

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Valino v. Chu*,  
2015 BCSC 114

Date: 20150127  
Docket: M123370  
Registry: Vancouver

Between:

**Mary Joyce Valino**

Plaintiff

And

**Bok Wing Haley Chu and Shui How Chu**

Defendants

Before: The Honourable Madam Justice Gerow

## Reasons for Judgment

Counsel for the Plaintiff:

J.L. Harbut  
J.M. Rice

Counsel for the Defendants:

D. Perry

Place and Date of Trial:

Vancouver, B.C.  
November 24-28, December 1, 4,  
and 5, 2014

Place and Date of Judgment:

Vancouver, B.C.  
January 27, 2015

**Introduction**

[1] Mary Valino was involved in a motor vehicle accident on October 10, 2010. Ms. Valino alleges she suffered injuries to her right hand, neck and back in the accident. She asserts the injuries have led to a partial disability, and have impacted her ability to pursue a career as a mining engineer. She seeks general damages for pain and suffering, damages for loss of future income earning capacity and future cost of care. The parties have settled Ms. Valino's claim for special damages and damages for past loss of earnings.

[2] The defendants, Bok Wing Haley Chu and Shui How Chu, admit liability for the accident, and concede that Ms. Valino sustained soft tissue injuries to her neck and back, and an injury to her right hand. However, the defendants disagree about the extent, seriousness and duration of her injuries. They take the position that Ms. Valino has not established she has suffered any loss of future income earning capacity, nor that she will require care in the future as a result of the injuries she suffered in the accident.

**Issues**

[3] The issues are:

- 1) What are the nature, duration and extent of the injuries Ms. Valino suffered in the accident?
- 2) What is the appropriate award of general damages for pain and suffering?
- 3) What amount, if any, should be awarded for the future loss of income earning capacity?
- 4) What amount, if any, should be awarded for cost of future care?

[4] The parties agree Ms. Valino's past loss of income, net of tax, is \$40,000. The parties agree Ms. Valino's claim for special damages is \$16,500.

**Background**

[5] Ms. Valino was 22 years old at the time of the accident and studying mining engineering at the University of British Columbia. She was working as a co-op student in what was to be a 12 month position, which commenced in September 2010.

[6] The accident occurred on October 10, 2010. Ms. Valino was the front seat passenger in an SUV driven by the defendant, Bok Wing Haley Chu, travelling northbound on Highway 40 near Grand Cache, Alberta. Mr. Chu admits he lost control of his vehicle at a curve in the road. The vehicle left the highway and rolled a number of times before coming to rest on its wheels. The front airbags deployed and the SUV was a total loss.

[7] Ms. Valino remained in the vehicle for approximately 15-20 minutes prior to being removed by emergency services. She was placed in a cervical collar, put on a spine board and transported to Grand Cache Hospital. She was later transported by helicopter ambulance to a hospital in Grande Prairie.

[8] Ms. Valino travelled back to Vancouver after her release from hospital with her mother and brother, who travelled to Alberta to assist her. Following the accident, Ms. Valino had to resign her co-op position because of her injuries.

[9] Ms. Valino returned to school in January 2011, and she was able to complete the term, with accommodations. Ms. Valino went on to complete her engineering studies, including a co-op term at the Gibraltar mine near Williams Lake, B.C. Ms. Valino graduated from the mining engineering program in May 2013.

[10] Ms. Valino obtained employment working at the Ekati Diamond Mine in the Northwest Territories commencing in January 2014 as a graduate mining engineer. She testified that she has trouble performing her job duties as result of the ongoing symptoms she is suffering.

**What are the Nature, Extent and Duration of the Injuries Ms. Valino Suffered in the Accident?**

**Plaintiff's Position**

[11] Ms. Valino says the evidence at trial establishes that she suffered the following injuries in the motor vehicle accident:

- 1) Various bruises and lacerations to her face, arms, waist, hips, chest wall and thighs, and a black eye, all of which have resolved.
- 2) A closed head injury and two-inch laceration to her scalp. She is left with a scar and a bald spot on her scalp. The wound site is sensitive to touch.
- 3) Soft tissue injuries and chronic pain to her neck, upper back, posterior shoulder/scapula and low back, all of which are chronic and ongoing.
- 4) A fracture and lacerations of her right middle finger. The finger had to be fused, and there is a permanent angulation deformity, pain, scarring, diminished motion in the finger, and radiating pain, stiffness and weakness through the right hand, wrist, and forearm causing permanent disability in her right hand.
- 5) Mood disturbance.

[12] Ms. Valino asserts that her chronic pain in her neck, back and shoulder impacts on all of her activities of daily living, both at home and work. While she has enjoyed periods of recovery, her recovery has plateaued. Since moving to Yellowknife, her condition is not improving, but worsening.

[13] Ms. Valino's evidence is that ongoing physiotherapy and daily exercise are necessary to manage her ongoing pain and symptoms. The physiotherapy treatments and her exercise program allow her to sit longer prior to experiencing pain, and to manage flare-ups. Ms. Valino's evidence is that she is unable to tolerate pain medication because it upsets her gastrointestinal system. She takes Advil or Tylenol every few weeks during more severe flare-ups of pain.

[14] Ms. Valino's prognosis for future recovery is guarded. Given that it is now four years post-accident, the consensus of the experts and her health care providers is to focus on symptom management.

[15] As a result of her chronic neck, shoulder and back pain, and the permanent disability to her dominant right hand caused by the fusing of her middle finger, Ms. Valino is now, and for the future, limited in the type of work she can do. As well, she is limited in her activities of daily living, including day-to-day activities around the house such as cleaning, cooking, and recreational activities.

[16] Ms. Valino says the medical evidence establishes that it is likely she will have to continue her exercise and stretching regime for symptom management of her back, neck and shoulder for the rest of her life.

[17] As well, the evidence establishes that Ms. Valino has suffered psychological and emotional injuries flowing from the accident and injuries. Ms. Valino says she has a reasonable reactive mood disturbance to the pain and disability she suffers from. She gets irritable and has anxiety regarding her future as a mining engineer. Following the accident, she had nightmares. She has become hyper-vigilant as a passenger riding in a car.

#### **Defendants' Position**

[18] The defendants agree that Ms. Valino suffered soft tissue injuries to her neck, and upper and lower back in the accident. As well, they concede that Ms. Valino has a permanent partial disability in her right hand as a result of the fused right middle finger.

[19] The defendants say there is consensus among the experts that Ms. Valino will not suffer any deterioration in her condition. Early on in her visits to Dr. Wee, her family doctor, Ms. Valino reported "marked improvement" of her back and neck symptoms.

[20] Some of the experts expect further improvement to Ms. Valino's neck, back and shoulder. The defendants say the fact that Ms. Valino often spends her time off work in Yellowknife and does not get any physiotherapy treatment or other treatment while there, and rarely takes pain medication, indicates that her condition is continuing to improve.

[21] Ms. Valino's finger affects her ability to grasp heavier items or perform fine work. The defendants concede that Ms. Valino's neck and upper back become painful with prolonged sitting or standing, which she deals with by stretching or changing position.

[22] The defendants concede Ms. Valino will continue to have intermittent neck and back symptoms and may need to get up and move around, but say that she is managing well as evident from the fact she has been working for over a year in a very demanding position. Dr. Wee's report and history obtained from Ms. Valino over the four years since the accident shows marked improvement with occasional flare-ups.

### **Relevant Law**

[23] In order to establish causation Ms. Valino must prove on a balance of probabilities that but for the accident she would not have suffered the injury she complains of.

[24] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32. The Court confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311, and *Athey v. Leonati*, [1996] 3 S.C.R. 458. The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant the injury would not have occurred.

[25] In *Athey* at 473, the Court states that the general rule is the plaintiff must be returned to the position he or she would have been in, with all of its attendant risks and shortcomings, and not a better position.

**Application of the Law to the Facts**

[26] As stated earlier, the defendants concede that the accident caused the injuries complained of, and that Ms. Valino suffers from some residual problems. They concede that Ms. Valino has suffered a permanent partial disability of her right hand as a result of the motor vehicle accident. As well, they agree that Ms. Valino suffered a laceration to her scalp which has left a scar with a bald spot. However, the defendants take issue with Ms. Valino's position that her back, neck and shoulder symptoms are continuing to impair her work, household and recreational activities.

