

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kinakin v. Nguyen*,
2023 BCSC 94

Date: 20230120
Docket: M216704
Registry: New Westminster

Between:

Kimberly Kinakin

Plaintiff

And

Minh-Dang Nguyen and Hoang Nguyen

Defendants

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.
July 25-29 and August 19, 2022

Place and Date of Judgment:

New Westminster, B.C.
January 20, 2023

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Introduction

[1] Ms. Kimberly Kinakin was injured in a motor vehicle accident on September 19, 2017, on the Alex Fraser Bridge, Delta, BC. The defendants admit liability for the accident.

[2] Ms. Kinakin claims her injuries from the accident have caused persistent, debilitating hip and lower back pain, harming her personal relationships, precluding the social and recreational activities she enjoyed, and thwarting her repeated attempts to return to work. The diagnosis from her expert medical evidence is myofascial pain and bursitis in her right hip, and a pessimistic prognosis for recovery. She seeks damages of \$700,000.

[3] The defendants submit that Ms. Kinakin suffered only mild soft-tissue injuries in the accident, from which she recovered within six months or less. They submit that her subsequent difficulties are caused by osteoarthritis unrelated to the accident and argue for a nominal award.

[4] For the reasons that follow, I generally accept Ms. Kinakin’s evidence and submissions. She is awarded \$640,880, subject to certain adjustments described below.

The Accident

[5] On September 19, 2017, Ms. Kinakin was driving alone in her car, southbound on the Alex Fraser Bridge. The defendants’ vehicle, merging from the lane on her left, struck the driver’s side of her car pushing it against the guardrail. Their vehicle then struck another car and veered back and struck Ms. Kinakin’s vehicle again, this time at the front, causing her to fear her vehicle might be pushed off the bridge. In the aftermath, her driver’s door would not open and she had to crawl out the passenger window.

[6] Ms. Kinakin testified to feeling immediate pain in her right thigh, right shoulder and both arms. She recalled repeatedly rubbing her right thigh at the scene. Taken

straight to the Surrey Memorial Hospital Emergency, her right leg was x-rayed and she was prescribed pain medication and anti-inflammatories.

[7] A few days later, she visited her family doctor with pain in her right shoulder, right hip area and neck. Her doctor prescribed physiotherapy and suggested she continue with anti-inflammatories. Over the next few weeks, her pain fluctuated but did not resolve.

Before the Accident

Personal life

[8] At the time of the accident, Ms. Kinakin was 45, and she is now 50. She is married to Mr. Roger Tuckey, whom she met in 2015 and married in 2019.

[9] Ms. Kinakin has three sons from her first marriage, aged 19, 24 and 27. Her first husband died in a tragic workplace accident in 2004. His death caused Ms. Kinakin panic attacks and depression, and since 2005 she has been on anti-depressants. Her evidence was that, although she went through dark times after his death, she recovered and returned to functioning well at home and work.

[10] Ms. Kinakin described a strong relationship with her three sons. After her husband's death, she devoted her full care and attention to them. She supported their activities and coached their teams. She volunteered in their ball hockey league, ultimately becoming league president. She took up ball hockey herself, because her sons loved the sport, and she played in the Surrey Central Ball Hockey League with them.

[11] In around 2015, she joined a jogging group in Langley and ran 5 km twice a week. During the summer, she liked to hike. Mr. Tuckey being an avid cyclist, she bought a bike to cycle in the neighbourhood with him.

[12] Mr. Tuckey described Ms. Kinakin, before the accident, as upbeat and full of life. He said she was in great physical health and they enjoyed active, social lives. He described Ms. Kinakin as free of any physical limitations in the years leading up

to the accident. They went running and walking, and played games with their children like baseball, frisbee, swimming and badminton.

[13] Ms. Gina Seabrook, Ms. Kinakin's close friend for 17 years, testified that, before the accident, they socialized, travelled, went to dinner, shopped, and played ball hockey together. They worked together at a wholesale sporting goods store from around 2012 to 2016. Ms. Seabrook described Ms. Kinakin as having no physical limitations before the accident and being creative and passionate socially and at work.

Employment

[14] Ms. Kinakin began working as a teenager, babysitting and washing cars. She testified that, before the accident, there were only two times in her life when she did not work. One was when her youngest son suffered a serious head injury as an infant and she stayed home for a couple of years to care for him while he recovered. The other was after the death of her first husband, when she stayed home for the next few years to be with her children.

[15] Starting at around 15, she worked for 10 years at Eaton's until it went out of business in around 1998. From 1999 to 2008, she worked various jobs such as a receptionist, delivery person, and manager for a newspaper publishing company in Surrey.

[16] From 2010 to 2017, she worked for Wholesale Sports, a hunting, fishing and camping goods store, eventually becoming operations manager. She described the job as physical – building displays, moving stock, unpacking boxes, stocking shelves and pricing products.

[17] Ms. Seabrook testified that, in 2012, Ms. Kinakin got her a job at Wholesale Sports. They worked there together for around four years. Ms. Seabrook also described the job as physical, dealing with products as heavy as barbeque smokers. She credited Ms. Kinakin with teaching her about merchandising and described her as the leader of their group who loved her job and was very good at it.

[18] Mr. Tuckey described her as someone who generally loved her work.

[19] In April 2017, just before the accident, Ms. Kinakin moved to a Bass Pro Shops outlet in Tsawwassen, also specializing in hunting, fishing and camping equipment. She testified that she was reluctant to leave Wholesale Sports, but Bass Pro offered her a “dream job” of visual merchandizer, meaning she was responsible for organizing the store’s merchandise displays and special sale events.

[20] This was another physical job. She put out stock, arranged heavy tables, chairs and product displays, which could be anything from fishing rods to kayaks. She believed she was good at the job and was awarded “associate of the month” just before the accident.

