

CANADA / JUDGMENT

Ayrheart v. Alexander

2025 BCSC 2214

COURT

Supreme Court of British Columbia

DECIDED

10 November 2025

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2025 BCSC 2214 Ayrheart v. Alexander

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ayrheart v. Alexander,

2025 BCSC 2214

Date: 20251110

Docket: M190648

Registry: Victoria

Between:

Amber Ariel Ayrheart

Plaintiff

And

Mark Alexander and Radana Trubka

Defendants

Before: The Honourable Justice Chan

Reasons for Judgment

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Place and Dates of Trial:

Victoria, B.C.

September 15–18, 23–25, 2025

Written submissions of the Plaintiff in Reply:

October 10, 2025

Place and Date of Judgment:

Victoria, B.C.

November 10, 2025

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Introduction

- [1] Amber Ayrheart was turning left on Highway 99 in Squamish on a green left-turn signal when the defendants' oncoming vehicle drove into the intersection and collided with her vehicle on June 24, 2018. Liability is admitted. Ms. Ayrheart had placed her right hand on her horn when she saw the oncoming vehicle. Her right wrist was fractured and she continues to have pain and restrictions in the use of her right hand. She claims non-pecuniary damages, loss of income and cost of future care.

Background of the Plaintiff

- [2] Ms. Ayrheart is currently 37 years old. She is a single mother to two boys aged 13 and 10 years old. She resides in Lantzville on Vancouver Island.
- [3] Ms. Ayrheart lived with her parents in Squamish when she was young. Her parents separated when she was 18 months old. She initially lived with her mother after the divorce. They moved throughout British Columbia, Ontario, Prince Edward Island and back to B.C. However, her mother struggled with mental illness and was diagnosed with a brain tumour when Ms. Ayrheart was six years old. Her mother was hospitalized, and Ms. Ayrheart moved in with her grandparents in Abbotsford for about a year. Her grandparents were busy and could not look after her, so she moved back to Squamish to live with her father and step-mother.
- [4] In retrospect, Ms. Ayrheart agrees her father provided her a stable home. However, at the time, she was influenced by her mother's negative views. Ms. Ayrheart decided to move out of her father's home at age 14. She dropped out of school in grade 9 and started using drugs. She lived with a boyfriend who was abusive. Ms. Ayrheart testified she made some poor decisions during this time. After about a year she decided to quit using drugs. She went back to school and completed grades 10 and 11 in one year. She also moved out of her boyfriend's family's house and was living on her own with funding from the government. Ms. Ayrheart described it as a youth agreement where she received rent subsidy from the government so long as she was attending school and in regular contact with her social worker. She was working part-time jobs during high school at places such as Tim Hortons, a Greek restaurant, day jobs through a central agency and housekeeping in Whistler.
- [5] Unfortunately, Ms. Ayrheart did not graduate from high school. She testified she was very close to meeting the graduation requirements in 2007 but missed writing her English 12 examination as she was moving out of her rental place on that day. She also missed the rewrite examination a week or two later as she had a bicycle accident that day which landed her in hospital, receiving stitches to her lip.
- [6] In 2011, Ms. Ayrheart began a common law relationship with the father of her children. She became pregnant and they moved in together. Her first child was born in 2012. Her partner had an older child, and Ms. Ayrheart became a stay-at-home mother to both children, along with two dogs and a cat. She and her partner were involved in an adult softball league, coaching a team.

Dog Attack

- [7] Ms. Ayrheart had started training in March 2014 for a delivery job with Just Call Terry in Squamish. On April 1, 2014, while she was doing a delivery in a building, Ms. Ayrheart was attacked by a dog. She required 150 stitches to her face and 12 stitches in her arm. Later in 2017, Ms. Ayrheart underwent surgery to treat her lip deformity.

- [8] Ms. Ayrheart testified the dog attack changed her life drastically. She had just become pregnant with her second child. She did not work for more than two years after the dog attack. She developed severe post-traumatic stress disorder ("PTSD"), for which she started seeing Dr. Wynn, a psychiatrist. Ms. Ayrheart testified that her relationship started falling apart due to the increased stress. In August 2014, she along with her child and one dog moved out of the home she shared with her partner. Ms. Ayrheart stayed with friends while she looked for a place to rent in Squamish.
- [9] She brought an action against the dog owner and the strata corporation, alleging physical and psychological injuries. She was successful only as against the dog owner. The dog was put down. However, she did not recover any damages.