[27] All of the doctors who examined Ms. Valino agree she injured her neck, upper and lower back, and hand, in the accident. The evidence is Ms. Valino has sought ongoing physiotherapy treatment for pain and symptoms from the injuries for her neck, shoulder, upper and lower back since the accident.

[28] Dr. Mark Adrian, an expert in physical medicine and rehabilitation, was retained by Ms. Valino's counsel to conduct an independent medical examination of Ms. Valino. He examined Ms. Valino on two occasions; October 17, 2011 and November 1, 2013. Dr. Adrian provided two reports and testified regarding his findings and diagnosis.

[29] In 2011, Dr. Adrian diagnosed Ms. Valino with mechanical neck, mid and lower back pain, a fracture of her right finger joint, and fusion of the finger due to the fracture. Dr. Adrian's opinion was that her complaints of difficulty in her neck, back, and hand were consistent with his physical findings. Dr. Adrian found that Ms. Valino suffered from persistent pain in her neck, and mid and lower back as a result of the injuries she sustained in the accident.

[30] Dr. Adrian's prognosis in 2011 was that full recovery of the symptoms over time was guarded but there may be some improvement over the next year. In his opinion it was unlikely the injuries would undergo progressive deterioration.

[31] Dr. Adrian's opinion was Ms. Valino's functional capacity was impacted as she would likely continue to have difficulties with activities that require heavy or repetitive lifting, prolonged static or awkward positioning involving her spinal column, prolonged sitting or standing, and impact activities. As well, she would probably experience difficulty performing activities that require gripping with her right hand, or fine motor control using her middle finger. Dr. Adrian recommended Ms. Valino continue with her physiotherapy and exercise program.

[32] As noted earlier, Dr. Adrian provided a second report dated November 1, 2013, after seeing Ms. Valino again. In the second report, Dr. Adrian notes there was some improvement in Ms. Valino's condition since 2011. In 2013, Ms. Valino's most dominant complaint of pain involved the base of her neck. The neck symptoms were more dominant on the right side than the left, and spread to the upper shoulder girdles and upper back.

[33] Dr. Adrian affirmed his findings in his first report. He found Ms. Valino was still experiencing clinical features consistent with suffering physical forces to her spinal column during the accident that caused an injury resulting in persistent and regularly occurring spinal pain symptoms. Dr. Adrian found the most physically limiting problem was in her neck and upper back. In Dr. Adrian's opinion, the prognosis for future recovery is poor; although it was unlikely the injuries to her spinal column will undergo progressive deterioration.

[34] In Dr. Adrian's opinion it is probable that Ms. Valino will continue to experience difficulty in performing employment, recreational, household, and scholastic activities due to the injuries to her spinal column. She will have difficulty performing activities that involve prolonged sitting, crouching, standing or stooping, impact activities, heavy or repetitive lifting, or repetitive reaching with her right upper extremity. Dr. Adrian opines that Ms. Valino is probably permanently partially disabled as a result of injuries she suffered in the motor vehicle accident. As well, Dr. Adrian is of the opinion that Ms. Valino will probably continue to experience

difficulty performing activities that require prolonged or repetitive gripping or fine motor control with her right hand.

[35] Dr. Adrian again recommended that Ms. Valino continue with a physiotherapy program to assist with pain management and temporarily assist with her symptoms. When Dr. Adrian saw Ms. Valino in November 2013, she was involved in a job search. He was of the opinion that she would probably require modification of her work environment due to her injuries. Dr. Adrian recommended that once she found suitable employment, Ms. Valino would benefit from an occupational therapist performing a work site visit to optimize the ergonomic set-up for her work station.

[36] Dr. Peter Gropper, an orthopaedic surgeon, was retained by Ms. Valino to provide an independent medical opinion regarding the injuries to the middle finger on her right hand. He provided two reports dated April 28, 2011 and September 12, 2013. He did not testify at the trial.

[37] Dr. Gropper first saw Ms. Valino six months post-accident. At the time, he diagnosed Ms. Valino with a fracture of her right long finger resulting in joint instability. Ms. Valino was suffering from severe post-traumatic stiffness and angulation deformity caused by a joint irregularity. He recommended that the best treatment for Ms. Valino was a joint arthrodesis or fusing. Joint replacement was discussed, but Dr. Gropper's opinion was that the results for joint replacement were very unpredictable. He expressed concern about the long term benefit and likely failure of a joint implant arthroplasty within five to seven years, necessitating further surgery.

[38] Ms. Valino's finger was fused on August 19, 2011. Dr. Gropper saw Ms. Valino again in September 2013. At that time, Ms. Valino reported she was suffering from persistent stiffness in the right long finger, as well as a loss of range of motion and pain in the adjacent fingers. Dr. Gropper found Ms. Valino had a deformity of the proximal interphalangeal (PIP) joint of the right finger as a result of it being fused, with loss of flexion. Dr. Gropper's opinion is the fusion is stable and is not at risk of deterioration in the future. In his opinion, Ms. Valino has a permanent

impairment to her right hand, and specifically the right long finger, as a result of the stiffness in both the proximal and distal interphalangeal joints.

[39] Dr. Wee, Ms. Valino's family doctor, prepared a report dated September 5, 2014, and testified at the trial. Ms. Valino initially attended his office on October 18, 2010, eight days after the motor vehicle accident. His evidence is that Ms. Valino had no pre-existing injuries.

[40] At the time of the first visit, Ms. Valino still had bruising and contusions. Although he reports from time to time in his clinical records that Ms. Valino is not reporting any back problems and she has had marked improvement, Dr. Lee's evidence at trial was that he was aware she has had chronic ongoing neck and back pain since the accident, and has attended physiotherapy for treatment since the time of the accident.

[41] It is clear from reviewing his report that Ms. Valino complained to Dr. Wee of recurrent back pain from the time of the accident until her last visit in September 2014. In Dr. Wee's notes there are comments that she has improved with physiotherapy, but there are also notes in 2011, 2012, 2013 and 2014 that she was complaining of back pain. Dr. Wee confirmed he has recommended that Ms. Valino continue with physiotherapy to reduce her pain and make her more functional, since the time of the accident to present. At trial, Dr. Wee agreed that physiotherapy is recommended as long as Ms. Valino continues to experience pain.

[42] Although in his report Dr. Wee gives a favourable prognosis for further recovery of her upper and lower back pain with ongoing physiotherapy, Dr. Wee indicated he would defer to the orthopaedic surgeons and physical medicine and rehabilitation specialist regarding the future prognosis for Ms. Valino's ongoing problems with her neck, back, and hand.

[43] Dr. Barry Vaisler is an expert in orthopaedics and hand surgery who was retained by the defendants to conduct an independent medical examination of Ms. Valino. Dr. Vaisler prepared a report dated April 22, 2013, but did not testify at

the trial. Dr. Vaisler examined Ms. Valino on March 15, 2013, and reviewed a number of documents.

[44] Dr. Vaisler's opinion is that:

Mary Valino most probably sustained a laceration to her scalp, a facial injury and chest contusion, a soft tissue injury to her neck, upper back and lower back, probable mild subacromial impingement of her right shoulder, a stiff right index finger and a compound fracture dislocation of the PIP joint of her right middle finger as a result of the motor vehicle accident of October 10, 2010.

[45] Dr. Vaisler is of the opinion that given the persistent nature of her upper and lower back pain, it is more likely than not, Ms. Valino is going to have continuing intermittent annoying, and possibly disabling, neck and upper and lower back pain from time to time with certain activities. Those activities include sitting and standing with the head flexed forward, extremes of movement of the neck, heavy lifting and heavy labour, with resulting fatigue at the end of the day, and increased psychological tension. Dr. Vaisler also opines that it is a little more likely than not Ms. Valino will experience right shoulder pain in the future with sustained or repetitive reaching with her dominant right upper limb.

[46] Dr. Vaisler also provided an opinion regarding Ms. Valino's index and middle fingers on her right hand. He noted she had objective stiffness in her right index finger and recommended physiotherapy. Dr. Vaisler's opinion was that fusion was the best option for Ms. Valino because of her young age. Fusion results in almost complete pain relief but will impact Ms. Valino's grip and grasp activities, and result in a marked functional disability in the hand. Wide grasp is difficult and the middle finger is eliminated from grip activities with a marked loss of grip strength. The ability to hold small objects in her right hand, and the hook function of her hand are also impaired. Dr. Vaisler's opinion is that the disability to Ms. Valino's right hand is unlikely to change in the foreseeable future, and she has a permanent disability to that hand.

