

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Starchuk v. Hannig*,
2016 BCSC 1655

Date: 20160908
Docket: M156452
Registry: New Westminster

Between:

Elaine Margaret Starchuk

Plaintiff

And

Helmutt Hannig and Lieselotte Hannig

Defendants

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for Plaintiff:

P. Kent-Snowsell

Counsel for Defendant:

M. Beharry

Place and Date of Trial:

New Westminster, B.C.
March 14 - 18, 2016
March 21 - 22, 2016

Place and Date of Judgment:

New Westminster, B.C.
September 8, 2016

[1] Ms. Starchuk was injured on May 13, 2013, at a deli in Langley, British Columbia. She was a customer standing in the store when a vehicle driven by the defendant, Helmut Hannig, crashed into it. Ms. Starchuk was pushed into the wall of the deli, breaking the drywall.

[2] Liability is admitted.

[3] Ms. Starchuk seeks:

1. Damages for pain and suffering;
2. Past loss of earning capacity;
3. Loss of future earning capacity;
4. Cost of future care; and
5. Special damages.

Issues

[4] The primary issues in this case are the nature and extent of Mr. Starchuk's injuries and the damages owed for them. The plaintiff says that she has suffered a number of injuries which include: soft tissue injuries to her neck, shoulders and upper limbs, back, chest, knees and right foot; chronic mechanical neck and shoulder as well as persistent forearm and wrist pain; a capsular tear of her left breast implant requiring bilateral revision surgery which resulted in postoperative pain and permanent loss of sensation; double crush neuropathic pain and bilateral carpal tunnel syndrome as well as thoracic outlet syndrome; a concussion or mild traumatic brain injury; an adjustment disorder, posttraumatic stress disorder and aggravated insomnia; headaches; and issues with concentration, memory and cognition. She says that these conditions have not resolved, are chronic, and will continue into the future. She says that as a result her business applying and teaching lash extension technology has been affected, and that she can no longer act as a lash technician or teach or demonstrate the techniques involved. She says that she also requires assistance with her household tasks.

[5] The plaintiff seeks an award as follows:

1. Non-pecuniary damages of \$175,000;
2. Past and future loss of capacity of \$300,000;
3. Future care costs of \$209,000;
4. Loss of housekeeping capacity of \$30,000;
5. An in trust award for her mother and sister of \$20,000;
6. Specials of \$8,418.70.

[6] The defence agrees to the amount of special damages. Otherwise, the defence disputes each amount claimed.

[7] With respect to non-pecuniary damages, the defence acknowledges that the plaintiff suffered soft tissue injuries to her neck and shoulders/upper back as well as damage to her chest and breast implants as a result of the motor vehicle accident. However, the defence submits that the motor vehicle accident did not cause the plaintiff's hand-related complaints of numbness, tingling, weakness and pain. The defence suggests that \$75,000 is an appropriate award for general damages.

[8] The defence also argues that the plaintiff has suffered either no past wage loss or a relatively small loss. The defence says that the plaintiff has not met the burden with respect to loss of future earning capacity or, alternatively, the award should be relatively minor.

[9] The defence argues as well that the cost of future care suggested by the plaintiff is excessive and should not exceed \$15,000. The defence also argues that the plaintiff is not entitled to an award for loss of housekeeping capacity.

[10] With respect to the care she received from her mother and sister, the defence says this care was not over-and-above what would be expected in a family relationship and no award should be made.

The Lay Evidence

[11] The plaintiff gave evidence, as did her mother Sandra Leitch, her sister, Yvette Starchuk and Ms. Chiang, one of Ms. Starchuk's trainers in her business.

Elaine Starchuk

[12] Ms. Starchuk testified that when she was approximately 18 years old she started modelling. She first had breast augmentation surgery in the 1980s. She had modelled for Penthouse and Playboy and personal appearance was very important to her.

[13] Physical fitness was also important to her. In 1999 she was engaged in competitive bodybuilding. In the years preceding the accident she attended the gym, became very proficient in yoga, and was considering becoming a personal instructor. She was able to lift her body perpendicular to the ground. These activities continued up to the time of the accident, after she developed ovarian cancer and received treatment.

[14] In the early 2000's she developed ovarian cancer and received treatment.

[15] Before the accident she was very strong and active and had no complaints with her hands, wrists, neck or back. She lived independently in a small house on her parent's property.

[16] In 2012 she had developed the idea of starting an eyelash extension business. Only two people in Vancouver were doing eyelash extensions at the time. She went to a class in Las Vegas to learn the techniques. She decided to create her own course, teaching others to do eyelash extensions. She explained that eyelash extensions require a great deal of precision. Each eyelash is individually attached to an existing eyelash with adhesive. The person performing the procedure holds tweezers in each hand: one is used to expose each eyelash while the other is used to apply the new eyelash. The customer lays on a bench while the cosmetician sits on a stool above the customer's head, bent over to apply the eyelashes. It takes one to two hours per client to perform the procedure. Ms. Starchuk was able to do two to

three clients per day. She saw clients and applied the eyelash extensions in her home and developed and conducted her business in training others to do eyelash extensions as well.

[17] Before the motor vehicle accident she was able to perform the procedures without problems. She had great dexterity and was able to undertake very intricate work with her hands.

[18] Her business concept was to work in Canada in the spring and summer and have others do the work in the winter. Her intention was to spend the winters in California. Before the accident she had trained one trainer how to do eyelash extensions as well as how to teach others. She intended to expand the business.

[19] On the day of the motor vehicle accident Ms. Starchuk went to a delicatessen in Langley that she often frequented. She was standing at the end of the counter and was speaking with one of the staff, looking at the eyelash extensions that the staff member had had applied. The counter was to her right and the wall to her left. She heard a loud crash and people screaming. She remembers something coming toward her and remembers having her hands up and going backward. She did not recall the counter hitting her. She is 5'7" tall and the top of the deli counter was approximately at her chin level. She introduced photographs which show that the deli counter had been pushed back by the impact with the vehicle. There was a narrow space left between the end of the deli counter and the wall. The space was so narrow that Ms. Starchuk's body was pushed into the drywall, causing it to collapse around her.