Since the Accident

Symptoms

[21] Ms. Kinakin described near-constant right thigh and hip pain since the accident. The pain runs from her upper thigh, into the hip joint and around the buttock, and sometimes feels like a backache. Her discomfort and associated difficulties have worsened over the years, though she said some days are better than others.

[22] She described her hip pain as aggravated by virtually any physical activity, including walking, bending, lifting, twisting, sitting or standing. It flares from simple, everyday things, like putting on her shoes and tying the shoelaces, and so Mr. Tuckey must help her with such things. She described being unable to sit through dinner or a movie unless she could keep her right leg elevated.

[23] She also described lower back pain that developed soon after the accident. It continues to bother her from time to time, mainly when bending or lifting, but is less of an issue now because she has eliminated most of her activities due to her hip problems.

[24] Ms. Kinakin described occasional headaches that she associates with her symptoms from the accident. She also injured her right thumb and neck in the accident, but they no longer bother her.

[25] Ms. Kinakin deals with her persistent hip pain by spending much of her time lying down, reclining, or in the bath. She uses ice and painkillers and, if something makes the pain worse, she stops. She tried active rehabilitation, physiotherapy and cortisone shots, but they generally provided no relief or made things worse. At one point, cortisone shots provided some relief, but within a few weeks the pain returned which she found demoralizing.

[26] Ms. Kinakin described two bad falls from dragging her right foot when she walks. One was on the outside steps of her home and the other was getting out of the bath. Both were traumatic and made her fearful of walking. In the fall from the bath, she broke her nose and her headaches increased for a time.

[27] Ms. Kinakin described no improvement in her condition since the accident and, if anything, finds her pain and limitations worse now. In the past two years, her mood has worsened due to her pain, and its associated limitations on her life. She has gained weight from inactivity and feels financial stress due to her difficulties working. She has increased the dosage of her anti-depressant medication.

Personal life

[28] Ms. Kinakin testified to being unable to do any of her prior recreational activities. She has experienced the same pattern over and over. After being inactive for a time, she feels better and gives something a try. Very quickly, however, the pain worsens and she must stop and rest and recuperate all over again. She gave examples of this cycle occurring when she tried various jobs (as described in detail below), or physical activities like a recumbent exercise bike, the occasional short jog, or even bowling. She still tries to go for walks but is often limited by pain.

[29] Ms. Kinakin avoids going to restaurants because it is painful to sit unless she can raise her leg on a bench seat. She dislikes visiting friends because of the pain and embarrassment that her disability causes her.

[30] Mr. Tuckey described all aspects of his wife's life having changed. He testified that her right hip pain stays with her constantly. She cannot bend, twist, kneel or reach. To his mind, she has no more recreational activities. Sometimes she will have a good day when can walk 1,000 steps but he sees that as a "chore" and a "landmark". She is often afraid of falling, and could not even walk across a soccer field with him to see a car show because of her right foot dragging on the grass. He sees her as anxious, depressed, unhappy with her weight, and having lost her self-esteem. This is all consistent with Ms. Kinakin's description of her situation.

[31] Ms. Seabrook gave evidence that, when she visits, Ms. Kinakin mostly sits in her recliner and usually does not get up even to say hello. Sometimes Ms. Kinakin will not even come out to see her because of pain. They do not go out like they used to. Ms. Seabrook said Ms. Kinakin was very together before the accident but now seems scattered. Ms. Seabrook thought she seemed even worse the past couple of years.

[32] Ms. Kinakin and Mr. Tuckey described difficulties travelling. They described Mr. Tuckey pushing her in a wheelchair around the West Edmonton Mall and Niagara Falls because she was too sore to walk. She found the experience at Niagara Falls humiliating because their excursion was not wheelchair-friendly and so they were constantly lagging behind their tour group.

[33] They and Ms. Seabrook described a trip with friends to Harrison Hot Springs for Ms. Kinakin's 50th birthday. Ms. Kinakin mostly stayed in her hotel room and was uncomfortable when she tried to join the group for dinner.

[34] Ms. Kinakin described difficulties in her relationship with her sons because of her pain and loss of function. She sees them less than she would like, as going upstairs to their part of the house aggravates her pain. She finds it too difficult to go

out with them, even for coffee at the local Tim Hortons. She worries about having no relationship with any future grandchildren.

[35] Ms. Kinakin sees herself as a burden to her husband. He cancels social plans because she cannot attend due to her pain. She feels their relationship is unfair because he cares for her and does most of the housework. They both described their intimate life as diminished by her pain. She recalls being severely compromised by pain on her wedding day, January 4, 2019.

[36] Ms. Kinakin said her marriage is not the way she would like it and she feels her relationship with her children is now “bizarre”. She feels financially insecure because of a lack of stable employment. She sees herself as lacking health and well-being and often feels there is nothing to wake up for.

Employment

[37] Following the accident, Ms. Kinakin took a few days off work at Bass Pro. On her return, she found the pain too much. She tried reducing to four-hour shifts but that did not help. On October 4, 2017, she left the job because she found the physicality too much and thought she needed time away to heal.

[38] Ms. Kinakin remained off work until the spring of 2018. Since then, she has tried all sorts of jobs but her pain always proved too much. She described trying the following:

- Cloverdale baseball concession stand – for around three months in spring 2018, she worked four-hour shifts. She paid one of her sons to do the lifting and Mr. Tuckey helped on the weekends.
- Acculogix Distribution Service – for around six months, first as merchandiser and then as merchandising supervisor. She took this job because it was supposed to be three days from home and two days in the field, but it turned out to be about four days in the field and one day at home. Her work included lifting bundles of books and magazines, stocking and displaying them. She tried to push through the pain and hired a friend, Judy Jackson, to help with the physical work. Eventually, she could not stand the pain and quit.