[47] Dr. Bernard Tessler, a medical practitioner with a speciality in neurology, was retained by the defendants to perform a document review, and provide an opinion.

Dr. Tessler provided a report dated October 28, 2013, and did not testify at the trial. In his report, Dr. Tessler summarizes the various clinical records and provides an opinion, based on his record review, that Ms. Valino sustained a closed head injury with a scalp laceration. Dr. Tessler notes that while Ms. Valino appears to have sustained a significant head injury, she does not appear to have sustained a concussive injury. Based on his review of the records Dr. Tessler is of the opinion there was no indication Ms. Valino suffered a traumatic brain injury (concussion) and there is no documentation of any ongoing neurological symptoms to suggest a concussive injury.

[48] Dr. Kevin Solomons, an expert in psychiatry, was retained by the defendants to conduct an independent medical examination of Ms. Valino. Dr. Solomons interviewed Ms. Valino on April 17, 2014, and authored a report dated April 26, 2014, but did not testify at the trial.

[49] Dr. Solomons' opinion is that Ms. Valino sustained a head injury in the form of a large scalp laceration, but did not sustain a traumatic brain injury, and did not develop any neurocognitive impairments as a result of the accident. Dr. Solomons is of the opinion Ms. Valino did not develop any psychiatric difficulties or disorders as a result of the accident. Dr. Solomons' opinion is that Ms. Valino was mildly and understandably stressed by her injuries, but she does not require any psychiatric or psychological treatment as a result of the accident.

[50] It is clear from a review of the reports that all of the doctors agree that Ms. Valino sustained injuries to her head, neck, upper and lower back, and her right hand in the motor vehicle accident. As well, she sustained some contusions, a laceration to her scalp, and abrasions. As a result of the accident, Ms. Valino has been left with a permanently disabled right dominant hand, and chronic neck, shoulder and back pain.

[51] The defendants concede that Ms. Valino's neck, and upper and lower back pain are ongoing, as is apparent from Dr. Vaisler's report. The defendants rely on

Dr. Wee's report and clinical records to argue that Ms. Valino's neck, shoulder and back complaints have largely resolved except for occasional flare-ups.

[52] However, Dr. Wee's evidence at trial was that Ms. Valino has complained of recurrent neck, back and shoulder pain since the time of the accident, and he has continued to recommend to Ms. Valino that she attend physiotherapy to control the symptoms and allow her to function.

[53] Contrary to Dr. Wee's notes of "no abnormal findings" on his examinations of Ms. Valino, her treating physiotherapists Clare Palmer and Cheryl Megalos both testified they found objective injury indicators including reduced range of motion and palpable muscle spasms during the same time period.

[54] As well, as indicated earlier, Dr. Wee agreed he would defer to the experts in orthopaedic surgery and physical and rehabilitation medicine regarding any ongoing problems with Ms. Valino's finger, neck and back.

[55] As set out earlier, the defendants' expert, Dr. Vaisler, opined at the time he examined Ms. Valino she was most probably disabled in regards to activities involving heavy lifting and heavy labour due to the soft tissue injuries to her neck and lower and upper back. His opinion was there could be some improvement with treatment, but there was a definite possibility she will continue to have a permanent disability regarding those activities in the future. As well, Ms. Valino was probably disabled from activities that require prolonged sitting, especially with her neck flexed forward due to her neck, upper and lower back symptoms. Dr. Vaisler was of the opinion Ms. Valino was most likely disabled from activities involving sustained or repetitive reaching at and above shoulder level. He concluded Ms. Valino has a permanent disability to her right hand which impacts her ability to grip, grasp and carry with that hand.

[56] Dr. Adrian was also of the opinion that Ms. Valino is likely permanently partially disabled. His opinion was that the prognosis for further recovery of the injuries to the spinal column over time is poor.

[57] The consensus of the medical experts is that Ms. Valino has suffered a permanent impairment to her right hand. There is no further treatment being proposed from a curative or rehabilitative perspective but rather from a pain and symptom management perspective. As noted in Dr. Vaisler's report, Ms. Valino is left with a permanent disability for work activities requiring power or fine grip, and a permanent marked loss in grip strength and a permanent moderate loss in grasp strength.

[58] Ms. Megalos testified she has provided approximately 80 physiotherapy treatments to Ms. Valino since September 2011. The physiotherapy treatments are not curative, but are aimed at keeping Ms. Valino moving and relieving some of her symptoms. When Ms. Valino worked in a co-op position at the Gibraltar mine following the accident, Ms. Megalos noted a change in her symptoms, including more physical findings in the lumbar spine and around her neck and shoulder. Ms. Valino also complained of pain in her wrist with prolonged desk work, radiating pain and marked pain in her right wrist, forearm and up to her shoulder. For the past year, since Ms. Valino started working at the Ekati mine in the Northwest Territories, Ms. Megalos has treated Ms. Valino once or twice a month, depending on when she can return to Vancouver. Ms. Megalos' assessment is that Ms. Valino appears to be having more problems in her neck and hand since starting work at the Ekati mine.

[59] There is also evidence that Ms. Valino has suffered from mood disturbance as a result of the accident. Ms. Valino testified she gets irritable and has anxiety about her future as a mining engineer. Dr. Wee's clinical records contain a number of notations that she is tearful and anxious, and required reassurance. Ms. Valino's brother, her boyfriend, and friends all testified regarding her mood since the accident.

[60] Wendy Lu, another mining engineering student and friend of Ms. Valino, testified that since the accident Ms. Valino has been prone to random outbursts and crying, whereas before the accident she was "happy go lucky", and not subject to

mood swings. Ms. Lu has not seen Ms. Valino since she moved to the Northwest Territories.

[61] Travis Nguyen, another fellow classmate in the mining engineering program, testified that Ms. Valino was moodier after the accident and less likely to help him with his studies than before the accident.

[62] Mark Valino, Ms. Valino's brother, testified her mood changed after the accident. Ms. Valino suffered from nightmares for the first two years after the accident. His evidence is that Ms. Valino is "sad and beat up" when she returns home after her shifts at the Ekati mine, and the biggest change he has noticed is the impact to Ms. Valino's self-esteem.

[63] Dr. Adrian noted Ms. Valino has experienced emotional difficulties since the accident. He indicated Ms. Valino reported she is irritable during flare-ups of pain, and that her pain symptoms can affect her concentration.

[64] Dr. Gouws, a medical doctor with an expertise in occupational medicine, commented on the emotional factors associated with the chronic pain Ms. Valino is experiencing. Dr. Gouws noted that Ms. Valino is having emotional difficulties and will have to come to terms with her disabilities. Her responses to the pain questionnaires he administered indicated Ms. Valino was having difficulty with pain focus and fear of re-injury. As well, he noted she was mildly depressed and suffered from anxiety when driving.

[65] Dr. Solomons' opinion is that Ms. Valino has suffered from some depression and anxiety following the accident, as well as irritability. Dr. Solomons' opinion is that Ms. Valino is not psychiatrically or psychologically impaired or disabled, and does not require any treatment in the future.

[66] However, Dr. Solomons' statement that Ms. Valino has spontaneously recovered from her mood disturbance is not supported by the other evidence I have outlined. As well, Dr. Solomons noted a number of instances where Ms. Valino has expressed ongoing mood problems. Ms. Valino told Dr. Solomons she could be

irritable with her family when she is in pain, but that has lessened because she no longer lives with them. It is apparent from Dr. Solomons' notes that Ms. Valino told him she continues to worry about what impact her injuries will have on relationships, and her ability to have and care for children in the future. Ms. Valino told Dr. Solomons her last two relationships were impacted by the limitations she has as a result of the accident. As well, Dr. Solomons reports that Ms. Valino is frustrated as a result of her pain.

[67] Having reviewed the medical evidence, I am of the view it supports Ms. Valino's evidence that she is having ongoing symptoms of pain in her neck, back, shoulder and hand, as a result of the injuries she sustained in the accident, which are continuing to impact her ability to perform tasks at home and work, and participate in recreational activities. Although she has had some improvement over time, Ms. Valino's recovery appears to have plateaued. The consensus of the medical experts is that Ms. Valino's prognosis of future improvement regarding her neck, shoulder and back is guarded. As well, the consensus of the medical experts is that Ms. Valino has suffered a significant partial disability to her right middle finger and hand. She also suffered permanent scarring to her head and hair loss as a result of the accident.