[20] Ms. Starchuk was taken by ambulance to Royal Columbia Hospital. She could not breathe, her chest hurt, and she was coughing and thought her ribs were broken. She was very frightened and confused. When she arrived at the hospital she said that everything hurt. She recalls complaints with her knee, foot, neck, shoulders and upper body and hands. After being assessed she checked herself out of hospital contrary to doctor's advice. Her mother took her home and she went to bed.

[21] The next day Ms. Starchuk was in bed in pain. She had chest and rib pain. Her neck was sore, her hands and arms were sore, and her whole body ached. She lay in bed with pillows on either side of her and was taking medications for pain.

[22] She went to her doctor a few days later. She later saw a doctor, Dr. Mian, about her breasts because her chest was very sore. She thought that her breasts were strangely shaped and she did not know if her implants had been broken. He told her that she was too swollen and bruised to assess, and told her to let the swelling lessen before they could evaluate her breast implants.

[23] She said that in the first six months her neck and shoulders were sore. She suffered from unbearable headaches, though these have lessened. Her hands and arms were numb, with pain and tingling. Her fingertips were numb and she dropped things. She had reduced grip strength which worsened over time. Her mother and others helped her until she received housekeeping assistance from the defence. At the time of trial she was still receiving housekeeping assistance one time per week for four hours.

[24] Ms. Starchuk says that she is not able to chop foods. She cannot use scissors and cannot get a pillow into a pillowcase. Her hands go numb although this is not constant. She cannot vacuum because it bothers her neck and shoulders. She cannot do heavy household tasks.

[25] She received massage therapy and physiotherapy to treat her complaints after the accident.

[26] On July 25, 2013, she fell while in Safeway and fractured the humerus of her right arm. There was some setback to her recovery from the motor vehicle accident as a result of this fall, but she had physiotherapy for it and it resolved completely within two to three months. She wore a sling on her right arm while recovering from the fracture. She has no ongoing problems with respect to her right upper arm. She said that she had no change to the numbness and tingling in her hand because of the broken arm.

[27] In late 2013 the swelling and bruising was resolved in her chest, but she was left with a bulge protruding from her left breast. She was concerned that the implant was torn. It did not look or feel proper. She could not wear a bra because it was very painful. She decided to have it investigated by a doctor she had seen previously, Dr. Warren. Dr. Warren determined it needed repair. She had surgery to repair her left breast in December 2013. She had to replace both implants because the implants she had were no longer produced, and replacing one would leave her with breasts of different shape and feel. She had complications following the surgery. Because of bleeding she had to return to the surgeon. She was in a great deal of pain. She has never recovered fully from the surgery. Her breasts are always painful and she has reduced sensation in them. She has been attending a mastectomy specialist in White Rock for massage therapy and has had some improvement in the pain. Before this she had no issues with her breasts. She now does not like the shape or the way they look or feel. She says this has contributed to her depression.

[28] Apart from her breasts, she continues to have pain. By the spring of 2014 her neck continued to bother her and she was sleeping at night on a heating pad. There was pain from the base of her skull into her shoulders. She was very stiff. Her hands were numb. She was still getting headaches. Her headaches come and go depending on her neck and shoulder pain and she takes medication for them. She does yoga and practices relaxation techniques.

[29] At the time of the motor vehicle accident Ms. Starchuk was approximately 125 pounds. She is now approximately 110 pounds. She cannot work out or lift weights as she did before the accident. She can do some yoga now, primarily stretching. She cannot do moves involving her neck and upper back as she did before.

[30] Because of her modelling and marriage to a well-known rock drummer, she has relationships with celebrities. She had the opportunity to do lash extensions for people in the modelling and film industries. Before the motor vehicle accident she had worked on the Transformers film and did Avril Lavigne's lashes. She is well

connected and could have had the opportunity to continue developing her skills and reputation in the entertainment industry.

[31] However, she is no longer able to apply lashes herself. Her hands are numb, her shoulders and neck hurt, and she has lost dexterity such that she is not able to hold tweezers properly. On one occasion she dropped the tweezers onto the model's forehead. She has likewise stopped teaching as this requires active demonstration. She now simply checks the work of students and talks at classes that her trainers teach. But for the motor vehicle accident she would have done the training herself. Because of her difficulties following the motor vehicle accident, she has hired additional assistance.

[32] In September 2014 she tried to take an advanced eyelash course in California. She found that she was not able to isolate the lashes properly. She also fell while in California and broke her kneecap and the small bone in one of her toes. She was in a knee brace for approximately a month and the boot for a couple of weeks. It took a few months before she was able to walk without problems, but she made a full recovery by January 2015.

[33] She took time off from her business after both falls.

[34] However, the motor vehicle injuries have not resolved. Her chest has improved, but she still has scar tissue pain and is still limited in the bras that she can wear. Her neck continues to bother her. Her hands have worsened over time.

[35] By January 2015 she was able to do some yoga, stretching and some light weight training. Before the accident she would run two to three times a week up to 10 miles, but by January 2015 she was able to run for not more than 10 minutes on a treadmill. She could not bike.

[36] Before the accident she put a garden in by herself. After the accident her father and her friend helped with the garden. By January 2015 she could do some light gardening, but she could not lift dirt and could not shovel.

[37] She had an active social life before the accident. She did volunteer work. She went out a lot. She was friends with bands and when they were in town should go out to concerts and dinners. Her energy level is now low and she is often in bed by 7 o'clock.

[38] Since the accident she has become much less social. She rarely goes out. She did not feel like going out while her neck and shoulder were bothering her.

[39] The lash industry has increased since she started her business. Despite her injuries, her business has also grown since its inception in 2012. She now has two trainers working for her and the courses over the next few months are sold out. She has expanded her program to include volume courses as well as regular courses.

[40] She is still the owner and manager of the business, though she cannot do lash extensions and is limited in her ability to run training sessions. She handles the phone and email. She schedules teachers, books students, and purchases supplies. She writes and revises training guides. She develops new courses. Before the motor vehicle accident she was working long hours. The business has grown and she still works a lot, but takes a lot of breaks due to the pain. She cannot sit for extended periods of time because of her pain and concentration issues, making it difficult for her to work on the computer. During the day she will work for a few hours and then go rest. She cannot work late.