- Hallmark Cards – in November 2021, Ms. Kinakin worked one eight-hour shift, displaying cards. The bending and reaching caused so much pain that she could not complete her shift and had difficulty making it home.
- Langley Hyundai – beginning in April 2019, she worked for around a year. Working three-hour shifts, she collected parts from the warehouse and delivered them to various dealerships. She said the job flared her pain and caused some driving anxiety. Eventually, she was laid off due to the Covid-19 pandemic.
- Bosley’s Pet Store – she tried one four-hour shift in August 2019. She was required to bend and twist to clean dog baths and kitty litters and lift bags of dog and cat food. She could not continue due to pain.
- EduPac – she worked for about three months, doing four-hour shifts, packaging school supplies. She hired her son and his friend to help with the physicality. She worked in pain and the job came to an end as it was seasonal.
- Access Families – starting in October 2020, she worked on and off for around a year, supervising children’s visits with their parents. She tried to work around her pain, but was unable to supervise children whose parents wanted to take them out for walks, to play in the park, etc. It was a stressful work environment as parents resented the supervision and sometimes she had to call the police. She left due to her pain and mental stress.
- Kosmetae Cosmetics Academy – she worked one three-day week in January 2021. She could not handle the pain from driving from Surrey to Abbotsford and then working all day.
- Oxford Learning Centre – in April 2021, she worked two-hour shifts for approximately one month. She had to sit on small chair and table and tutor young children. This combined with leaning over the table caused too much pain and she could not continue.

[39] Since April 2022, Ms. Kinakin has worked in Merritt, as a case manager for the Canadian Red Cross.

[40] She testified to being unable to perform many of the duties of the job, including assignments involving walking such as visiting First Nation Band areas or other locations. She finds the desk-work painful, often rests her leg on a chair, and finishes the day in too much pain to do anything outside of work. She takes many unscheduled breaks, is often behind on her work, and cannot participate in team-

building or socializing with co-workers. She expected that, due to her limitations, her contract would not be renewed in November 2022 when it expired.

[41] She described her life in Merritt as “office, bathtub, bed”. She did not return home most weekends because the drive was too much and she needed to rest. Mr. Tuckey visits when he can. She tried to find things for them to do together but has given up. For example, one weekend, she bought tickets to a stock car racing event but they had to leave before it started because sitting on the bleachers was too painful.

[42] Mr. David Shibata, her Red Cross supervisor, testified to her struggles at work. He described helping her with a chair to rest her leg on; putting a printer right beside her desk so she does not have to walk far; her numerous unscheduled breaks throughout the day; and, his assistance with any part of the job requiring her to walk.

[43] He testified that Ms. Kinakin turned down most invitations to socialize and described her asking him to use her bank card to buy ear phones at a store across the street so she did not have to walk. He confirmed her evidence that the number of case managers is expected to reduce when their contracts were up for renewal in November 2022.

Expert Evidence

Orthopaedics

[44] Ms. Kinakin relied on the expert evidence of Dr. Gilbert, an orthopedic surgeon with a sub-specialty in orthopedic disorders of the hips and related areas. He examined Ms. Kinakin on October 25, 2021 and wrote a report dated December 16, 2021.

[45] Dr. Gilbert found stiffness in her hip for motion, inflexion, internal rotation, external rotation, and abduction. His diagnosis for the difficulties in her right hip was myofascial pain and damage to the muscle and trochanteric bursitis. He also diagnosed injury to the muscles and ligaments of her low back.

[46] Having reviewed her history, and the relationship between her accident and the pain in her right hip, neck, lower back, and left thumb, he concluded that, temporally, the pain in these regions were all related to the accident and, but for the accident, “probably would not have occurred”.

[47] His prognosis was: “It is now over 4 years from the time of the accident, and it is probable that her pain will persist in the future. The overall prognosis for significant further clinical improvement at this point in time is guarded.”

[48] In cross-examination, Dr. Gilbert disagreed with the diagnosis of osteoarthritis of the right hip from the defendants’ expert, Dr. Tansey. In his opinion, it was not supported by her imaging or reports, the results of the freezing test she had undergone, or her history and examination. He testified that, in his view, the reference to osteoarthritis in the records of Dr. Irfan Abdullah (who did not testify) was internally inconsistent, as it said that the space in her hip joint was both preserved but also narrowing.

[49] Dr Tansey, the defendant’s orthopedic surgeon, saw Ms. Kinakin on May 18, 2021 and wrote a report of August 5, 2021. In his view, the accident caused her symptoms for a few weeks, but after that, her difficulties were caused not by the force of the accident but by degeneration from osteoarthritis that had developed in her right hip.

[50] His report says:

I am of the opinion that she sustained uncomplicated myofascial strain type injuries in the accident from which she has made a recovery and that her current complaints are related to degenerative disease within the hip and hip musculature.

As I found no objective evidence of any ongoing impairment in relation to injuries in the accident I have no recommendations with regard to future treatment. I would recommend that she return to all of her pre-accident activities including her work activities and her pre-recreational activities without limitation.

[51] Dr. Tansey’s report opined that the “mechanism of the accident” is inconsistent with her hip injury. In that regard, his report said:

I would take issue with him on [whether the hip injury could be caused by the collision]. In particular I note that although she had a side impact this was to the left side of the car which would result in her body moving towards the left side of the car and therefore if the mechanism of the accident had caused an injury to her hip I would expect it to cause an injury to her left hip and not her right hip. Secondly there is no indication from either her description of the accident or the available documentation, including all the photographs of the damaged vehicles, to indicate any form of front-end collision to her vehicle. I am therefore of the opinion that the mechanism of the accident in question is not consistent with the injury she describes. She did have a subsequent slip and fall injury in the bathroom shortly after this which could also have caused injuries such as those described by Dr. Faraday.