[68] As well, the evidence supports a finding that Ms. Valino suffers from some ongoing mood disturbance in the form of irritability, mild depression and anxiety as a result of the accident.

[69] I find that but for the accident Ms. Valino would not be suffering from the chronic pain in her neck, shoulder, back and hand, and the associated ongoing mood disturbance.

### **What is the Appropriate Award of General Damages for Pain and Suffering?**

#### **Applicable Law**

[70] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident

had not occurred, but not in a better position: *Parypa v. Wickware*, 1999 BCCA 88 at para. 29.

[71] In *Stapley v. Hejslet*, 2006 BCCA 34, the court noted that a non-pecuniary award will vary to meet the specific circumstances of each case, and set out the factors to be considered in making such an award, at para. 46 as follows:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

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

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

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

[72] Ms. Valino submits the appropriate amount for the award of general damages is \$150,000, given the injury she sustained to her right hand and the chronic back, shoulder and neck issues she suffers. Ms. Valino argues that if she had only chronic neck and back pain limiting her ability to sit or engage in heavier physical activities, an award of \$100,000 would be appropriate based on similar cases such as *Sunner v. Rana*, 2014 BCSC 1379; *Prince-Wright v. Copeman*, 2005 BCSC 1306; *MacKenzie v. Rogalasky*, 2011 BCSC 54 (rev'd on other grounds, 2014 BCCA 446); and *McCarthy v. Davies*, 2014 BCSC 1498.

[73] However, Ms. Valino says in addition to the chronic neck and back pain, she sustained a very serious injury to her right hand. The right hand injury adds another layer of pain and disability in addition to the pain of the injuries to her neck and back,

and an additional amount should be awarded for the injury to her hand. Ms. Valino relies on the following cases as support for her argument that an additional \$50,000 should be awarded for the injury to her hand: *Lumanlan v. Sadler*, 2008 BCSC 1554; *Star v. Ellis*, 2007 BCSC 512; *Laberge v. Wagner*, 2002 BCSC 843; *Sandher v. Binning*, 2012 BCSC 1000; and *Simmavong v. Haddock*, 2012 BCSC 473.

[74] The defendants rely on *Dobre v. Langley*, 2011 BCSC 1315; *Lumanlan*; *Tsougrianis v. Marrello*, [1998] B.C.J. No. 2087 (S.C.); *Leduc v. Toth*, [1997] B.C.J. No. 110 (S.C.); *Sandher*; *Star v. Ellis*, 2007 BCSC 512; *Combs v. Moorman*, 2012 BCSC 1001; and *Keller v. White*, [1996] B.C.W.L.D. 709. The defendants submit the most similar case on the facts is *Dobre*, in which a young person with professional aspirations suffered a permanent injury to his dominant right hand and ongoing soft tissue injuries was awarded \$70,000 (including \$5,000 for loss of homemaking capacity). The defendants submit that an award of \$70,000 is an appropriate award under this head of damages.

#### **Application of the Law to the Facts**

[75] The defendants admit that Ms. Valino suffered soft tissue injuries to her neck, upper and lower back, head and right hand in the accident. They point to the fact that she did not suffer a concussion, nor any psychiatric injury arising from the accident. The defendants concede Ms. Valino suffered a permanent partial disability to her right hand as a result of having the middle finger fused.

[76] The defendants submit there is a consensus amongst the medical experts that Ms. Valino will not suffer further deterioration in her condition. The defendants say some of the experts expect further improvement. They rely on Dr. Wee's opinion that Ms. Valino's upper and lower back pains will continue to improve with ongoing physiotherapy. However, as noted earlier, Dr. Wee indicated that he would defer to the orthopaedic surgeons and experts in physical medicine and rehabilitation regarding the long term prognosis for Ms. Valino's injuries.

[77] The defendants' submissions and supporting cases are predicated on the argument that Ms. Valino's neck and back injuries caused by the accident are largely

resolved except for occasional flare-ups. The defendants argued that Ms. Valino's evidence regarding the impact of the injuries on her daily activities was exaggerated. They also asserted that Ms. Valino had a tendency to anticipate questions and be argumentative during cross-examination.

[78] However, I found Ms. Valino to be a straightforward witness. Any inconsistencies in her evidence pointed to by the defendants were minor in nature.

[79] Despite suffering fairly extensive and serious injuries in the accident, Ms. Valino has persevered with her schooling and career plan. She deals with daily neck and back pain, and has done so for four years. Her prognosis for future recovery is poor. As well, as conceded by the defendants, Ms. Valino has a serious partial disability to her right dominant hand.

[80] While the defendants point to the fact that Ms. Valino is able to work an arduous schedule of 12-hour shifts, 14 days in a row, and has been doing so for almost a year at the time of trial, I accept Ms. Valino's evidence that she does so at a cost. Her evidence in this regard is supported by the evidence of her boyfriend, Chris Chan, who described how Ms. Valino has to sleep for a couple of days at the end of her 14-day rotation, and her treating physiotherapist, Ms. Megalos.

[81] The defendants point to the fact that Ms. Valino does not take pain killers and stays in Yellowknife during some of her breaks, instead of returning to the lower mainland to seek treatment. However, Ms. Valino's evidence is that she has to limit pain killers because they upset her gastrointestinal system.

[82] Ms. Valino has made many trips to Vancouver for treatment. She has attended for physiotherapy treatments approximately 180 times since the accident. As noted earlier, Ms. Megalos' evidence is she currently treats Ms. Valino once or twice a month when she can return to Vancouver.

[83] Ms. Valino's evidence is that she is finding her current shift work of 12-hour shifts, 14 days in a row, very difficult, and is looking for a new position where she

can work shorter hours, with less sitting. She is looking for a job that has shorter shifts and has a combination of field and desk work.

[84] It is clear from Ms. Valino's evidence, as well as the evidence of her friends, brother, boyfriend, treating health care professionals and the medical experts, that she is suffering from ongoing symptoms in her neck, back and hand.

[85] Prior to the accident Ms. Valino had no problems with her neck, back, shoulder, head or hand. She was very young when she was injured, only 22 years old. As noted earlier, it is unlikely her neck and back will improve significantly, and the prognosis is that there will be no improvement in her hand.

[86] As a result of the accident, Ms. Valino has been left with ongoing chronic pain in her neck, back and shoulder which is unlikely to resolve, and a permanent partial disability in her right dominant hand which impacts her ability to grip and grasp.

[87] Ms. Valino had to make some serious decisions regarding the appropriate treatment for her hand at a very young age. She had to decide whether to have a toe amputated to replace her finger in the hopes of having some future mobility, or have the finger fused. There was a third option which involved having a joint replacement, however, according to Dr. Vaisler and Dr. Gropper, there were significant concerns given Ms. Valino's age about the long term benefit, and the likely failure of the replacement joint within five to seven years, necessitating further surgery.

[88] Ms. Valino has undergone four surgeries to her injured middle finger, with the attendant pain and discomfort. Her right hand has required three years of therapy, and she now suffers a permanent disfigurement in her right hand. As Ms. Valino points out, her right hand is now disfigured in what many in our culture regard as a rude gesture. The injury to her dominant hand impacts most aspects of her life.

[89] As a result of her injuries Ms. Valino has not been able to return to some of the recreational activities she enjoyed before, such as ultimate frisbee and badminton. She is precluded from trying many new recreational activities such as water skiing, racket sports and climbing, to name a few.

[90] Ms. Valino is worried about the impact her injuries will have on her ability to care for children should she have them in the future. Her concerns are well-founded in my view, given that she experiences difficulty in carrying out many household functions such as cooking and cleaning, and is fatigued easily.

[91] Ms. Valino is career driven, and the injuries are likely to impair her ability to enjoy her job, as many of her work activities are now a source of pain for her. Finally, Ms. Valino has been left with a scar that has created a bald spot on her head.

[92] I have reviewed the cases provided. Each case has distinctive facts, and it is often difficult to reconcile them as awards for pain and suffering are individual in nature.

[93] Although the defendants argue that the facts in *Dobre* are similar to this case, in my view the plaintiff's injuries in that case were not as significant as the injuries suffered by Ms. Valino. Mr. Dobre's main complaint was an injury to his right thumb which required one operation, not four as in this case. As one of the experts stated, Mr. Dobre's current thumb symptoms were relatively limited in impact, but the experts were of the view that he would have some worsening of his degenerative arthritis within 15 years. However, the court found there was also a chance he could make his way into his middle years without experiencing a significant decline in function. There was some risk he would require further surgery to his thumb. The prognosis for the eventual resolution of the soft tissue injuries to his back was favourable, and there was no mention of any ongoing back problems in the award of non-pecuniary damages.