[41] Since the motor vehicle accident she has had several trainers leave her business. She is concerned that if her trainers leave they would deplete her business.

[42] A further part of her business is selling materials to customers. Since the accident she cannot ship materials. She has hired people to do this for her.

[43] She said that but for the motor vehicle accident she would have taught eyelash extensions in Vancouver and abroad. These would include courses to teach trainers. She would herself do volume eyelash extension.

[44] Her injuries have restricted her ability to expand her business.

Yvette Starchuk

[45] The plaintiff's sister Yvette Starchuk also testified.

[46] She described her sister before the accident as very outgoing, social and very involved in her business. She was gardening, did yoga, rode her bike and went to the gym. She attended family get-togethers, loved to cook and was never antisocial or withdrawn. Before the accident she described her sister as “the Energizer Bunny”, stating she worked hard all the time.

[47] She saw her sister in her home the night following the accident. She was in bed and could not get out of it. She was in obvious pain and not able to move. She visited her sister every few days in the first few weeks. After that she came by once per week. Often she would find her sister in bed in the dark when she arrived. She would pick up food for her sister. She would also wash her sister's hair. She was depressed and not showing up to family events, including the family Christmas.

[48] After the accident she was without energy and physically wasted away. She lost a good deal of weight. Although her energy levels have improved she has still not recovered.

[49] Before the accident her house was always tidy. She did not clean the house after the accident. She was not able to lift the kettle and did not have the grip strength to lift a teacup or wash dishes.

[50] After the accident and successive falls, her sister became depressed and difficult to hold a conversation with. That has not changed in any significant way. She became a hermit. She has improved more recently but is not nearly as social as she was before the accident.

Sandra Leitch

[51] Ms. Starchuk's mother Sandra Leitch testified.

[52] From approximately 2002 until recently the plaintiff lived in a small house on the property that she and her husband owned. The plaintiff loved the house. She upgraded it herself. She dug, planted and tended a 10' x 8' garden herself.

[53] In the year preceding the accident she had no health concerns.

[54] With respect to her personality, the plaintiff was very outgoing, independent and people oriented. On the day of the accident May 13, 2013, Ms. Leitch went to the hospital. She found the plaintiff agitated and wanting to go home. The plaintiff signed herself out and Ms. Leitch took her home and put her to bed. For the next few weeks Ms. Leitch took over feeding her cats, feeding her daughter breakfast, doing the housework, shopping, and preparing food. In the first two to three months after the accident her daughter was mentally okay but her hands were going numb. She was also getting therapy for her neck and shoulder complaints. Ms. Leitch gave her daughter a heating pad to sleep on.

[55] Following the fall in Safeway in the summer of 2013 her daughter had her arm in a sling and Ms. Leitch helped her for approximately one week.

[56] For the breast surgery in December 2013 Ms. Leitch and her husband drove the plaintiff to hospital and then brought her home. She was very groggy and in a lot of pain. The next morning there was blood everywhere and the Leitch's took the plaintiff back to Vancouver to have the bandages replaced. This occurred on two other occasions.

[57] The plaintiff was not able to move her arms up and down following surgery and was on bedrest for several weeks. Again, Ms. Leitch took care of the household activities, cleaning, bed-making, washing clothes, feeding cats, buying groceries and preparing food. The plaintiff was very uncomfortable and was in bed with a couple of pillows propped behind her to allow her to sit up a bit. She was going to physiotherapy and massage therapy but her energy was depleted.

[58] For months and months she could not lift anything. Ms. Leitch's husband would load the car for her.

[59] Her personality became withdrawn. For Christmas of 2014 she did not even attend the family Christmas. She became cool. Occasionally if Ms. Leitch said something wrong the plaintiff would jump up and leave. She had not been irritable before.

[60] She does not handle objects much. She has a hard time hanging on to things. Her fingers will not hold. For a period Ms. Leitch helped repackage her orders until the plaintiff hired staff.

[61] At times she appeared depressed. At one point Ms. Leitch felt she had to talk to her because the plaintiff would rarely leave her house and did not even want to continue with her business. Ms. Leitch was also worried because she had sleeping pills in the house and it would be easy for her to take them. Her talk with the plaintiff appeared to work.

[62] She has improved but she is not the same person as she was before the motor vehicle accident.

Chan Chiang

[63] Chan Chiang is a hairstylist in Abbotsford and one of the plaintiff's trainer's. She is also an advanced eyelash technician who was trained by Maria, one of the plaintiff's teachers, while the plaintiff oversaw the lesson. She has taken both the classic course in which one lash is applied and the advanced or volume course where three lashes are applied to each lash.

[64] Ms. Chiang testified that to do the job you have to have good hand-eye coordination and be very stable. There can be no shake in the hands. It is very hard to be clean and precise. She has seen the plaintiff try and apply lashes. Her hands shake and she misses eyelashes.

[65] Ms. Chiang also testified to her rates and schedule. She said the demand for eyelash extensions is increasing.

[66] With respect to Ms. Starchuk's involvement in the business, Ms. Chiang testified that she observed her to be exhausted during the day. She further no longer attends when Ms. Chiang conducts training sessions.

Expert Reports

Dr. S. Schlagintweit

[67] The plaintiff introduced a report from Dr. Schlagintweit to provide an opinion with respect to the injury to her breast implant and subsequent surgery.

[68] Dr. Schlagintweit describes the accident and injury as follows:

Ms. Starchuk describes that she was a customer at a delicatessen in Langley on May 13, 2013. At that point in time, she was talking with the salesperson on the other side of the counter when a small SUV came through the front of the shop. This SUV ultimately hit the deli counter, pinning Ms. Starchuk against the wall. Apparently there was a fairly significant impact and records indicate that the car was travelling at approximately 40 kilometers per hour when it entered the shop. The drywall was dented in from the impact of Ms. Starchuk's body in between the deli counter and the wall.

...

She describes that, in the ensuing weeks, she had significant thoracic and chest pain. With regards to her breasts, most of the pain was centred in the lateral portion of the left breast. She did not develop bruising, but did note some swelling...

...

... She had difficulty wearing a number of clothes due to her breast pain. he was very limited in wearing a bra and was unable to wear a bathing suit. She also notes that anything that pressed on the lateral aspect of her breasts were painful for her to wear. She has been aware of the bulge and altered the contour of the left breast.