[52] Dr. Tansey testified that he based this opinion on his experience correlating injuries to accidents over the years. He did not, however, provide any medical justification or explanation for this opinion.

Functional capacity

[53] Ms. Louise Craig, physiotherapist and certified work capacity evaluator, performed a work capacity evaluation on January 4, 2022, and wrote a report of January 7, 2022.

[54] In Ms. Craig's opinion, Ms. Kinakin was "limited by pain to restricted sedentary activity". Her conclusion regarding employability was pessimistic:

Ms. Kinakin demonstrates limitations that limit her ability to work at sedentary, light and more physically demanding jobs. Occupations with need for sedentary to light physical strength demands (although more in keeping with her current physical capacity) will require accommodation allowing for frequent positional and task changes, regular stretching, avoidance or minimized exposure to some tasks and proper ergonomics to best manage symptom aggravation. As such, the scope of occupations once viable from a physical perspective for Ms. Kinakin is reduced, leaving her with reduced competitive employability.

[55] Regarding the future, her report says that "Ms. Kinakin is likely at or near maximum physical rehabilitation and the gains she will make will likely be small going forward".

[56] The defendants' functional capacity expert, Mr. Padvaiskas, did not examine Ms. Kinakin. He wrote a report confined to opinions about possible limitations in

Ms. Craig's method and conclusions. He was forthright about the drawbacks of not having interviewed and tested her himself.

[57] As I understood his report and evidence, his key queries were whether Ms. Craig should have provided more: (a) scrutiny of the reliability of pain reports and self-limiting or declining of testing, by using breaks and alternative tests; and (b) assessment of the apparent discrepancy between the jobs Ms. Kinakin had done since the accident and her inability to perform clinical testing.

[58] In my view, the evidence at trial addressed both concerns. On hearing the evidence from Ms. Kinakin and Ms. Craig regarding her pain reports during testing, I find Ms. Craig ceased testing because of understandable concerns about Ms. Kinakin's description of severe pain and difficulty. Regarding the possible discrepancy between job history and poor functional performance in testing, as indicated below, I accept Ms. Kinakin's evidence about the pain she has experienced at the different jobs she has tried, her numerous adjustments to try to manage it, and her determination to find a job she can do despite her difficulties.

Credibility

[59] *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, summarizes the approach to credibility assessment:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[60] Generally speaking, I accept Ms. Kinakin's evidence. Her description of her history and circumstances was clear, reasonable and consistent, including in cross-examination. She volunteered concessions such as resolution of the difficulties with her shoulder, arm and thumb. The striking number of jobs she has tried in vain since the accident support her description of her pain as too much to bear.

[61] Her evidence throughout included persuasive details about her difficulties, such as: her wheelchair struggles at the West Edmonton Mall and Niagara Falls; when delivering car parts, pushing the boxes along the loading dock with her foot, rather than bending to pick them up; embarrassment when visiting friends because of ruining so many nights and then leaving early and suffering in pain afterwards; and her avoidance of restaurants because it is too painful unless she can rest her leg on a bench-seat.

[62] Ms. Kinakin's description of her circumstances was supported by Mr. Tuckey. Their chronology differed in places, and at times each was unsure about the timing of certain things, such as Ms. Kinakin's two falls. But this suggested they were recounting what they recalled rather than giving self-serving or rehearsed evidence.

[63] Ms. Kinakin's version of events regarding her pain and limitations was also supported by Ms. Seabrook and Mr. Shibata. Nothing in their testimony suggested any lack of reliability or credibility.

[64] Also of note is that Dr. Tansey was instructed by defence counsel to describe any "Waddell signs" in his interview of Ms. Kinakin, referring to signs of malingering or inconsistencies between self-reporting and medical observations. Dr. Tansey testified that, if he had seen such signs, he would have mentioned them in his report, but he did not. In cross-examination, he agreed that he found her a good and reliable historian.

[65] The defendants critiqued Ms. Kinakin's credibility by arguing that her clinical records right after the accident mentioned right thigh pain, not right hip pain. I accept Ms. Kinakin's explanation that she was referring to pain in the upper leg area that

included the hip. Dr. Gilbert supported this, explaining that, in his experience, patients often struggle to describe exactly where pain is located and that often hip pain can present and be described as thigh pain. Also, her clinical records of September 28, 2017, nine days after the accident, refer to pain in the right sacroiliac, or pelvis, region.

[66] The defendants argued that Ms. Kinakin's recovery from the accident was indicated by her clinical records from April 4 and 11, 2018, suggesting no pain in March, ability to carry on with daily living, and even to try jogging.

[67] I do not accept this argument. The April 11, 2018 record also indicates Ms. Kinakin reporting that her back is "... killing me. This is the same pain as she had from the MVA."

[68] I accept Ms. Kinakin's evidence in cross-examination that, at the time, and as indicated in the clinical records, she had been resting at home and so had some improvement. As a result, she tried jogging and took the job at the concession stand. This quickly proved too much for her injuries. She could not do the lifting required, hired her son to help, and her back became very sore.

[69] The defendants' main attack on Ms. Kinakin's credibility was the evidence of three former managers who denied seeing her struggle at work after the accident.

[70] First was Mr. John Donnelly, the assistant general manager at Bass Pro, who testified to seeing no difference in Ms. Kinakin at work after the accident. Nor did he recall her mentioning any pain or difficulties.