[94] The defendants also rely on *Combs*, in which the award for general damages was \$90,000. However, in my view, the damages do not appear to be as significant. In *Combs*, the court found the injury to the plaintiff's hand and a hematoma on her knee did not interfere with her activities. However, she suffered daily neck, back and hip pain.

[95] Having considered the evidence and the cases provided by counsel, it is my view that an award of non-pecuniary damages in the amount \$125,000 is appropriate.

### **Loss of Future Income Earning Capacity**

#### **Plaintiff's Position**

[96] Ms. Valino asserts that she has demonstrated there is a real and substantial possibility of a future event leading to an income loss. She says that based on the expert evidence it is apparent she has functional impairments which will likely continue to impact her ability to perform many job activities of any mining engineering position which involves prolonged sitting, standing, or physical labour such as climbing ladders or carrying heavy packs of equipment. Ms. Valino points to the fact Louise Craig, who performed a functional capacity evaluation, and Dr. Gouws, concluded that as a result of her neck, back and hand problems, she has diminished capacities.

[97] Ms. Valino argues that given her age at the time of the accident and the fact she was just commencing her career, the capital asset approach rather than the earnings approach is the appropriate approach to use in determining her loss of future income earning capacity. The task of the Court is to assess damages, not to calculate them according to some mathematical formula.

[98] Ms. Valino submits the method of making the assessment that should be used is that set out in *Fox v. Danis*, 2005 BCSC 102, aff'd 2006 BCCA 324. In *Fox*, the court compared the likely future income of the plaintiff if the accident had not occurred with the likely future income of the plaintiff since the accident occurred.

[99] Ms. Valino has provided the following table and says that based on the table, the appropriate range for the award for her loss of capacity is between \$542,607 and \$2,073,025, depending on what average lifetime salary is used, and what percentage it is determined her capacity is diminished.

Average lifetime salary	Multiplier	Asset value	25%	33%	37.5%	50%
117,562	18.462	\$2,170,429	\$542,607	\$716,241	\$813,910	\$1,085,215
155,700	18.462	\$2,874,533	\$718,633	\$948,596	\$1,077,950	\$1,437,267
175,000	18.462	3,230,850	\$807,712	\$1,066,180	\$1,211,568	\$1,615,425
175,000	23.702	\$4,147,850	\$1,036,963	\$1,368,791	\$1,555,443	\$2,073,925

[100] Ms. Valino asserts her capacity to earn income in the future has been diminished by at least 25%-50%. One real and substantial possibility is that she will have to leave her work at the Ekati mine and return to Vancouver to work at a much reduced salary. She points to the fact that her classmate, Mr. Nguyen, is working in Vancouver, earning \$45,000 a year. Ms. Valino submits that if she earns \$45,000 instead of the \$120,000 she is currently earning, she would sustain an annual loss of \$75,000. If that loss continued over her lifetime, she says that would equate to a loss with a present day value of \$1,384,650.

[101] Ms. Valino says she has established there is a real and substantial possibility she will be unable to work in remote locations with the long hours normally associated with such locations. She points to the fact that \$28,770, or 26% of her current compensation, is the northern living and site allowances she receives.

[102] Finally, Ms. Valino submits that the diminishment of the asset is more than just the loss of future earnings as a mining engineer. Ms. Valino, now at 26 years of age, is limited with regards to all work that involves sustained sitting or standing, or greater than "light" physical work.

### **Defendants' Position**

[103] The defendants take the position that Ms. Valino has not demonstrated there is a real and substantial possibility of a future event leading to an income loss. They

point to the fact that Ms. Valino is earning the same income at present that she would have earned with no accident.

[104] The defendants submit Ms. Valino's pre-accident condition has to be considered in determining whether the injuries she has sustained have impacted her capacity to earn income in the future.

[105] The defendants point to the following:

- 1) Ms. Valino is a slight young woman who was unlikely to ever excel in work involving heavy physical labour;
- 2) Her chosen profession of mining engineer requires brain, not brawn;
- 3) In spite of her "catastrophizing" tendency to fear for the worst, Ms. Valino has so far had a very successful career with two different employers, three different job descriptions, and in arduous and demanding conditions; and
- 4) It is purely speculative to hold that Ms. Valino's future will be negatively impacted by her apparent inability to perform heavy physical work, even assuming she was capable of that type of work before the accident.

[106] The defendants point to the fact that Ms. Valino is performing a very arduous work schedule – with 14 day rotations, 12-hour days – and yet she has thrived in all her placements. The evidence of her current supervisor, Christopher Fedora, is that he would hire Ms. Valino to do either of the two positions she has been placed in so far.

[107] Ms. Valino has been working since August 2013 in a mainly sedentary position for 12 hours per day and has not missed any time from work because of her injuries. Ms. Valino's evidence is that she has not turned down work tasks, and agreed that most engineering jobs are sedentary as you move up the ladder.

[108] The defendants submit that if it is found that Ms. Valino meets the real and substantial possibility of loss threshold enunciated in the cases, they rely on the

following cases on quantum for loss of income earning capacity of a plaintiff with a permanent finger injury: *Dobre*; *Lumanlan*; and *Tsougrianis*.

[109] The defendants argue that *Dobre* is the most similar in terms of facts, and the award of \$60,000 made in that case is the appropriate award in this case.

### **Applicable Law**

[110] In *Perren v. Lalari*, 2010 BCCA 140, the court noted that the first inquiry in dealing with a claim of this nature is whether there is a substantial possibility of future income loss. The court stated at para. 32:

A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. ...

[111] If a plaintiff establishes a loss of earning capacity and that it should be valued as a capital asset, the impairment must be valued. It is an assessment, rather than mathematical calculation. However, it is appropriate to compare a plaintiff's likely future earnings before and after the accident: *Rosvold v. Dunlop*, 2001 BCCA 1 at paras. 11 and 12. While under the capital asset approach, a trial judge may begin by comparing the present value of the difference between the plaintiff's earnings before and after the injury, that is not conclusive.

[112] In determining a plaintiff's loss of future income earning capacity, some of the factors to be considered in making the assessment include:

- 1) Has the plaintiff been rendered less capable overall from earning income from all types of employment?
- 2) Is the plaintiff less marketable or attractive to an employer as an employee?

- 3) Has the plaintiff lost the opportunity to take advantage of all job opportunities he or she could have if not injured?
- 4) Is the plaintiff less valuable to him or herself as a person capable of earning income in a competitive labour market?

*Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353; *Perren* at para. 11.

[113] In *Shapiro v. Dailey*, 2012 BCCA 128, the court discussed the difficulties in assessing an award for loss of future capacity as follows:

[40] The inherent difficulties of assessing awards for hypothetical future events are well-known. The exercise has been variously described as “gazing into a crystal ball” (*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 at 469) and “an estimate based on prophesies” (*Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at 263). In *Morris*, as Mr. Justice Donald observed at 264:

... The defendant's arguments unduly focus on the mechanics of the judge's calculation and they fail to recognize that in the end it is the judge's sense of what is fair compensation that matters. There is much more art than science in the process. Accordingly, on appeal any missteps that may have occurred in arriving at an award are unimportant if the figure falls within the range of reasonable compensation.

### **Application of the Law to the Facts**

[114] The defendants assert Ms. Valino has not established a real and substantial possibility that she has a loss of future income earning capacity. In support of their position they point to the fact that Ms. Valino was able to complete her engineering education, perform well in a co-op position, obtain a job as a graduate engineer after the accident, and perform her current job functions. However, the defendants' argument is based in part on the premise that Ms. Valino's only limitation is the ability to perform medium to heavy physical labour.

[115] The defendants appear to suggest Ms. Valino will advance quickly in her career and obtain a more sedentary position, and will not be limited by the fact she cannot perform some of the more physically demanding activities associated with mining engineering.

[116] However, I agree with Ms. Valino that the weight of the evidence establishes there are significant barriers to Ms. Valino gaining the necessary experience to obtain a management position in a mine.