[69] On examination, Dr. Schlagintweit found that Ms. Starchuk did have a bulge in the left lateral breasts which could be reduced (pressed away). He could feel a defect in the breast implant capsule through which the implant passes.

Dr. Schlagintweit opined that it was reasonable to assume that her injuries arose from the injury of May 13, 2013. Significant compression to the breast implants would result in tearing of the capsule around the implant resulting in a defect. He concluded that the accident was the cause of her present left breast pathology.

[70] He recommended an operation to remove the left breast implant. Because it would not be advisable to reinsert the old implant, a new implant would have to be used. Because the plaintiff's breast implants were no longer produced, and newer implants sat and felt different, he suggested a bilateral procedure.

[71] Ms. Starchuk underwent surgery and had both breast implants replaced.

[72] As a result of the surgery she was left with a loss of sensation in her nipples and some numbness. Dr. Schlagintweit notes these issues in his letter of February 3, 2015, where he states:

She did undergo bilateral removal of what appears to have been bilateral capsulectomy and implant replacement by Dr. Warren in December 2013. She describes that postoperatively she did have a small amount of bleeding from her incisions, but did not require a return to the operating room. She describes that after her surgery, particularly the right side, quickly became hard, painful and had areas of numbness which included the nipple. She also notes that she has noted rippling in both breasts, more so the left than the right. She has got some relief with massage treatment to the right breast, but notes that the pain continues as does the firmness. She is unable to sleep on that side.

[73] On examination Dr. Schlagintweit found that Ms. Starchuk had moderate rippling throughout all quadrants of the breasts on both sides, more being notable on the left than the right. He found minimal to moderate capsular scar contracture on the right breast. In his opinion, Ms. Starchuk has a thin skin envelope and inevitably is going to have some degree of rippling. Any intervention would only aggravate further problems that she already has such as pain and numbness and rippling. In his view the dysesthesia and lack of sensation in the right breast may slowly improve and he encouraged her to continue with massage therapy. In his view she had a very nice result. Any further intervention would not be warranted.

Dr. G. Singh

[74] Dr. Singh is a neurologist. He initially evaluated Ms. Starchuk on May 12, 2014. Ms. Starchuk had been suffering pain of the neck and upper back after the accident. In addition, she had numbness of both upper extremities. In her left hand she had almost constant numbness of the first three fingers. On the right hand she

would get periodic tingles of the fourth and fifth fingers. She also felt weak in the hands and would occasionally drop things. She said that she had been asymptomatic prior to the accident with no functional limitations. On examination, Dr. Singh found that she had carpal tunnel syndrome bilaterally and mild ulnar neuropathy on the left hand.

[75] On June 10, 2014, electrophysiological studies were performed. Dr. Singh suspected that Ms. Starchuk might have irritation of C5-6 nerve roots.

[76] On April 9, 2015, Ms. Starchuk reported being symptomatic in mostly her right hand. She still had a tendency to drop objects such as glasses and cups. After examination, Dr. Singh again concluded that Ms. Starchuk likely had a neurogenic thoracic outlet syndrome on the right.

[77] Dr. Singh's diagnosis was that Ms. Starchuk's right arm functional impairment is from arm pain, paraesthesia and impaired dexterity. She has mild carpal tunnel syndrome, ulnar nerve compression at the elbow and overlapping thoracic outlet syndrome and irritation of C5-6 nerve roots. He recommended reassessment periodically by a neurologist, repeat electrophysiological studies and possible consideration of C5-6 nerve root blocks .

[78] He said that both the cubital tunnel syndrome and thoracic outlet syndrome occurred in temporal relationship to the accident and he believed that the accident more likely than not is the cause of these. He said that cubital tunnel syndrome can remain stable or improve but it more often tends to progress. He would agree that operative intervention for ulnar neuropathy at this stage is not recommended. However, Dr. Singh said she needed to be clinically observed and have repeat electrophysiological studies every 6 to 12 months not just to assess the progression of the ulnar neuropathy, but also the neurogenic thoracic outlet syndrome. In his view the overlapping median neuropathies, i.e. carpal tunnel syndrome, are likely contributing to her symptoms as well.

Dr. D. Koo

[79] The plaintiff was also seen by Dr. Koo, a physiatrist.

[80] In Dr. Koo's opinion the motor vehicle accident likely resulted in the following injuries and conditions:

1. Soft tissue injuries to her neck, shoulders, and upper arms back, chest, knees and right foot with the following sequela:
 - a. Capsular tear of previous breast augmentation requiring revision surgery, with subsequent postoperative pain and loss of sensation;
 - b. Chronic mechanical neck and shoulder pain, myofascial origins; and
 - c. Soft tissue injuries to the arms, with persisting forearm pain and a probable double crush neuropathic pain;
2. Possible concussion;
3. Adjustment disorder with depressed mood;
4. Posttraumatic stress disorder symptoms;
5. Aggravated insomnia;
6. Posttraumatic headaches;
7. Multifactorial concentration, memory and cognitive concerns.

He notes:

Her headaches, neck and shoulder complaints have gradually improved but not fully resolved with physiotherapy and massage therapy and chiropractic treatment. She has had ongoing and worsening pain affecting her forearms wrist and hands, which is notably disabling to her previous work due to the fine motor dexterity and sustained hand use required.

In my opinion the diagnoses as described are likely directly attributable to the effects of the accident in question, or to complications of her original acute injuries in the motor vehicle accident.

[81] As to the causation of Ms. Starchuk's injuries, Dr. Koo observed that she was previously a well woman with an active recreational lifestyle who worked full time

teaching and performing eyelash extensions and who reported no significant limitations related to her neck, shoulders, back, or hands and no history of headaches. Further, he opined that based on the information provided in her interview, Ms. Starchuk did not appear to demonstrate a significant vulnerability to these areas. In his opinion she would not have been considered subject to abrupt or spontaneous pain or disability from these areas if not for the subject accident. But for the accident in question, he could identify no other clinical cause for her post-accident problems.