[71] Second was Mr. Ernie Hawkins, the district manager for sales and merchandising at Acculogix, and the plaintiff's manager when she worked there. Mr. Hawkins testified that she worked at Acculogix from May to October 2018 as a merchandiser and then as a merchandising supervisor. He said she never mentioned limitations for physical work and he noticed no such limitations.

[72] Third was Mr. Gabriel Kovacs, the plaintiff's supervisor/manager at Langley Hyundai. He testified that she started there in April 2019 and was still there in December 2019 when he left. He described her duties as a parts driver: picking up car parts from the warehouse, bringing them back to the dealership, taking them off of the van, driving them to customers who had purchased them, unloading parts at those companies, lifting different boxes of different weights. He said that, depending on the day, she worked three to eight hours and on many occasions worked eight hours. He testified that the only difficulty he observed was lifting heavy items, like transmissions or hood panels or quarter panels. He testified that there were people available to help with these heavy items.

[73] It is certainly troubling that all three of these independent witnesses denied observing Ms. Kinakin's physical difficulties at work. I accept their evidence to the extent of finding there were times at these jobs when Ms. Kinakin did her work without demonstrating pain or difficulties.

[74] Overall, however, I find that Ms. Kinakin's general reliability and credibility are not undermined by this evidence. I do so, firstly, because of what I have said about the general credibility of her evidence, and that of Mr. Tuckey, Ms. Seabrook and Mr. Shibata.

[75] Secondly, in my view, her extensive record of attempted employment since the accident indicates someone who is highly motivated to return to work and a more normal life, has made repeated, sincere efforts to do so, but has been unable to physically sustain any of the jobs because of the pain she described. I see this as the most plausible explanation of her work history since the accident.

[76] In final argument, the defence argued that her post-accident work record could be explained by a preference for short-term jobs, and that her pre-accident work history demonstrated the same thing. I find that implausible and do not accept it. It is also contrary to her work history pre-accident. As pointed out by her counsel in reply, before the accident she worked at Eaton's for 11 years, Wholesale Sports for seven years, and Black Press for two years.

[77] Thirdly, I accept Ms. Kinakin's evidence in response to the evidence of these witnesses. I accept her evidence that she was generally reluctant for employers to see the extent of her problems because she felt that would harm her prospects. I accept her evidence that she did not disclose to Mr. Hawkins that one of the reasons she hired her friend was to do the physical work that she could not.

[78] I also accept that she has better recall of the details of her work history than the managers. I accept her evidence that Mr. Kovacs was incorrect that she often worked eight-hour shifts, and that he may have been thinking of the previous employee who did so. I also accept her evidence that his description of seeing her unload parts without difficulty could have involved the many light boxes of small body parts such as wipers, screws, etc.

[79] The defendants also called Mr. Paul Burgoyne, Ms. Kinakin's manager at Wholesale Sports before the accident. He testified to Ms. Kinakin's employment records indicating many absences from the store, which he thought were for mental health issues, and that, from his memory, she worked part-time except for her last two years after she was promoted to merchandising manager.

[80] I accept Ms. Kinakin's evidence that her full-time years at Wholesale Sports were closer to five years. My impression of his evidence was that Mr. Burgoyne was working from general recollections rather than records or specific memories. Regarding her absences from work, I accept Ms. Kinakin's explanation that Mr. Burgoyne's recollection of frequent absences from the office for depression overlooked that most of her absences had nothing to do with depression, such as three weeks away with a urinary tract issue and frequent business travel to their other stores in Prince George, Kelowna, Kamloops, Edmonton, and Grand Prairie.

Key Findings

[81] Though Ms. Kinakin struggled with depression and anxiety following her first husband's death in 2005, she sought help, took medication, and carried on with her personal, work and social life.

[82] In the years leading up to the accident, Ms. Kinakin was healthy, active, social and hardworking. She enjoyed sports and exercise, and physical activity was one of the ways she engaged with her husband, sons and friends. She had no notable physical limitations, and no history of right hip or lower back pain. These problems developed immediately after the accident and have persisted ever since.

[83] From 2008 to 2017, she was happy at work and enjoyed relatively physical jobs at Black Press, Wholesale Sports and Bass Pro Shops. She did well at Wholesale Sports and moved to Bass Pro because she coveted the merchandise display job they offered her. Though only there five or six months, she was off to a good start including quickly receiving employee of the month.

[84] I accept Ms. Kinakin's evidence, supported by the testimony of her husband, friend and co-worker, that ever since the accident she has suffered persistent and debilitating right hip pain, and occasional lower back pain. Her pain flares from virtually any activity, including walking, sitting, lifting, twisting or bending, and she spends much of her time resting and recuperating.

[85] I find that the accident caused Ms. Kinakin's persistent hip and back injuries and her associated difficulties since. The chronology of events strongly supports this finding as does Dr. Gilbert's opinion regarding causation.

[86] While not questioning Dr. Tansey's expertise in these areas, I accept Dr. Gilbert's diagnosis and prognosis because they correspond with the factual findings I have made about her constant and significant hip pain ever since the accident. I accept Dr. Gilbert's prognosis that "[i]t is now over 4 years from the time of this accident, and it is probable that her pain will persist in the future. The overall prognosis for significant further clinical improvement at this point in time is guarded."

[87] I accept Dr. Gilbert's opinion that Ms. Kinakin's hip problems are not caused by osteoarthritis. Given the factual findings about Ms. Kinakin's persistent pain and disability since the accident, and for the reason given by Dr. Gilbert, I reject Dr. Tansey's view that she had "uncomplicated soft tissue injuries from which she

has made a full recovery” within a matter of weeks and then later developed degenerative disease within the hip unrelated to the accident. I also do not accept Dr. Tansey’s opinion that she should return to all pre-accident work and activities without limitations. This is inconsistent with the findings I have made about the extent of her pain and its effect on her functioning. Finally, I do not accept Dr. Tansey’s opinion that the “mechanism of the accident”, i.e., being struck from the left side, would not be expected to injure her right hip. I find there was no medical evidence offered in support of this opinion and, in my view, it suggested a lack of impartiality.