[117] As noted earlier, the evidence is that Ms. Valino is struggling in her present position, which is sedentary in nature. Ms. Valino has described her struggles with sitting. She gets up very early, around 3:00 a.m., so she can go to the gym and have a workout for an hour before work. Ms. Valino's evidence is that the working out assists in pain management and she can tolerate sitting longer. She eats breakfast at 4:30 a.m. and catches the 5:15 a.m. bus to be at work by 5:30 a.m. Her shift ends at 5:25 p.m.

[118] Ms. Valino's evidence is that she is currently looking for another position with less onerous hours. Ms. Valino testified that sitting and working on her computer is painful for her neck and back, and typing causes her right hand and arm to ache. She says her tolerance for sustained sitting is less than 30 minutes.

[119] Ms. Valino's evidence is that when she first started with her present employer, she was a ventilation engineer, was able to job shadow other engineers, and go underground for breaks from sitting. Her current position of drill and blast engineer involves more desk work, and her evidence is that she is having difficulty tolerating the increased sitting.

[120] As noted above, Ms. Valino is looking for a position that will have a mix of field and office work. However, she is concerned that she will not be able to do some activities in the field. Ms. Valino now has difficulty climbing ladders because looking up causes neck pain, and she has a problem gripping with her right hand. This may pose a problem in the future in performing field work. For example, part of the safety route from the underground area in the Ekati mine involves climbing a series of ladders. As well, Ms. Valino cannot carry a heavy pack, which means it is unlikely she can participate in emergency response training. Ms. Valino's plan prior to the accident was to gain experience in different mines in order to advance in her career, and eventually become part of management.

[121] Mr. Fedora, one of Ms. Valino's supervisors, testified by way of audio deposition by consent. His evidence is that Ms. Valino was hired by Dominion Diamond Corporation as graduate engineer at the Ekati mine. The graduate program is designed to give the graduate engineers experience in every aspect of the mine so they can choose their career paths and progress through certain skill sets. Ms. Valino started working at the underground mine as a ventilation engineer and is now moving into a position as a drill and blast engineer. Mr. Fedora's evidence is that the next position for Ms. Valino is as an open pit drilling and blasting engineer. The program lasts approximately three years, and at the end the company hopes the graduates will apply for a permanent position.

[122] All of the graduates who have worked at the mine before Ms. Valino have been involved in every aspect of the mine. Many of them end up working with the actual mining crews so they have an idea of what is entailed in other positions. The traditional path on the surface is to work with the blasters doing drilling patterns, as well as designing the drill patterns on the computer. Mr. Fedora testified that it was unlikely that Ms. Valino will be able to work with the crew because of her limitations.

[123] One of Ms. Valino's goals is to become a shifter which is a lead person in an operations crew, but because of her limitations that probably won't be possible. Ms. Valino would have to climb a ladder to get onto the decks of the drills used on the surface, while the drill machine was shaking. The drill/blast engineers do testing on the vibrations after and during each blast. Mr. Fedora expressed reservations regarding Ms. Valino's ability to use a hand drill to drill a hole in the wall of the pit to screw in the device that monitors the vibrations. As well, the ground is uneven and the temperature is around minus 50 or 60 degrees. Mr. Fedora testified it is more likely that when Ms. Valino works on the surface she will mainly be doing office work rather than field work.

[124] Mr. Fedora is aware Ms. Valino was injured in a motor vehicle accident, and they try to accommodate her. Mr. Fedora testified that he was aware Ms. Valino was having a hard time with sitting at a computer for a long period of time, and with lifting

and other heavy tasks when she is working underground. They give her help with the heavier tasks underground and try to give her different tasks to do so she is not sitting all the time when she is in the office.

[125] Mr. Fedora also testified about the possible careers for a mining engineer. He has practised as an engineer for 10 years. His evidence is that a lot of the engineers in supervisory roles have experience doing the actual manual tasks and working with the crews. It is a general lead up to a supervisory role. It helps as a manager to have a familiarity with the types of tasks the people who you are managing are doing. Mr. Fedora's evidence is that Ms. Valino's limitations could result in her not being able to gain the field experience necessary to allow her to progress in the manner she wants, or as quickly as she wants.

[126] As stated earlier, Ms. Megalos' evidence was that she had noticed a marked increase in Ms. Valino's hand and neck symptoms since she has started working at the Ekati mine. Her evidence was that Ms. Valino's symptoms also increased when she was working in a co-op position in the Gibraltar mine.

[127] Dr. Gouws was retained by Ms. Valino to provide an independent medical opinion regarding her functional limitations for employment. Dr. Gouws has expertise in the area of occupational health. He provided an independent assessment of Ms. Valino's fitness to work, including whether she could meet the requirements for the physical demands of a mining engineering job.

[128] Dr. Gouws provided a report, and testified at the trial. Dr. Gouws assessed Ms. Valino on October 22, 2013. At the time of Ms. Valino's consultation with Dr. Gouws, she had graduated from mining engineering and was looking for work. In order to become a registered professional engineer, Ms. Valino has to work as a graduate engineer in her field. Ms. Valino advised Dr. Gouws that her future goal was to develop a career as a mining engineer, and eventually branch out into consulting work. Ms. Valino expressed concern to Dr. Gouws that she would not be able to work 12-hour shifts, which are often required in mining engineering positions, or lift heavier loads.

[129] Dr. Gouws found that Ms. Valino suffered ongoing chronic neck, back, upper shoulder and upper back pain which is myofascial in nature with associated reduced tolerance for prolonged body positioning, including sitting and standing. As well, he found she had low-grade lower back problems, and a deformity to her right long finger which impacts the dexterity and grip strength of her right hand. Dr. Gouws found that Ms. Valino's level of pain, and most specifically her spinal pain, impacted her quality of life and ability to work, and she had a reduced capacity at the sedentary to light level. Finally, Dr. Gouws found that Ms. Valino had emotional difficulties related to her chronic pain and functional impairment.

[130] Dr. Gouws is of the opinion that although Ms. Valino has reached maximum medical improvement, she has not reached maximum physical rehabilitation, and would benefit from further physical therapy for symptom management and to allow her to be as active as possible.

[131] Dr. Gouws noted that the profession of mining engineer requires a significant degree of academic skill, dedication, and a willingness to take on different work situations and tasks that could present in any geographic location in the world. Dr. Gouws' opinion is that Ms. Valino's injuries have had a very significant impact on her career trajectory as she does not now meet the full physical demands of the position of mining engineer. Her ongoing impairments are of significant concern considering her young age and the fact she has just embarked on her career. Dr. Gouws' opinion is that Ms. Valino's neck and back symptoms and the injuries to her right middle finger have left Ms. Valino with a permanent impairment and disable her from performing the heavier tasks involved in the work of a mining engineer.

[132] Dr. Gouws acknowledged that Ms. Valino is currently working 12-hour shifts on a 14 day rotation but is of the view that she is probably doing it at a significant price in terms of increased pain symptoms. Dr. Gouws agrees Ms. Valino has the ability to do the types of work in mining engineering that are light work, such as office work, but he is of the opinion that it is unlikely she will be able to sustain a working schedule of 12-hour shifts. Dr. Gouws is of the opinion that Ms. Valino will

experience unreasonable levels of pain if she works in a work-intensive situation for 12 hours per day, and her symptoms will get worse if she continues to work beyond her capacity. Dr. Gouws noted that she had been accommodated by her present employer as she has problems with prolonged sitting or standing.

[133] Ms. Craig, an expert in field of physiotherapy and functional capacity evaluation, saw Ms. Valino on October 21, 2013, at the request of her counsel, for a functional capacity evaluation. Ms. Craig prepared a report dated October 24, 2013, and testified at the trial.

[134] Ms. Craig conducted a six-hour assessment of Ms. Valino. during which she performed a short physical examination and had Ms. Valino participate in various tasks, and complete questionnaires. Ms. Craig's opinion is that Ms. Valino did not meet the full physical demands of her job as a mining engineer set out in the National Occupational Classification (NOC). Ms. Craig found that at the time of the assessment Ms. Valino demonstrated limitations in her neck, right upper back, right trapezius area, and right hand that reduced her ability to work at more physically demanding jobs. Ms. Craig found that Ms. Valino would have difficulty even with sedentary positions, and would require accommodation allowing for frequent positional and task changes, avoidance of repetitive right hand use, regular stretching and proper ergonomics to manage symptom aggravation in her neck, upper back and right hand.