[82] Although she had had an earlier accident in 1993 which resulted in a neck fracture, she had made a full recovery, with no ongoing concerns beyond a degree of cervical radiculopathy. Her cervical radiculopathy likely accounting for her degenerative changes at C-6 nerve root, but it was asymptomatic prior to the accident in question and unlikely to explain her current left-sided sensory changes and pain. While it would not explain the extent or distribution of her upper extremity pain on its own, it may have increased her susceptibility to a condition known as double crush injury where subsequent soft tissue injury distally to the arms and milder peripheral nerve injury at the elbow could be additive in effect.

[83] With respect to her two subsequent falls, Dr. Koo opined:

...She has made good physical recovery from [the humeral fracture from the fall in the grocery store] in so far she has a full range of motion of the glenohumeral joint, no palpable or reported crepitus and no visible deformity...

In my opinion, her humeral fracture likely added additional psychosocial stressors to her recovery... this was a superimposed injury that likely added to her functional disability during her period of recovery. I would estimate that her humeral fracture likely contributed to approximately one year of additional restriction related to right shoulder mobility and resolving pain, but at present it is well healed and of no contribution to her current disability.

In September 2014 she tripped and fell, resulting in a comminuted fracture to the right patella and left fifth toe. Her left toe has healed well, with no ongoing pain or disability. Her right knee continues to heal, although she feels ongoing limitations related to higher impact activities...

Her right knee fracture is likely going to continue to improve...

Given the relatively sedentary nature of her employment and relative demands on her upper extremities, I feel that her right knee injury would likely have been of minimal consequence to her employability as an eyelash technician or instructor. It may continue to interfere with her active recreational pursuits such as yoga or running, but she was also likely already precluded from these activities on the basis of her soft tissue injuries with neck back and upper extremity pain.

[84] Dr. Koo also agreed with Dr. Fry (a treating physician) that Ms. Starchuk's upper limb sensory disturbances are likely related to an additive phenomenon known as "double crush syndrome". Although subject to debate, the concept behind double crush syndrome is that when a nerve is impaired at one location it makes the patient more susceptible to symptomatic nerve irritation further down the extremity. In this way, summative effects of these multiple sites of nerve compression can lead to clinical dysfunction, with pain and sensory disturbance that is in excess of her nerve conduction study abnormalities. He states:

In my opinion, her upper limb pain and reports of reduced dexterity and grip strength are likely the result of the cumulative effect of her double crush neurologic injuries as well as the unresolved chronic soft tissue injuries of the forearms, wrists and hands. Her right thumb osteoarthritis is only a minor contributor to her present loss of dexterity and pain in the right hand.

[85] Dr. Koo concluded that Ms. Starchuk was very disabled from her previous work as an eyelash technician. Her soft tissue injuries, pain, numbness, and tingling affecting both her dominant and non-dominant hands significantly limited her ability to perform precise cosmetic work as well as her ability to perform prolonged keyboarding activities and to lift packages and ship inventory with her online store.

Dr. D.G. Passey

[86] Dr. Passey is a psychiatrist. He provided an opinion following his examination of Ms. Starchuk on November 19 and 27, 2015. In Dr. Passey's opinion, Ms. Starchuk was suffering from chronic posttraumatic stress disorder ("PTSD") and somatic symptom disorder. In his opinion the PTSD was a direct result of the motor vehicle accident on May 13, 2013. It was not present prior to the motor vehicle accident and there is no other event or history that would account for the diagnosis. Likewise, the somatic symptom disorder arose as a result of the accident and her

subsequent recovery. He explained the basis of his opinions as follows at para. 76 of his report:

... Ms. Starchuk's early career revolved around the beauty of her body and in particular her breasts. This body image has been a part of her self-concept, which exceeds that which is typical of the average person. Thus this part of her 2013 MVA injury has resulted in a very significant and lasting psychological impact on her....

[87] In his opinion it is also more likely than not that she suffered a mild traumatic brain injury in the motor vehicle accident. He said it is more likely than not that Ms. Starchuk did hit her head in the 2013 MVA when she was slammed into the drywall with such force that she left a deep depression in the drywall. Despite her MRI or CT scans, Dr. Passey opines that it is quite possible to get micro-tearing with long-term disruption and thus dysfunction of brain neural pathways without clear evidence on such scans. In addition, there can be significant overlap of symptoms between psychiatric diagnoses such as PTSD and the effects of chronic pain with a chronic mild traumatic brain injury. The significant overlap of symptoms between these diagnoses makes it very difficult to determine whether all the above listed symptoms are due strictly to the psychiatric diagnoses or are at least partially due to residual physical damage from a mild traumatic brain injury. He opined that there is a significant possibility that she continues to have residual effects, which are coupled with her psychiatric diagnoses and chronic pain. In combination or alone these continue to cause significant cognitive dysfunction.

[88] Dr. Passey said PTSD is a lifelong disorder that can increase in severity or become subclinical depending on a person's overall stress level and exposures to triggers that are a reminder of their traumatic experiences. He opined that Ms. Starchuk's pain and breast disfigurement will remain a constant reminder of her 2013 MVA and thus will be a constant trigger for her PTSD and somatic symptom disorder symptoms. He recommended that Ms. Starchuk receive up to one year of PTSD-specific therapy in combination with an active physical lifestyle to determine if any further lessening of symptoms is possible. He said that those recommendations could produce some degree of further improvement but it is most likely that she would continue to have some degree of PTSD symptoms, somatic symptom disorder

symptoms, and chronic pain with paresthesia or anaesthesia for the rest of her life. She would remain susceptible to further exacerbation of her PTSD symptoms. Her level of dysfunction would probably continue to be present, varying somewhat according to her overall stress level, exposure to major triggers, access to appropriate therapy, the intensity of her chronic pain, anaesthesia and paraesthesia, and ability to exercise regularly. She is also at increased risk of developing other psychiatric diagnoses such as an anxiety disorder, major depressive disorder etc. as well as fibromyalgia and chronic fatigue syndrome.

Dr. A. Eisen

[89] The defence called a neurologist, Dr. Eisen. Dr. Eisen was of the view that the accident of May 13, 2013, resulted in musculoligamentous injury to chest and thoracic area without neurological deficit. Regarding Ms. Starchuk's recovery, Dr. Eisen opined that good recovery started within an anticipated time period, namely a few weeks, but her progress was interrupted by the falls which resulted in fractures of the right humerus, right patellar and fifth metatarsal bone.