[88] I accept the limits on her functioning reported by Ms. Craig, as described above. I also accept Dr. Gilbert and Ms. Craig’s pessimistic opinions about the likelihood of significant improvement, and their opinions that Ms. Kinakin is likely to suffer long-term symptoms and restrictions that will harm employment opportunities. Dr. Gilbert put it this way:

Ms. Kinakin will have difficulty with full-time work involving repetitive lifting, pulling or pushing. She would have difficulty with work in the future that involves sitting or standing for prolonged periods of time. She would probably need a job that allows her to change position frequently, and that allows her to perform minimal to light physical activity. Her limitations for work in the future would be based upon her subjective level of pain.

[89] I also accept the following summary, from the plaintiff’s final submissions, as an accurate description of Ms. Kinakin’s employment prospects:

With her multiple limitations, the only employment Ms. Kinakin could hope to sustain would require an employer with near limitless empathy and understanding for her condition; who allows Ms. Kinakin to work flexible hours, take multiple unscheduled breaks, take help from co-workers, to walk, sit, or stand as needed, to leave early on days when pain flares, or to come in late on days where Ms. Kinakin wakes up with pain. Who has work that is not physically demanding, but that does not involve using a computer for too long. It is difficult to imagine such an employer, or such a job. But even if such a job and employer exist, what competitive advantage would Ms. Kinakin have over an able-bodied potential employee seeking the same position?

[90] Her marriage has suffered. There is little she and her husband can do together. Mr. Tuckey runs the household almost entirely. Their intimacy is reduced.

[91] Ms. Kinakin has difficulty relating to her sons because of the limitations she faces. Her efforts to socialize are undermined by pain.

[92] She cannot perform any of her pre-accident recreational activities, such as biking or jogging. She suffered two bad falls due to her hip pain causing her to drag her right foot and is anxious about future falls. Her depression worsened in the last couple of years and she doubled the dosage of her medication. Due to her inability to be active or exercise, she has gained weight which hurts her self-esteem.

[93] As a result of her pain and loss of functioning since the accident, virtually all aspects of Ms. Kinakin's quality of life have been diminished. She often does not see the point of getting up in the morning.

Damages

Pain and suffering

[94] Damages for pain and suffering must be fair and reasonable between the parties and measured against awards made in comparable cases.

[95] Under the leading case of *Stapley v. Hejslet*, 2006 BCCA 34, paras. 45-46, leave to appeal ref'd [2006] S.C.C.A. No. 100, the key considerations include: age; nature of the injury; severity and duration of pain and disability; emotional suffering; and impairment of life, lifestyle, relationships, and physical and mental abilities.

[96] Ms. Kinakin seeks \$150,000-\$170,000. The defendants argue that, if the Court accepts that Ms. Kinakin's injuries from the accident are continuing, then an award of \$70,000 to \$100,000 is appropriate.

[97] The plaintiff relies on three cases all of which I find to be highly similar in terms of the *Stapley* considerations.

[98] First is an award of \$150,000 in *Cox v. Craig*, 2022 BCSC 53. It is a similar situation to this case in terms of age, injuries, prognosis, and loss of well-being and quality of life. Mr. Cox was 43 at the time of the accident. His injuries caused him to drink excessively and led to his divorce. He was an operations manager for a

moving company and was able to keep his job because of an employer who accommodated his inability to do physical tasks or come to work full-time.

[99] Justice Choi explained her award this way:

[65] Mr. Cox is a 47-year-old man. Before the accident, he worked hard at his physically demanding job, enjoyed being active in his free time and had a good relationship with his wife and daughters. After the accident, he experiences chronic pain constantly. This has impacted his life in several ways, from work to home life. He is no longer physically active and he struggles with the physical demands of his job. The accident impacted his relationship with his wife, and he believes the accident is responsible for his divorce. It has also caused him to experience depression, although I note that his mental health appears to be improving and Dr. Dahi thinks he can make a full recovery in that respect.

...

[72] For the reasons that follow, an award of \$150,000 in non-pecuniary damages and housekeeping is in keeping with the cases cited by Mr. Cox. He used to be a critical employee, one whose organizational skills and energy were key to Mr. Kilborn. Mr. Cox found purpose in performing that job well. After the accident, his relationship with his wife deteriorated. They could not sleep in the same bed because he of his fitful sleep and nightmares. Their intimate relationship, which was previously good, suffered. He used to be an engaged and involved father, which included biking, swimming and playing basketball with his daughters. His former spouse Leanne Cox gave evidence that the two of them parented their daughters together, taking turns with the tasks. After the accident, Mr. Cox was angry, depressed, and frustrated by the daily pain, fatigue and lack of progress with his recovery. He could only bicycle for 15 minutes due to soreness. I accept Ms. Cox's evidence.

[73] The severity and duration of Mr. Cox injuries are significant and likely to continue indefinitely. He suffers from substantial impairment of family and social relationships and a loss of lifestyle. While he has remained employed, he has lost much of his function and value as an employee.

[100] Second is *Ratelle v. Barton*, 2022 BCSC 22, which also awarded \$150,000 with a 25% reduction for pre-existing conditions. The injuries, detriment to well-being and lifestyle, and prognosis are again highly similar to this case (see paras. 196-202). The material differences were that Mr. Ratelle was only 39 when injured, and his persistent injuries were more extensive, being to his shoulder, wrist, back, ribs, hip, ankle, and his knee which had had undergone one surgery and might require more.