[135] At the time of the assessment Ms. Valino was not working, and Ms. Craig expressed an opinion that it was unlikely she would tolerate 12-hour shifts. Ms. Craig also expressed concern that Ms. Valino's limitations would make it difficult for her to find and sustain a suitable engineering position. Ms. Craig's opinion is that it is likely a part-time position would be better for Ms. Valino in the long term. At trial, Ms. Craig testified she is aware that Ms. Valino is currently working 12-hour shifts. Ms. Craig agreed she could tolerate it with accommodation, but is of the view that even with accommodation she is likely to experience symptom aggravation with that schedule. Ms. Craig's opinion is that Ms. Valino would benefit from further physical

rehabilitation to improve symptom management and maintain function, as well as ongoing exercise.

[136] Trevor Lesmeister, a psychologist with expertise in the area of vocational counselling, was retained by the defendants to perform a document review and provide an opinion about Ms. Valino's ability to work as a mining engineer. Mr. Lesmeister did not meet Ms. Valino. Mr. Lesmeister's report was filed, but he did not testify. Mr. Lesmeister agrees Ms. Valino experiences residual physical limitations from the accident. However, he was of the view that she did meet the requirements in the NOC for mining engineers. Mr. Lesmeister opined that due to Ms. Valino's current limitations she is more suited to lighter positions where she will not be required to overuse her right hand or engage in certain activities such as standing, stooping, sitting, and typing for prolonged periods of time.

[137] Mr. Lesmeister summarizes his opinion as follows:

While her physical limitations will likely affect her ability to perform certain select jobs within her profession, she has successfully completed an education that allows her to access a wide range of job opportunities in a field with a strong labour market. Given the diversity of work within this occupational area, it is likely that Ms. Valino would be able to identify positions that would be more suited to her current abilities.

[138] Mr. Lesmeister states that if Ms. Valino experiences further improvement there would be an even broader range of employment opportunities available to her.

[139] Insofar as there is any conflict between Mr. Lesmeister and Dr. Gouws in regards to Ms. Valino's occupational limitations, I prefer Dr. Gouws who had the opportunity to interview and conduct an examination of Ms. Valino, as well as review the records.

[140] In my view, it is clear from a review of the evidence that Ms. Valino has established a real and substantial possibility that she has suffered a loss of future income earning capacity. Ms. Valino's evidence that she is not able to sustain her current work schedule is supported by the medical evidence, and the evidence of both Dr. Gouws and Mr. Lesmeister. Mr. Lesmeister states in his report that

Ms. Valino is limited from performing job activities which require prolonged sitting and typing. Ms. Valino's current job position requires such activities. Given her current work schedule, it is not surprising that Ms. Valino is struggling.

[141] As well, the defendants agree that there are certain jobs Ms. Valino will not be able to do. Although Mr. Lesmeister opines Ms. Valino should be able to find positions that will meet her abilities, and then build her functionality by having the appropriate ergonomic work station, he has not identified any specific positions or work schedules which would be appropriate.

[142] Ms. Valino's pre-accident plan was to work at various mines so that she could gain experience as a mining engineer. She is limited as a result of the accident in the types of work she can perform, and in particular, work that involves heavier physical work or long hours. Many of the mining engineering positions are in remote locations, involve long hours, and have some physical requirements.

[143] Ms. Valino's current position has long hours, and some of the positions require more physical work than others. Although Mr. Fedora stated he would hire Ms. Valino in the two positions she has worked in, he had reservations as to whether she would be able to perform all of the job duties on the surface. He also noted the two positions she had worked in were being phased out at the Ekati mine because the work is going to be more focused on the surface in the future. Mr. Fedora was uncertain as to how Ms. Valino would perform on the surface given her physical limitations. I note as well that Ms. Valino reports increased pain in her hand in cold weather. Working outside on the surface in minus 50 to 60 degrees will likely pose some challenges for her.

[144] The evidence is that the progression of Ms. Valino's career depends largely on her ability to gain experience across the spectrum of roles within the field of mining engineering. The evidence is Ms. Valino's career and ability to earn income will likely be diminished if she is unable to work in those various roles.

[145] Ms. Valino is currently seeking other employment which involves shorter hours, and a mix of office and light field work. I agree with Ms. Valino's submission that it is likely she will have to take lower paying jobs that do not require long hours in difficult working conditions. As noted earlier, Mr. Nguyen, a mining engineering graduate who completed his course at the same time as Ms. Valino, earns approximately \$45,000 a year in Vancouver working 8-hour shifts as a mineral processing technician.

[146] In my view, the evidence establishes that there is a real and substantial possibility that Ms. Valino will be unable to gain the experience she needs to move into the more lucrative managerial positions because she will be limited from gaining experience in all of the different areas of mining engineering. Accordingly, I have concluded that Ms. Valino has demonstrated impairment to her earning capacity and that there is a real and substantial possibility that the diminishment in her earning capacity will result in pecuniary loss.

[147] I turn then to the quantification of Ms. Valino's loss. As noted in *Perren v. Lalari*, once the plaintiff discharges the burden of establishing there is a real and substantial possibility of a future loss of income loss, quantification of the loss may be proved either on an earnings approach or a capital asset approach.

[148] I agree that in the circumstances of this case, and in particular the age and stage of education Ms. Valino was at the time of the accident, the capital asset approach is appropriate.

[149] In this case, Ms. Valino has provided tables based on the reports and tables prepared by Darren Benning, an expert economist, to assist in assessing the amount of her loss. As noted in the case law, an analysis of the loss should start with a consideration of any mathematical aids. However, that is not the end of the analysis. The overall fairness and reasonableness of the award must also be considered, taking into account all of the evidence.

[150] Based on the table she has provided, Ms. Valino submits her loss is between \$542,607 and \$2,073,925. Ms. Valino argues that the higher range is appropriate based on her earnings at the Ekati mine, and the fact the evidence demonstrates she was more attached to the workforce than the average Canadian woman. Ms. Valino argues that it is likely she would have earned more than the average Canadian female mining engineer.

[151] While I agree that Ms. Valino has shown both stoicism and tenacity in completing her degree, working in a co-op position in the Gibraltar mine, and then working in her present position despite her ongoing pain, it is very early in her career and it is difficult to determine the extent to which her future earning capacity is diminished. I do not agree that her level of impairment is 50% to function as an engineer overall. Ms. Valino is able to perform both office work and light field work. While she will likely require accommodation in the form of an ergonomic work station, the evidence establishes there is a wide spectrum of job opportunities in mining engineering. There are likely positions available where she can be accommodated. As pointed out by the defendants, Ms. Valino's current employers are willing to accommodate her.

[152] In my view, Ms. Valino has established a real and substantial possibility she will be unable to work in remote areas and the long hours usually associated with those areas. As well, Ms. Valino has established that she has been rendered less capable overall from earning income from all types of employment including all types of employment for a mining engineer, she is less marketable and attractive as an employee, and she may not be able to take advantage of all job opportunities. It was evident from her testimony and that of her brother that Ms. Valino is less valuable to herself as a person as a result of her diminished capacity.

[153] The evidence is that Ms. Valino's compensation for living in a remote area and working her current work schedule is 26% of her total compensation. Ms. Valino's current base salary is \$81,000. The northern living allowance is \$15,000, and there is a site allowance of 17%, or \$13,770. As well, Ms. Valino is

eligible for a bonus up to \$10,350, for a total remuneration of \$109,770 to \$120,300. The average earnings for a female engineer of Ms. Valino's experience in 2014 dollars is \$89,201. A loss of \$28,770 times the multiplier provided in Mr. Benning's report of 18.462 results in a loss of \$531,152.

[154] Mr. Fedora's evidence is that senior managers in mines earn in the range of \$200,000 to \$250,000 and up.

[155] I think it is reasonable to assess Ms. Valino's future loss of income earning capacity on the basis that there is a 50% chance she will be unable to work in the more lucrative positions available for mining engineers in the more remote areas, and unable to obtain the skills necessary to move into mine management. The tables provided show the lump sum present value of an average lifetime salary of \$175,000 is \$3,230,850, based on a multiplier of 18.46, or \$4,147,850, based on a multiplier of 23.70. The present day value of the average salary for a Canadian female engineer of \$117,562, using a multiplier of 18.462, is \$2,170,429. The difference between the two if the same multiplier is used is approximately \$1.1 million. On these calculations Ms. Valino's loss would be approximately \$550,000, which is similar to the amount of loss calculated if she lost her remote living allowances.