[90] Regarding Ms. Starchuk's hand numbness, Dr. Eisen conducted a neurological examination of November 4, 2015, which gave evidence for bilateral cubital tunnel syndromes, possible bilateral carpal tunnel syndromes, and mild spinal cord compression at or above the C-5/6 level. There was further electrophysiological evidence of a right cubital tunnel syndrome with compression of the ulnar nerve at the elbow and a mild left carpal tunnel syndrome.

[91] With respect to causation he said:

Cubital tunnel syndrome (ulnar nerve neuropathy with compression of the nerve at the elbow), is extremely common, and predominantly results from an anatomical defect almost universally present. In the majority of cases there is no associated other disease, such as diabetes. It is more frequent in people who lean on their elbows a lot. Possibly when Ms. Starchuk fractured her right humerus she protected the arm in such a way, in subsequent weeks, to precipitated [*sic*] an ulnar neuropathy...

Dr. P. Clarkson

[92] Dr. Clarkson is an orthopaedic surgeon who was called by the defence. He was of the opinion that Ms. Starchuk made a good but slow recovery from her fall in July 2013 and a good recovery from her fall in September 2014. He opined that these subsequent injuries likely prolonged the time Ms. Starchuk was incapacitated after the May 3, 2013, motor vehicle accident, but that they did not affect her overall recovery.

[93] He was further of the opinion that Ms. Starchuk should have been able to return to work within three months of the motor vehicle accident and that she was not currently disabled as a result of the motor vehicle accident. At the time of his assessment the main factor limiting Ms. Starchuk was her lack of fine motor control in her right hand. He was of the view that this may be due to cubital tunnel syndrome, and he agreed with Dr. Eisen these symptoms would not be attributable to the motor vehicle accident. In cross-examination, Dr. Clarkson deferred to Dr. Eisen with respect to the cause of the cubital tunnel syndrome.

Discussion**Nature and Extent of Ms. Starchuk's Injuries**

[94] The main issue of contention between the parties is the cause of the numbness, tingling, pain and lack of dexterity in her hands. The issue is whether these were caused by the motor vehicle accident.

[95] I accept that motor vehicle accident caused the complaints that Ms. Starchuk is experiencing in her right and left upper limbs. I found the evidence of Ms. Starchuk's experts, Drs. Koo and Singh, persuasive and comprehensive. Whether one accepts the double crush theory or not, the accident is the cause of these complaints.

[96] I accept Ms. Starchuk's evidence that she was experiencing numbness, tingling and pain in both hands shortly after the accident. Certainly she complained of these complaints to her treating physiotherapist and massage therapist by June

2013. Moreover, Dr. Lebl, her treating family physician, acknowledged that she may well have been complaining of these to him before he first noted complaints in January 2014. As he said, although a doctor tries to make notes of all of the major complaints, when a patient has a number of complaints as Ms. Starchuk did immediately following the accident it is possible that not every complaint is noted.

[97] Before the accident Ms. Starchuk was very active, lifting weights and able to support her entire body weight on her hands without issue. All of this was done without complaints in her arms or hands. Very shortly after the accident, if not immediately after the accident, she began to experience numbness, tingling and pain in her upper limbs, particularly her hands. Within approximately a month of the accident she was complaining of this to treating medical professionals. Dr. Eisen speculates that "possibly when Ms. Starchuk fractured her right humerus she protected the arm in such a way in subsequent weeks to precipitate an ulnar neuropathy." Of course, the fracture of her humerus took place July 25, 2013, well after Ms. Starchuk's complaints to her massage therapist and physiotherapist and possibly her doctor of numbness, tingling and pain in her hands. Dr. Eisen provided no explanation for the sudden onset of her hand complaints following the accident, they were idiopathic. I do not find Dr. Eisen's opinion persuasive and I prefer the opinions of Drs. Koo and Singh. As I have said their opinions were detailed and persuasive.

[98] As I noted above, Dr. Clarkson deferred to Dr. Eisen with respect to the cause of the nerve complaints. Otherwise, I accept Dr. Clarkson's opinion that Ms. Starchuk's right arm break, her broken kneecap and her broken toe resolved well, without issue.

[99] However, with respect to Ms. Starchuk's ongoing upper limb complaints, notably the complaints in each hand, I find these complaints were caused or contributed to by the motor vehicle accident. It may be that wearing a sling for a period of time also contributed to Ms. Starchuk's right hand complaints.

Nonetheless, I am satisfied that the ongoing complaints are caused or contributed to by the motor vehicle accident.

[100] I also accept the evidence of Drs. Schlagintweit, Koo and Passey with respect to Ms. Starchuk's other injuries.

[101] In summary, I am satisfied that as a result of the motor vehicle accident of May 13, 2013, Ms. Starchuk has suffered soft tissue injury to her neck, shoulders, upper limbs, back, chest, and right foot; a capsular tear of her breast implant which required surgery and has left her with postoperative pain and loss of nipple sensation; chronic mechanical neck and shoulder pain; soft tissue injuries to her arms with persisting forearm and hand pain, numbness and tingling; posttraumatic stress disorder, somatic symptom disorder, chronic pain, and a mild traumatic brain injury. I accept that Ms. Starchuk:

1. will remain at risk for a potential reduction in capacity due to her psychiatric diagnoses because of exacerbation from stress or other triggers; increased risk of developing another psychiatric diagnosis; and increased risk of developing fibromyalgia and chronic fatigue syndrome;
2. would likely benefit from further therapy for her soft tissue injuries within the next year, but that she will be left with ongoing pain and activity restrictions related to neck, back, chest, arms and hands which will likely be permanent and enduring; and
3. has had a good result from her breast revision surgery, but is left with pain and lack of sensation and the result is not aesthetically satisfying to her.

Damages

Damages for Pain and Suffering

[102] Damages for pain and suffering, or non-pecuniary damages, are awarded to compensate the plaintiff for the loss of enjoyment of life they experienced and will experience as a result of the injuries. As reviewed in the evidence above, the effects of this accident on Ms. Starchuk have been significant: her injuries have caused and will continue to cause her chronic pain, have drastically altered her lifestyle for the worse, and have prevented her from participating in an industry and business she spent a year before the accident developing.

