Reyes's life has been seriously impacted. She suffers from myofascial pain associated with her injuries and, even more significantly, she has developed a number of serious psychological conditions in response to her pain. These psychological conditions now dominate her life, and limit her ability to live the same happy, social life she did before the accident. Her personality has been affected. She is short tempered, and unable to provide uncritical love and care to her family as she did before the accident. She is no longer able to work at the level she did before, and can no longer contribute to her family life in the same way. She is socially isolated, and is no longer affectionate with her husband. She feels shame, and feels that she is of less worth now. These impairments are not likely to improve overtime. I find that an award of \$120,000 is appropriate for non-pecuniary damages.

2. Loss of earning capacity

[68] The purpose of an award for loss of earning capacity is to restore the plaintiff, as best as possible, to the position he would have been in had the accident not occurred. The plaintiff must establish an impairment in his earning capacity, and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss: *Perren v. Lalari*, 2010 BCCA 140.

[69] The court in *Brown v. Golajiy* (1985), 26 BCLR (3d) 353 (SC) at para. 8 set out the factors to consider in assessing a loss of earning capacity:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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.

[70] Both past and future loss of earning capacity address the same loss. However, there are differences in how this loss is assessed before trial and after trial. To the extent past loss of capacity relies on facts which are capable of proof, those facts must be proven on the balance of probabilities. To the extent past loss of capacity relies on hypothetical facts, the court must be satisfied that there is a real and substantial possibility of such facts occurring. The court may assess the likelihood of such hypothetical facts occurring, and discount or increase an award to reflect such contingencies. Future losses are almost always based on hypothetical facts, and are assessed on the standard of real and substantial possibility with consideration of relevant contingencies: *Rousta v. MacKay*, 2018 BCCA 29 at para. 14.

[71] Dr. Caillier opined that it is highly unlikely that Ms. De Reyes will be able to return to her full work duties, or consistently work full time hours within her current job. Dr. Cailler recommended that Ms. De Reyes work between two to three days per week, with accommodations for and management of her physical, emotional, psychological and cognitive symptoms.

[72] Dr. Gray was of the view that Ms. De Reyes was susceptible to exacerbations/aggravations with holding prolonged static postures, such as computer work and some domestic duties. Dynamic or repetitive movements of head and neck, such as lifting her arms out in front, repetitive lifting, pushing, and pulling, would lead to increased symptoms. Ms. De Reyes would also suffer increased symptoms from holding stooped postures, like cleaning floors. While Dr. Gray was of the view that if Ms. De Reyes's psychological conditions improved, her ability to participate in activities would also improve, I am not satisfied, on a balance of probabilities, that Ms. De Reyes's psychological conditions will improve. As such, Ms. De Reyes remains disabled in her work, as described by Dr. Gray.

[73] Dr. Misri noted that Ms. De Reyes's ability to work fulltime is affected because she is not able to concentrate, and that Ms. De Reyes is not able to lift anything moderately heavy. Her low mood and anxiety fatigue reduce her ability to complete tasks in a timely way. Dr. Mirsi further was of the opinion that Ms. De Reyes's prognosis in relation to her psychological conditions was poor. Dr. Misri recommended that Ms. De Reyes work on a part time basis to allow her to cope with her pain symptoms and better manage her mental health.

[74] Ms. Ashea Neil, a registered occupational therapist, performed a functional assessment of Ms. De Reyes's abilities. She concluded that it was unlikely that Ms. De Reyes had the functional capacity to work fulltime in her current job. She also was of the view that the difficulties Ms. De Reyes had in raising her arms, bending at the waist, and maintaining sustained neck flexion would require accommodation from any employer.