[101] Third is *Pike v. Kasiri*, 2016 BCSC 555, the plaintiff received \$190,000 with a 25% deduction for the possibility his back and hip problems might have developed anyway. Again, this is a similar case in terms of most of the *Stapley* factors, including the type of injury and effect on the plaintiff's work, social and personal life, and prognosis (see paras 310-31). One material difference is that the plaintiff was 33 at the time of the accident, 14 years younger than Ms. Kinakin.

[102] The defendants relied on cases, although similar in respect of many of the *Stapley* factors, represent less serious harm, impairment and loss of lifestyle and well-being than what has occurred to Ms. Kinakin.

[103] In *Tait v. Soda*, 2020 BCSC 638, Ms. Tait was awarded \$110,000. In my view, important differences are that, despite her serious chronic pain, Ms. Tait was able to: work two days per week as a hostess in a pub; do daily yoga and rehabilitation exercises; and go out and socialize occasionally though much less frequently than before.

[104] The defendants rely on *Lucas v. Canniff*, 2021 BCSC 1014. In that case, the plaintiff was awarded \$100,000. The important differences from our situation are that she was able to: work 32 hours per week as assistant manager of a farm in Langley; participate in social activities, though not as much as before; and complete most household tasks. Also, her injuries had not impaired her relationship with her husband or children.

[105] Finally, they rely on *Uppal v. Page*, 2021 BCSC 492, where the plaintiff was awarded \$80,000. Again, although similar to our situation, there are important differences in the severity and effect of the injuries. Most importantly, Dr. Uppal had missed no work from her physically demanding chiropractic practice. She exercised with a trainer, and had vacationed extensively, although without the physical activities she used to enjoy.

[106] Overall, guided by these cases, I find \$140,000 to be the fair and reasonable award. I find the overall situation in this case similar to *Cox* and *Ratelle*. The

circumstances for Mr. Cox appear somewhat worse in that the accident caused alcohol issues and a divorce, but his functioning may have been better than Ms. Kiniakin's as he was able to keep working at his job. In *Ratelle*, the plaintiff was eight years younger, injured in more parts of his body, and required knee surgery. In my view however, those physical differences are diminished by the fact that, although Ms. Kinakin's injuries are more localized, her pain and loss of functioning and quality of life are severe.

Past wages

[107] Ms. Kinakin seeks \$87,080, as the additional amount she would have earned, without the accident, working full-time at Bass Pro until trial.

[108] Mr. Darren Benning, economist from PETA Consultants Ltd., calculated this loss for the plaintiff, using the \$18/hour she earned at Bass Pro, and a 40-hour week, and subtracting from this her actual employment income since the accident.

[109] The defendants argue for \$15,629, being 6 months of her 2014 income (her 2015-2016 income being unavailable), minus a contingency deduction of 20%, leaving a total of \$12,503.20.

[110] In my view, if Ms. Kinakin had not been injured, the most likely scenario was continued full-time work at Bass Pro well into the future. I accept that she enjoyed the job and was doing well at it, as indicated by her quickly receiving employee of the month. I see nothing in the evidence to suggest she would have left and, even if she had, her pre-accident work history suggests she would have done so only to move to something comparable.

[111] I find nothing in the evidence to suggest that the negative and positive contingencies are not roughly offsetting. In other words, in my view it is roughly equally likely that her income might have fallen, due to unemployment or her own choice, or might have risen through raises or some better opportunity.

[112] I therefore accept the plaintiff's approach and calculation of \$87,080 as fair and reasonable, with two adjustments.

[113] First, as I understood the evidence, Mr. Benning's \$87,080 needs to be adjusted by subtracting Ms. Kinakin's earnings in 2022 before trial, as those employment records were not provided to Mr. Benning.

[114] Second, Mr. Donnelly's evidence, from the Bass Pro records, was that her average hours per week for the six weeks before the accident were 34 hours (including holiday and sick pay) as opposed to a 40-hour work week. This was not challenged by the plaintiff in cross-examination and so the calculation of her past wage loss should be adjusted to reflect this 34-hour work week.

Future earning capacity

[115] Ms. Kinakin seeks \$313,701, representing 75% of the present value of the income stream she would have earned at Bass Pro, working to age 67.

[116] The defendants say no award is warranted, based on Dr. Tansey's opinion of full recovery. In the alternative, if an award is made, it should be \$63,648, which they say is the equivalent of two years of Ms. Kinakin's 2014 income (as information was not provided for 2015 or 2016), with a 20% deduction, leaving a total of \$50,918.40

[117] In its trio of 2021 decisions, the Court of Appeal emphasized that assessment of future financial losses should 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. 71-74.

[118] *Rab* (para. 47) provides a three-step process to assess these losses:

- (1) Does the evidence disclose a potential future event that could lead to a loss of capacity?
- (2) Does the evidence disclose a real and substantial possibility that the future event will cause a financial loss to the plaintiff? and

(3) What is the value of that possible future loss, given the relative likelihood of it occurring?

[119] 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.

[120] I find that, without the accident, Ms. Kinakin would likely have worked full-time for many years. Her pre-accident work history demonstrated that sort of ethic throughout her life. I accept her evidence of lacking substantial savings for retirement and that, before the accident, she planned on working for as long as she was physically able to. I accept her evidence that her expectation was that she could work until 70. Mr. Tuckey's testified that his annual income is approximately \$60,000, which also suggests Ms. Kinakin would have remained in the workforce.

[121] The findings above about Ms. Kinakin's condition and prognosis, including my acceptance of the opinions of Dr. Gilbert and Ms. Craig, indicate that the injuries from the accident are virtually certain to cause continued loss of capacity and resulting financial loss.