[103] I have considered the cases provided to me by each of the parties. It is trite to state that no two injuries and no two plaintiffs are the same (*Boyd v. Harris*, 2004 BCCA 146 at para. 42). Considering the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, in my view the appropriate award for damages for Ms. Starchuk's pain and suffering is \$135,000.

Past and Future Loss of Capacity

[104] Where a plaintiff has been injured the defendant must compensate them for any past loss of earning capacity. This amount is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; see also *Ibbitson v. Cooper*, 2012 BCCA 249).

[105] I am satisfied that Ms. Starchuk has suffered a loss of capacity. Although she has suffered a variety of medical complaints over the years and from time to time has not had significant earnings, in the years leading up to the accident Ms. Starchuk developed what has been a successful business. She was clearly an energetic and outgoing person and her business is driven entirely by her vision. She now cannot perform eyelash extensions, cannot be trained in new eyelash technologies as they develop, and must rely on others to perform these aspects of her business. She is limited to performing administrative tasks, which still require her to take breaks during the day. Her inability to develop the business as she planned

and her limited ability to continue contributing to it are due to her loss of capacity. Because Ms. Starchuk could not be as active in the business as she would have been, I am satisfied that but for the accident, her business would have been more successful than it has been and her income from it greater. Her income has thus been reduced.

[106] It is my view that given her ongoing symptoms, Ms. Starchuk will continue to suffer loss of her income earning capacity. Because of her limitations, her ability to develop her skills or further develop her business have been reduced. Given the prognosis for her hand injuries, it is unlikely this limitation will be reduced in any significant way.

[107] There are two approaches to the assessment of the future loss of earning capacity: the real possibility approach and the capital asset approach. The latter approach is more appropriate where the loss is not measurable in a pecuniary way and I thus adopt it here (*Perren v. Lalari*, 2010 BCCA 140 at para. 12).

[108] Applying the capital asset approach is not a mathematical calculation — it is an assessment that considers what the evidence suggests she would have earned and, going forward, what was reasonably achievable by the plaintiff but for the accident, taking into account factors such as Ms. Starchuk's intentions for her business (*Pett v. Pett*, 2009 BCCA 232 at para. 21).

[109] Assessing this loss as best I am able, I assess the loss of capacity at \$50,000 for past income loss and \$150,000 for future income loss.

[110] I make this assessment based largely on my assessment of the plaintiff, her strength of character and the evidence with respect to the burgeoning business that she was engaged in. I have also considered negative contingencies: such as a possible diminution in business due to changes in demand or added competition as well as the possibility that Ms. Starchuk would not have continued with the business for other reasons or that the business would not have grown as anticipated. She is now less valuable to herself as a person capable of earning income from her

business. Ms. Starchuk testified, and I accept, that she has had difficulty dedicating the time she did to her business as a result of the accident. Similarly, her intention was to grow the business and her skills as an aesthetician and teacher were an important part of that plan. To the extent she has been required to delegate these tasks and take up a more administrative role, the businesses' future growth and her future income have been reduced. The amounts are informed by the testimony of Ms. Starchuk and Ms. Chiang and the financial statements submitted through Tamara Hatoum.

[111] The award for past earning loss will have to be adjusted by the parties in accordance with s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231. I will leave it to the parties to address the tax impact on these earnings.

Future Care Cost

[112] Turning now to future cost of care, the plaintiff is entitled to compensation based on what is reasonably necessary to restore her to her pre-accident condition to the extent that is possible or to ensure full compensation through the provision of alternate care.

[113] The test for determining the appropriate award under this heading is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification for claims for cost of future care and (2) the claims must be reasonable (*Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84 (S.C.); *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63). Medical justification is shown where they are both medically necessary and likely to be incurred (*O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, & 68-70).

[114] Ms. Starchuk has provided the report of Allison McLean as to the costs to be incurred for the various recommendations of Ms. Starchuk's doctors. I will deal with these individually.

Pain Management

[115] Dr. Koo stated that Ms. Starchuk would likely continue to experience partial benefit from further therapy regarding her soft tissue injuries with maximal medical recovery within the next year. Ms. McLean states that the cost for such therapies ranges between \$2,690 and \$9,300 per year. Considering the extent of her injuries as I have found them and the benefits obtained from therapy so far, I will award \$5,000 in this regard.

Personal Trainer/Physiotherapist

[116] Dr. Koo also recommended ongoing gentle stretching on a daily basis and exercises for gradual progression of muscular endurance, strength and flexibility as well as postural correction. He suggested that initially this exercise would involve the input from a personal trainer or physiotherapist two to three times per week for the first month. Thereafter there would be a gradual reduction in supervision and increased independence by Ms. Starchuk and within two to three months she would be independent, needing only monthly supervision to help progress her rehabilitation program as tolerated. Ms. McLean estimates the cost of these services as ranging from \$1,700–\$3,600 per year.

[117] Ms. Starchuk is very experienced with exercise. As I have noted above, she attended the gym before the accident and contemplated becoming a professional bodybuilder. She also has a great deal of experience in yoga. It is my view that Ms. Starchuk will be more able than most to quickly understand the appropriate exercises and to undertake an independent exercise program. Accordingly, in my view an award of \$1,700 is appropriate under this head.

Gym Membership

[118] Dr. Koo also recommended that Ms. Starchuk perform home exercise program or take a gym membership.

[119] Many of the exercises that Dr. Koo recommended, e.g. stretching, etc., can be performed without equipment. To the extent that equipment is required, or she

wishes to take aquasize, Pilates, or tai chi classes, Ms. Starchuk can acquire a gym membership. She gave evidence that she had attended a gym before the accident. Accordingly, I award nothing for this expense.

Therapy

[120] Dr. Passey recommended that Ms. Starchuk receive PTSD-specific therapy. He recommended up to one year with a minimum of 6 months of weekly therapy. He suggested the rate would be in the range of \$190 per hour and would cost a minimum of \$9,120. He said she might require treatment beyond that time depending on her response. Considering the extent of her psychological issues and my assessment of the likelihood she will have a positive response to the treatment, I will award \$10,000 on this head.