[75] Ms. Zhou was Ms. De Reyes's team leader. She testified that Ms. De Reyes was a hard worker and before the accident had the potential to become a team leader. Team leaders earn \$20/hour, and work overtime as well. Ms. Zhou said it is no longer possible for Ms. De Reyes to become a team leader, because she often calls in sick and has to go to the doctor. As team leader, she would be responsible for the jobs and team spirit. With Ms. De Reyes's injuries, it is no longer possible for Ms. De Reyes to take on that role.

[76] Ms. Wong is the packing assistant supervisor at Fresh Direct. She was of the opinion that Ms. De Reyes had the potential to become a team leader prior to the accident. Since the accident, two graders at Fresh Direct have been promoted to team leader. All the team leaders have been with the company for at least five years. Ms. Wong was of the view that Ms. De Reyes no longer had the potential to become team leader.

[77] Ms. Zhou stated that as of the date trial, Ms. De Reyes was on sick leave due to the pain she experiences in her neck, shoulder, and back, and the difficulty she has in lifting her arms. Ms. Zhou testified that Ms. De Reyes had no attendance issues before the accident.

a) Pre-trial loss of earning capacity

[78] After the accident, Ms. De Reyes missed five days of work in 2016, three days in 2017, two days in each of 2018 and 2019, 17 days in 2020, 18 days in 2021, and as of the date of trial in 2022 Ms. De Reyes had missed 58 days in 2022. Ms. De Reyes testified that the majority of these days relate to pain she has experienced as a result of her accident related injuries.

[79] Ms. De Reyes testified that she did still take on some overtime work after the accident, because she needed the money. Overtime was typically one to three extra hours in a shift. However, she said she did not take on as much overtime as she did before the accident. The evidence before me showed that Ms. De Reyes did work a considerable amount of overtime, from 2016 to 2020. From 2017 to 2019 Ms. De

Reyes worked between 40 and 50 overtime shifts each year, and in 2020 she worked 65 overtime shifts. In 2021 her overtime shifts began to decrease, to just over 20 shifts, and in 2022 Ms. De Reyes worked only 8 overtime shifts.

[80] The defendants argue that because Ms. De Reyes continued to take overtime shifts, I should not accept her evidence that her absences from work are related to her injuries. The defendants also point to the fact that in 2018 Ms. De Reyes earned another \$5,000 from a second job, which suggests that her injuries did not interfere with her work. I reject these arguments of the defendants.

[81] Ms. De Reyes testified that in 2018 she attempted to earn some needed extra money by helping with a landscaping business in the summer. She said she worked on weekends for five to six months. She said she was not on her feet all the time. Often she would be seated and doing weeding. She also gathered leaves for others to pick up. She only worked the one season, as she found it was too much for her.

[82] With respect to overtime, the fact that Ms. De Reyes was able to periodically work a couple of extra hours on a shift does not negate the fact that she missed many days of work due to pain from her injuries. As her psychological conditions worsened, so did her absences from work.

[83] Ms. De Reyes argues that I should apply positive contingencies in determining her past loss of earning capacity claim. In particular, Ms. De Reyes argues that I should apply positive contingencies to account for her lost overtime, and her inability to become a team leader at Fresh Direct. I do not agree that there is a likelihood that Ms. De Reyes would have become a team leader in the years before trial, and I decline to apply a contingency in that respect. I agree that a positive contingency is appropriate to account for lost overtime work since 2021.

[84] Ms. De Reyes also submits a negative contingency should be applied to account for some days that were lost for reasons other than her injuries, consistent with Ms. De Reyes's evidence at trial where she allowed that a small number of missed days did not related to her injuries

[85] I am satisfied that, based on the hourly rates for her work established in the evidence, and including statutory vacation pay, the value of the days Ms. De Reyes was absent from work prior to trial is \$13,763. I find that in 2021 and 2022, a positive contingency of approximately 10% ought to be applied to account for lost overtime work. A negative contingency of approximately 10% ought to be applied to account for days where Ms. De Reyes was absent for reasons unrelated to her injuries.

[86] In the result, I find Ms. De Reyes has established a pre-trial loss of earning capacity in the amount of \$13,500.