[156] The defendants assert that the appropriate award, if Ms. Valino establishes that she has suffered a loss of future earning capacity, is that set out in *Dobre* of \$60,000, on the basis that her only diminishment in income earning capacity is due to her finger injury. However, as discussed earlier, *Dobre* is distinguishable on its facts. In this case, not only does Ms. Valino have diminished capacity due to her hand injury but also due to her back and neck injuries which preclude her from prolonged sitting at a desk or computer.

[157] Having taken into consideration all of the evidence and the submissions of counsel regarding what is fair in the circumstances, I am satisfied a fair award for loss of future income earning capacity is \$500,000.

**Cost of Future Care**

[158] Ms. Valino advances a claim of \$223,343 under this head of damages based on the report of Terry Berry, an occupational therapist who provided a cost of future care report.

[159] The defendants take the position that Ms. Valino has not established that the items set out in Ms. Berry's report are medically justified or that the claim is reasonable. They say the amount for ongoing physiotherapy is not medically justified, but simply provides some temporary relief, and it should be more properly compensated for under the head of general damages. The psychological counselling is unlikely to be used based on Ms. Valino's evidence. There is no medical justification for the claims for housekeeping.

[160] The defendants say in the event there is an award for the cost of future care, the report of Linda Waithman, an occupational therapist who provided a cost of future care report at the request of the defendants, should be preferred. The defendants say Ms. Waithman's report should be preferred because she properly considers the likelihood of Ms. Valino needing care while living in camp conditions or an apartment.

[161] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42.

[162] Measures that provide some periodic temporary relief but little to no medical improvement ought to be compensated for under the head of general damages, rather than an expense that is compensable as a cost of future care: *Ho v. Dosanjh*, 2010 BCSC 845. As well, services that a plaintiff has not used and not sought out in the past should not be awarded as the plaintiff will be unlikely to avail herself of them in the future: *Izony v. Weidlich*, 2006 BCSC 1315 at paras. 73-74.

[163] Ms. Valino has provided the following table which sets out the care items from Ms. Berry's report:

Care Item	Medical Justification/Evidentiary Link	Cost
Physiotherapy	<ul style="list-style-type: none"> <li>Ms. Valino testified at length about the benefit of treatment and has demonstrated both a profound need and dedication to pursuing this treatment.</li> <li>It was recommended by Louise Craig, Tracy Berry, Dr. Gouws, Dr. Wee, Dr. Adrian, Ms. Waithman.</li> <li>No one recommended that she discontinue physiotherapy</li> <li>No one recommended a fixed end point in terms of its value in reducing pain and increasing function.</li> </ul>	Ms. Berry costs physiotherapy at \$60 per treatment. Ms. Valino is in fact paying the \$75 per session charged by Ms. Megalos. Ms. Valino has in fact attended 31 times in the past 12 months. 24 yearly attendances costs \$1800. The lifetime multiplier is 34.179. The present day value is therefore \$61,522. Mr. Benning calculates a cost of about \$35,000 based on a lower cost and less usage
Psychology	<p>Ms. Berry – based on interview and history recommends and assessment and a limited amount of treatment</p> <p>Dr. Gouws – based on questionnaire – diagnosed mood disorder</p> <p>Dr. Wee – diagnosed mood disorder</p>	<p>Assessment - \$600</p> <p>Treatment \$2,400</p>
Occupational Therapy	<p>Ms. Berry</p> <p>Ms. Craig</p> <p>Ms. Waithman</p>	<p>12 hours @ \$105</p> <p>= \$1,260</p>
Homemaking	<p>Ms. Berry</p> <p>Ms. Waithman</p> <p>Ms. Craig</p> <p>Dr. Vaisler</p> <p>Dr. Gouws</p>	<p>2 hours per week @ \$24.50 per hour</p> <p>Lifetime cost - \$70,000</p>
Home Maintenance		<p>10 hours per year @\$50/hour</p> <p>lifetime cost - \$16,000</p>

Care Item	Medical Justification/Evidentiary Link	Cost
Seasonal yard care		26 hours per year (approx. 2 hours per month) @ \$50/hour lifetime cost -\$43,000
Moving	Ms. Berry Ms. Waithman  Functional limitations found by all doctors and Ms. Craig	16 hours every 7 years to age 70 @ \$121 per hour  Lifetime cost - \$9,446
Gym pass	Ms. Berry, Ms. Waithman	\$361 per year - ongoing  Lifetime cost - \$12,000
Ergonomic work station equipment	Ms. Berry, Ms. Craig, Dr. Gouws	Lifetime cost - \$4,500
TENS machine	Ms. Berry, Ms. Craig, Ms. Waithman	Lifetime cost \$2200
Kinesiology	Ms. Berry (Note – this is the only item Ms. Waithman does not endorse)	Lifetime cost \$437
<b>Total</b>		<b>\$223,343</b>

[164] Mr. Benning provided multipliers for calculating the present day value of care items needed in the future and a line-by-line calculation of the recommended items from Ms. Berry's report.

[165] Although the defendants argue that physiotherapy is not medically justified because the health care professionals have, for the most part, indicated there is not likely to be further improvement in Ms. Valino's condition, it is apparent from the evidence that the physiotherapy treatments Ms. Valino undergoes keep her functioning and able to exercise. Dr. Wee, Dr. Adrian and Dr. Gouws all recommend Ms. Valino continue with her physiotherapy in order to assist with her symptoms and allow her to be as active as possible, and function in her work environment. In my

view, the amount of \$31,776 set out in Mr. Benning's report as present value of the cost of the physiotherapy treatments is an appropriate award under this heading.

[166] The defendants assert that Ms. Valino does not require any psychological counselling based on the opinion of Dr. Solomons. However, Dr. Gouws and Dr. Wee have both identified that Ms. Valino is suffering from ongoing mood disturbance. Although she did not find counselling helpful on the one occasion she went while still attending university, Ms. Valino has expressed a willingness to attend to help her deal with her losses. In my view, given the opinion of Dr. Gouws and Dr. Wee, some amount for psychological counselling is appropriate. Ms. Waithman agrees if psychological counselling is appropriate, a cost of \$1,600 to \$2,100 is appropriate. Ms. Valino is claiming \$3,000 under this head. I am of the view it is appropriate to award the amount of \$2,000 for psychological counselling.

[167] Ms. Valino is claiming costs for various types of home support, including house cleaning, home maintenance, seasonal yard work and moving, in the amount of \$138,600. The defendants say the home support services listed in Ms. Berry's report are not medically necessary and should not be awarded. Ms. Waithman agrees some homemaking service may be reasonable for Ms. Valino, but two hours per week seems high to start, particularly when Ms. Valino is working in a camp job where the cooking and cleaning are done for her. I agree with Ms. Waithman that based on her described function in the medical reports and in her own evidence, Ms. Valino is able to complete the majority of household chores.

[168] However, I agree that the evidence establishes there is some medical justification for the provision of some assistance to Ms. Valino in the future in regards to heavier chores, yard work, and moving. Based on the limited evidence I am of the view that an award for home support in the future in the amount of \$30,000 is appropriate.

[169] The various health professionals have all recommended that Ms. Valino continue with an active exercise program in order to improve her symptoms and functionality. Accordingly, I am of the view that an award for a gym pass is

appropriate. However, as noted by the defendants, Ms. Valino's current claim does not take into account that she has a gym provided to her at her current location. I am of the view that the possibility of Ms. Valino having a gym provided by her employer is a contingency that has to be taken into account in terms of the amount of the award under this head. I am of the view that a reduction of 50% is appropriate, for an award in the amount of \$6,000.

[170] None of the doctors have recommended a TENS machine. Accordingly, I am not awarding any amount. As well, none of the doctors have recommended a kinesiologist. Ms. Valino's evidence is that she is given exercises by her physiotherapist.

[171] Having considered all of the evidence, I have concluded the appropriate award for future care for both one time and annualized expenses is the amount of \$69,776.

**Conclusion**

[172] In summary, I am awarding the following amounts:

Non-pecuniary Damages:	\$125,000
Future Loss of Income Earning Capacity:	\$500,000
Future Cost of Care:	\$69,776

[173] As noted earlier, past loss of income has been agreed to in the amount of \$40,000, and special damages have been agreed to in the amount of \$16,500, for a total award of \$751,276.

[174] As well, Ms. Valino is entitled to her costs at Scale B, subject to submissions.

“Gerow J.”