Ergonomic Assessment and Support

[121] With respect to ergonomic assessment and support, it is my view that Ms. Starchuk would benefit from the assistance of an ergonomic assessment to provide her with advice as to the appropriate tools to assist her with her disabilities and I will award \$700 in this regard. She will also require some adaptive aids and equipment. Ms. McLean suggests this will cost \$100 every two years for a total of \$1,222 and I accept that figure.

[122] As to ergonomic furniture and support, it is my view that such ergonomic support as a task chair, a computer monitor stand and document holder are the ergonomic supports generally required by anyone working for any period of time at a computer. Accordingly, I do not consider that these are required by virtue of the accident. I similarly do not consider hot and cold therapy items to exceed the normal requirements of an individual.

Psychiatric Medications

[123] With respect to psychiatric medications, Ms. Starchuk was consuming psychiatric medications prior to the accident and has continued to consume them since the accident. Her consumption has increased somewhat. I anticipate that her

consumption will be reduced by the benefit of ongoing therapy. Accordingly I award \$500 in this regard.

Housekeeping/Gardening Assistance

[124] The plaintiff seeks the costs of housekeeping assistance as part of the future care costs of \$209,000. She argues that she will incur these costs to have assistance for tasks she can no longer perform. In *O’Connell v. Yung*, 2012 BCCA 57, the Court of Appeal discussed the distinction between housekeeping as a cost of future care and an award for loss of housekeeping capacity.

[65] As explained by Professor Cooper-Stephenson in *Personal Injury Damages in Canada*, 2d ed. (Scarborough: Carswell, 1996) at 315, the claims for loss of home making capacity and for future cost of care are distinct:

The claim for loss of homemaking capacity is for the loss of the value of work which would have been rendered *by the plaintiff*, but which because of the injuries cannot now be performed. The plaintiff has lost the ability to work in a manner that would have been valuable to her- or himself as well as to others. The claim is not the same as that under future cost of care, which is for the value of services that must now be rendered *to the plaintiff*. It is true that the two claims may overlap—just as the normal claim for loss of earnings and cost of care may do so—because the cost of care claim may include items which the plaintiff-homemaker would have performed but for the accident. However, a large portion of homemaking involves the performance of work for others, namely, the family unit, and in many cases the claim for loss of homemaking capacity is wholly distinguishable from that for cost of care, particularly if the plaintiff is hospitalized. The loss is a “negative” loss, in the sense that it is the loss of something the plaintiff would have had (her homemaking work) but which she now does not have because of the accident. This places it squarely under the head of loss of working capacity. In contrast, the expense of services provided by others to care for the plaintiff are “positive” losses—the addition of an extra expense—and they clearly fall under cost of care.

[66] Indeed, in *McTavish*, the Court distinguished between loss of housekeeping capacity and future care costs, at para. 43:

[43] As I have noted, the majority in *Kroeker* quite clearly decided that a reasonable award for the loss of the capacity to do housework was appropriate whether that loss occurred before or after trial. It was, in my view, equally clear that it mattered not whether replacement services had been or would be hired. It did not adopt the analogy with future care as a general rule. Nor did it permit, nor in view of the authorities to which I have referred could it have permitted, a deduction for the contingency that replacement services might not be

hired. Allowances for contingencies are for risk factors that might make the loss of capacity more or less likely. [My emphasis.]

[125] I am satisfied that this correctly assessed as a cost of future care rather than a loss of housekeeping capacity.

[126] Ms. Starchuk currently lives alone in White Rock and receives 4 hours per week of housekeeping assistance. The housekeeper assists with the heavier aspects of cleaning the house as well as food preparation, etc., that Ms. Starchuk is not able to undertake. I expect that she will continue to require assistance of this nature. As the doctors have opined, it is likely that her disability in her hands will not improve. As Ms. McLean notes, this expense should be reimbursed only until she would have required such assistance due to aging or potential future health problems. On my view, given my assessment of Ms. Starchuk and her physical abilities, she likely would have been able to perform these tasks for herself until she was at least 85 years old. Ms. McLean states that the cost of housekeeping services in Surrey ranges between \$32.50 and \$41.25 per hour. Using an average of \$37 per hour for 12 hours per month results in an annual expense \$5,320. Using the present value tables provided by the plaintiff, this totals approximately \$100,000 assuming an ongoing loss to age 85.

[127] As to yard work, Ms. Starchuk testified that she cannot garden or push a lawnmower as a result of her wrist problems and needs assistance in that capacity. Dr. Koo likewise recommended Ms. Starchuk receive yard work support. Given my assessment of Ms. Starchuk and the heavier nature of the tasks, I find she would have continued performing yard and gardening work until 75 years old. In my view \$800 annually would be an appropriate assessment of this expense, or \$11,493 to age 75.

[128] Considering positive and negative contingencies, in my view, \$80,000 is a reasonable award for future housekeeping/yard work.

Loss of Housekeeping Capacity

[129] Ms. Starchuk also sought an award for loss of housekeeping capacity. In my view, the cost of future care award provides her with replacement services for the capacity she has lost and it would be double recovery to also award loss of capacity for those services.

In-Trust Award for Mother and Sister

[130] On a review of their evidence I am not persuaded that the services provided by Ms. Starchuk's mother and sister exceeded those which would normally be provided by a family member. Accordingly I make no award in this regard.

Special Damages

[131] Special damages have been agreed to at \$8,418.70.

Conclusion

[132] In conclusion I award:

Pain and Suffering	\$135,000.00
Past Loss of Earning Capacity	\$50,000.00
Future Loss of Earning Capacity	\$150,000.00
Future Care Cost	
Pain Management	\$5,000.00
Personal Trainer/Physiotherapist	\$1,700.00
Post-Traumatic Stress Disorder	
Specific Therapy	\$10,000.00
Ergonomic Assessment and Support	\$700.00
Adaptive Aides & Equipment	\$1,222.00
Psychiatric Medication	\$500.00

Housekeeping Capacity	
Housekeeping	80,000.00
<u>Special Damages</u>	<u>\$8,418.70</u>
Total	\$442,540.70

[133] As I have stated, I have not addressed the tax aspects of this award. The parties may speak to this, as well as to costs, in the event that they are not able to agree.

“B.J. Brown J.”