[87] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 234 income tax must be deducted from this award. If the parties are unable to agree on the appropriate deduction, they may appear back before the Registrar to settle the income tax deduction.

b) Future loss of earning capacity

[88] In *Dhanda v. Thind*, 2022 BCSC 1003 the court summarized the appropriate assessment of future income loss. I adopt this reasoning, as follows:

[54] Three recent decisions from the Court of Appeal emphasize that assessment of future financial losses should expressly adjust for the likelihood of the relevant contingencies established in the evidence: *Dornan v. Silva*, 2021 BCCA 228 paras. 160 – 161; *Rab v. Prescott*, 2021 BCCA 345, para. 47; *Lo v. Vos*, 2021 BCCA 421, paras. 74 – 74.

[55] In *Rab* (para. 47), the Court provides a three-step process to assess these losses:

- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?
- (2) Is there a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff? And
- 3) What is the value of that possible future loss, given the relative likelihood of it occurring?

[56] As a fourth step, the court must assess whether, all things considered, the damage award is fair and reasonable to both parties, *Lo*, para. 117.

[89] On the evidence before me, I am satisfied that Ms. De Reyes will suffer an ongoing loss of future earning capacity. The trend which has been established

between the date of the accident and the date of trial will continue. I am satisfied that the chronic pain and associated psychological conditions experienced by Ms. De Reyes may be stabilized with appropriate treatment, but are unlikely to resolve. The injuries resulting from Ms. De Reyes's accident have resulted in a future loss of capacity.

[90] I am also satisfied that Ms. De Reyes has proven a real and substantial possibility that she will suffer a pecuniary loss as a result of her continuing injuries. While Ms. De Reyes may be able to return to modified duties at Fresh Direct at some point in the future, I find there is a substantial likelihood that she will not return to a fulltime position. In addition, I am satisfied that there was a substantial possibility that Ms. De Reyes would have become a team leader at Fresh Direct in or about 2023 but for the accident. That opportunity is now lost to her as a result of the accident.

[91] In addition to the losses associated with her position at Fresh Direct, I am satisfied that Ms. De Reyes has established functional limitations which reduce her employability for any similar labouring jobs in the processing or manufacturing sectors.

[92] Ms. De Reyes submits that an earnings approach is appropriate in quantifying her future loss of capacity. I agree.

[93] Ms. De Reyes's planned to work full time to age 70 or beyond. She testified that her father worked until he was 70, and she expected that she would also. Given her financial responsibilities for her family, I accept Ms. De Reyes's evidence.

[94] Ms. De Reyes's hourly rate of pay in 2022 was \$16.10/hour, and she expected to work, before overtime, 40 hours per week. This equates to an annual wage of \$33,488, to which must be added statutory vacation pay at 6%, for total annual income of \$35,497.

[95] A team leader position would increase Ms. De Reyes's to \$20/hour, or \$41,600/year. With statutory vacation pay, Ms. De Reyes's annual income as a team leader would be approximately \$44,000.

[96] In addition to her standard rate income, there is a substantial likelihood that Ms. De Reyes would have taken at least 50 overtime shifts each year, of between one to three hours, which is paid at 1.5% of her hourly rate. But for the accident, Ms. De Reyes could have expected to earn an additional \$2,500 to \$3,000 each year in overtime.

[97] Ms. De Reyes's current earning capacity with her injuries, assuming she can work two to three days per week, is approximately 50% of her capacity had she not been injured. If Ms. De Reyes was never promoted to team leader, her loss of earning capacity, on an annual basis, would be \$19,000. If she had been promoted to team leader, her loss of capacity, on an annual basis, would be \$24,000.

[98] I am satisfied that there was a 70% possibility that Ms. De Reyes would have become a team leader, and I assess Ms. De Reyes's future loss of capacity, on an annual basis, at \$22,500. I accept that Ms. De Reyes will work until age 70. Applying the discount rate of 1.5%, the present value of Ms. De Reyes's loss of future earning capacity is \$434,945.