[122] In that regard, I find Ms. Kinakin's current job for the Red Cross unsustainable. It is unreasonable to expect her to continue. She is in too much pain to travel home from Merritt on the weekends. When her husband visits they do almost nothing but sit in the hotel room so she can rest and recover. She cannot perform many of the job's requirements, sits with her leg up, and takes numerous breaks throughout the day. She cannot participate in team-building meetings or socialize with co-workers.

[123] In my view, it is very likely that the Red Cross will decide it must let her go, if not in November then sometime in the near future. Even if they do not, in my view it is unreasonable to expect her to keep this job up for much longer.

[124] I find it unlikely that Ms. Kinakin will significantly reduce her future losses by being able to work despite her injuries. Her work history since the accident, despite her determined and varied efforts, supports that conclusion. In my view, unless she

greatly improves, she will be unable to work much in the future other than for short, intermittent stretches. I accept Dr. Gilbert's opinion that such significant improvement is unlikely given the amount of time that has passed since the accident.

[125] Mr. Benning estimated Ms. Kinakin's future "without accident" earnings to be \$418,269. His key assumptions were that she would have worked at Bass Pro (or equivalent), 40 hours per week at \$18 per hour (based on her Bass Pro employment records), and would not work past 67.

[126] His calculation is adjusted for inflation and deducts for negative market contingencies – such as choosing to work part-time or retire, or being forced by market conditions to retire early or work less – based on broad statistical averages for females of her age and education. He explained that, when the assumption of working until 67 is adjusted for these negative contingencies, it results in an expected retirement age corresponding with this with data.

[127] I accept this income approach as the most suitable method of estimating Ms. Kinakin's "without accident" income. I have found Bass Pro, or something similar, to be Ms. Kinakin's most likely "without accident" long-term employment scenario. Given her consistent work history pre-accident, and substantial efforts to work despite her pain post-accident, I find that well supported in the evidence.

[128] In my view, this makes the income approach, as applied by Mr. Benning, a reasonable measure of her "without accident" earnings, apart from needing to reduce the Bass Pro weekly hours from 40 to 34, as described above.

[129] Mr. Benning did not estimate her future "with accident" earnings, as her residual earning capacity was unknown to him. In my view, the plaintiff's suggested approach of a 25% reduction to her "without accident" earnings is a fair and reasonable estimate of the likelihood of her ability to reduce these future losses, given the pessimistic findings I have made about the likelihood of her ability to do so.

[130] Ms. Kinakin is therefore awarded \$313,700, on the basis sought by the plaintiff, to be adjusted by reducing the calculation of the future income stream from Bass Pro from 40 hours per week to 34.

Housekeeping capacity

[131] Under this category of damages, Ms. Kinakin seeks \$25,100 for past loss and \$101,519 for future loss, based on requiring assistance at \$25/hour, four hours per week, 51 weeks per year.

[132] The defendants say any such award should be dealt with in non-pecuniary damages.

[133] In *Kim v. Lin*, 2018 BCCA 77, Chief Justice Bauman explained that a pecuniary damage award is appropriate where the housework difficulties reflect a loss of capacity as opposed to a loss of amenity or increased pain and suffering:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[134] Ms. Kinakin and Mr. Tuckey testified that, before the accident, she did most of the housework while he did most of the cooking and worked on renovating the house. They shared the gardening.

[135] Since the accident, Mr. Tuckey has taken over most of the housework. He does all the cooking, most of the cleaning and most of the grocery shopping. Ms. Kinakin tries her best to help him. Unable to do tasks that need bending, twisting, lifting or standing for long, they described her unloading the top row of the dishwasher and dusting counter-tops.

[136] Ms. Seabrook gave evidence that, during her visits to Ms. Kinakin's house, she noticed that Ms. Kinakin does not do much housework but just sits in her recliner. During dinners, Mr. Tuckey brings her plate to her and she does not get up to serve herself dinner.

[137] Ms. Craig's report says: "based on findings of this assessment Ms. Kinakin does not meet the full physical demands for regular household cleaning, or seasonal household cleaning and requires assistance". Dr. Gilbert's report says that "Her limitations for performing household chores will probably continue into the future."

[138] Given my findings about Ms. Kinakin's extensive injuries and loss of functioning, in my view she has suffered a loss of capacity for housekeeping warranting a pecuniary award.

[139] I accept as reasonable the plaintiff's suggested award of \$25/hour (based on *Amini v. Mondragon*, 2014 BCSC 1590, and the cases cited by plaintiff's counsel that have followed it), at four hours per week for 51 weeks a year.

[140] For past housekeeping this comes to (round numbers) \$25,000.

[141] For future housekeeping, to age 75, and a discount rate of 2%, it comes to (round numbers) \$100,000. In my view, this should be subject to the same 25% discount as her future earning capacity, to reflect the possibility that her condition might improve enough that she can perform more of these tasks. She is awarded \$75,000.

Conclusion

[142] Ms. Kinakin is awarded \$640,880, to be adjusted, as follows:

- a) Pain and suffering: \$140,000;
- b) Past wage loss: \$87,080, to be adjusted for her actual earnings in 2022, and a 34-hour work week at Bass Pro;

- c) Future earning capacity loss: \$313,700, to be adjusted for a 34-hour work week at Bass Pro; and
- d) Housekeeping capacity loss: \$25,100 for past loss and \$75,000 for future loss.

[143] If counsel cannot reach agreement on the adjustments, they have leave to address these issues further.

[144] By consent, Ms. Kinakin is awarded special damages of \$1,408.80 and granted an order that her care costs under Part 7 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, shall continue for so long as medically advisable.

[145] Subject to the parties wishing to make further submissions on costs, Ms. Kinakin is awarded costs of the action at Scale B.

“Coval J.”