[99] I assess Ms. De Reyes's loss of future earning capacity at \$435,000, which I find is fair and reasonable to both parties.

3. Cost of future care

[100] Any claim for cost of future care must be medically justified, and must be reasonable to both parties: *Milina v. Bartsch*, (1985) 29 B.C.L.R. (2d) 33. The plaintiff is entitled to services, medications and other items of care that are reasonably necessary to preserve and promote her mental and physical health, and which she is likely to access in the future: *Sendher v. Wong*, 2014 BCSC 140, para 192-195.

[101] Ms. Neil conducted a clinical interview and in-home assessment of Ms. De Reyes. She reviewed the expert reports tendered at trial, and provided costing estimates for all future care recommendations.

a) Medications

[102] Both Dr. Misri and Dr. Caillier recommend ongoing medications for mood and pain. Ms. De Reyes submits that, while a number of drugs have been recommended, and must be trialed to find which drugs she can tolerate and obtain relief from, once she and her physicians have settled on the appropriate drugs, she will only be taking one drug into the future for mood, and one for pain. Ms. Neil estimated the annual cost of these medications to be \$1,761. The defendants do not dispute this estimate. Ms. De Reyes submits an additional one time medication of \$1,264 to allow for trials to determine the appropriate drug for her. I accept that Ms. De Reyes will use drugs as recommended by her physicians, and I find the costs advanced by Ms. De Reyes to be reasonable.

[103] Ms. De Reyes submits the cost of drugs should be calculated to age 80. The defendants submit that the cost should be calculated to age 70. I find that it is likely that Ms. De Reyes will require these drugs through to the end of her life, and I accept that age 80 is the appropriate end point for the present value calculation.

b) Procedures

[104] In 2019 Ms. De Reyes received trigger point injections to assist with her shoulder pain. At trial Ms. De Reyes testified she was willing to try trigger point injections again. Dr. Caillier did not make a recommendation for further treatments, but rather indicated that such a recommendation should come from the chronic pain program at St. Paul's Hospital, if it was an option for her. While Dr. Misri also suggested trigger point therapies, she deferred to her colleagues in the area. In the absence of a specific recommendation from a medical professional, I am not satisfied the Ms. De Reyes has established that it is probable that she will require

further trigger point injections. I decline to make an award in relation to this treatment.

c) Therapies – kinesiology and physiotherapy

[105] Dr. Caillier recommended that Ms. De Reyes engage in a regular exercise program, working with a kinesiologist for 18-20 pool based sessions, followed by 18-20 gym based sessions. She then recommended ongoing exercise three to four times per week. Dr. Cailler recommended a discontinuance of regular physiotherapy and massage, as Ms. De Reyes requires a more active program. However, after Ms. De Reyes has an established exercise routine, Dr. Caillier recommended once a month sessions with either a physiotherapist or a massage therapist to manage pain flareups. Ms. De Reyes submits that costs for these therapies should be calculated to age 75.

[106] The defendants agree that Ms. De Reyes is entitled to kinesiology treatments of 38 sessions in the first year, six to eight sessions annually in years two to five, and two sessions annually beginning in year six until age 70. The defendants submit that Ms. De Reyes is entitled to 12 physiotherapy visits per year to age 70. The present value of the kinesiology and physiotherapy treatments, as calculated by the defendants, is \$29,290. I accept the present value for these therapies as presented by the defendants, which are consistent with the recommendations from Dr. Caillier

d) Therapies – psychological

[107] Dr. Misri recommended ongoing psychological treatment for Ms. De Reyes, even though Ms. De Reyes's prognosis was poor. Dr. Misri explained that treatment may improve Ms. De Reyes's quality of life, even though Ms. De Reyes is not expected to fully recover.

[108] Dr. Misri recommended Ms. De Reyes continue to see Dr. Butterfield at the St. Paul's Hospital pain clinic, and that she continue to see a pain psychologist to address all of her psychological conditions. Dr. Misri also recommended that Ms. De Reyes practice mindfulness therapy, attending 10 sessions with a counsellor.

[109] Ms. De Reyes and the defendants agree that the first year one time cost of psychological counselling is \$2,700, and the ongoing annual cost is \$1,275. Ms. De Reyes submits these costs should be calculated to age 75, while the defendants submit the calculation should be done until age 70. I find it probable that Ms. De Reyes will continue to use psychological counselling until age 70.

[110] Ms. Neil estimated the cost of mindfulness therapy, as a one time cost of \$1,575. The defendants do not agree to this therapy. I am satisfied that Ms. De Reyes will benefit from mindfulness therapy, as recommended by Dr. Misri, and I make this award.

e) Equipment

[111] Ms. De Reyes and the defendants agree on the cost of three pieces of equipment recommended by Ms. Neil to assist Ms. De Reyes with her tasks: an anti-fatigue mat, a long handled cleaning tool, and a light weight vacuum. The one time cost of these items is approximately \$120. I agree that Ms. De Reyes will benefit from these pieces of equipment.

f) Health maintenance

[112] An exercise program is recommended by Dr. Caillier, Dr. Misri and Ms. Neil. An annual adult community centre gym pass is \$443.06 in the City of Vancouver, and a senior's pass at age 65 is \$310.14. The defendants submit a one time allowance of \$443 is appropriate. Ms. De Reyes submits an annual cost should be calculated to age 75. I agree that Ms. De Reyes is likely to attend the gym, and that her participation in a recommended exercise program will assist her pain management to age 75. I accept the present value of \$8,728 as submitted by Ms. De Reyes.

g) Home support

[113] Ms. De Reyes has not been able to afford any housekeeping support, but would use a house cleaner if she had access to one. It is clear that many

housekeeping chores exacerbate Ms. De Reyes's symptoms and pain. I am satisfied that the use of housekeeping services will preserve and promote her physical health and, consequently, her mental health.

[114] I am satisfied that Ms. De Reyes will benefit from housekeeping services, and that her need for such services arises out of the injuries she suffered in the accident. The cost range is \$25-\$39/hour. I award a mid-point of \$32/hour, three hours per week, until age 70. The annual cost of such housekeeping services is \$4,992. The present value to age 70 is \$81,626.

h) Summary of future care awards

Item	One time cost	Annual cost	Age at which treatment or service will end	Present value
Medications	\$1,226			\$1,226
Medications		\$1,761	80	\$38,468
Kinesiology/ physiotherapy		Y1 - \$4,560 Y2-5 - \$840 Y6 – 70 - \$180	70	\$29,290
Psychological counseling	\$2,700			\$2,700
Psychological counseling		\$1,275	70	\$20,848
Mindfulness therapy	\$1,575			\$1,575
Equipment	\$120			\$120
Gym pass		\$443	65	\$8,418
Gym pass (after age 65)	\$310			\$310
Housekeeping		\$4,992	70	\$81,626
TOTAL				\$184,581

4. Special damages

[115] The parties have agreed on special damages in relation to treatment and medication expenses, in the amount of \$6,514.80.

C. Conclusion

[116] Ms. De Reyes is awarded the following damages against the defendants, jointly:

Non-pecuniary damages	\$120,000
Past Loss of earning capacity (before tax deduction)	\$13,500
Loss of future earning capacity	\$435,000
Cost of future care	\$184,581
Special damages	\$6,514.80
TOTAL	\$759,595.80

[117] If the parties wish to make submissions on costs, they may do so in writing within 30 days of this judgment. If I receive no submissions on costs, I award costs to Ms. De Reyes at Scale B.

“W.A. Baker J.”