Move to Galiano Island

- [10] In September 2014, Ms. Ayrheart moved to Galiano Island, as she could not find a place to rent in Squamish. A friend had found her a place to rent on Galiano Island starting in October. As Galiano Island did not have a hospital, her friend arranged for Ms. Ayrheart to stay with a relative who lived nearby Royal Columbian Hospital for the birth of her second child in November 2014. Shortly after, Ms. Ayrheart returned to Galiano Island.
- [11] She lived on Galiano Island until the end of 2016. Ms. Ayrheart testified as her oldest child was about to start kindergarten, she was looking for a place with more opportunities. She decided to return to Squamish.

Move back to Squamish

- [12] In late 2016/early 2017, Ms. Ayrheart moved back to Squamish. Her oldest child was involved in martial arts, and Ms. Ayrheart began taking classes in jiu-jitsu and kickboxing as well. She testified she found the exercise therapeutic. She attended three to five times a week.
- [13] In May 2017, Ms. Ayrheart moved into a house where she provided childcare for the landlord for reduced rent. She enrolled in a government program for single parents, called the Single Parent Employment Initiative, that provides single parents career training. As she explained it, participants had to find a training course that met the program's mandate and funding criteria. If approved, the participant would receive funding to attend the training, as well as funding for childcare for one year before, during, and one year post training. Ms. Ayrheart testified she researched options and settled on a spa massage course at the Vancouver School of Healing Arts. She testified she along with her caseworker had to do research to show there was a demand for graduates of this program. She was approved by the funding program and accepted into the full-time bodyworks course; however, she decided to sign up instead for the part-time course to start in September 2018. She completed her level 1 Reiki training as well in 2017. Ms. Ayrheart described Reiki as energy healing, where negative energy is cleared and beneficial energy is restored. She believed she could incorporate Reiki with spa massage work.

- [14] Ms. Ayrheart was working at Just Call Terry doing deliveries about once a week and childcare for her landlord. She had worked briefly as a cook for a pub, but she was fired from that job in May 2018 after she was late for a shift.

The Accident

- [15] The accident occurred on June 24, 2018. Ms. Ayrheart testified that her vehicle was hit by an oncoming vehicle when she was making a left turn. She testified that she was knocked out and when she came to, she realized her vehicle had been pushed back quite a distance from the impact. The airbags were deployed. Her arm was in excruciating pain and she realized it was broken. She was able to get out of the vehicle on her own. She was placed in an ambulance and given gas to help with the pain. At the hospital, she testified it was very difficult for her to place her arm on the X-ray machine due to the pain.
- [16] Ms. Ayrheart waited for three days for the surgery. During that time she was heavily sedated. A friend came to help her and her children during this time. Ms. Ayrheart required an incision into her right inner wrist and hardware consisting of a plate, screws and pins were inserted into her wrist to hold the bone together.
- [17] After the surgery, Ms. Ayrheart could not place any weight on her right hand for three months. She had to learn to adapt, as her right hand is her dominant hand. Her friend Samira Yousuf came from Calgary to stay with her to help for two months.
- [18] As Ms. Ayrheart could no longer provide childcare for her landlord, she had to move. She lived with a friend in Squamish for a while, but that house developed mold problems. Ms. Ayrheart looked for other places to rent in Squamish but was unsuccessful. She started to look elsewhere.

Sex Assault December 2018

- [19] Ms. Ayrheart alleges she was sexually assaulted in December 2018 by someone she knows. While she filed a police report, she did not pursue charges.

Move to Lantzville

- [20] In August 2019, Ms. Ayrheart moved to Lantzville to the home where she resides today.
- [21] Ms. Ayrheart started her relationship with her current partner in 2019. While they do not live together, they are committed to each other. They celebrated their relationship recently with their family and friends.
- [22] Ms. Ayrheart enrolled in August 2019 in adult education courses to upgrade her grade 12 English and math at Vancouver Island University in Nanaimo. She testified she was intending in the future to pursue a degree or a program in science, such as horticulture or forestry, so she can work outdoors. She required grade 12 graduation for these programs. However, Ms. Ayrheart ultimately decided the workload from two courses was not realistic for her, as she had difficulties with sitting in class and taking notes. She withdrew from the

courses.

Persons with Disability Designation 2020

- [23] Ms. Ayrheart testified that after the accident, she believed that it was no longer feasible for her to work. Her psychological and physical injuries prevented her from working in jobs that she was qualified for, which were mostly labour jobs.
- [24] Ms. Ayrheart applied in November 2019 for the persons with disability status pursuant to the Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41. Dr. Wynn provided a medical report with four diagnoses relating to Ms. Ayrheart's impairment: PTSD with onset in 2014; depressive disorder since adolescence; chronic pain from 2018; and cannabis use disorder with unknown onset date.
- [25] Ms. Ayrheart's application was approved in early 2020. She started receiving approximately \$25,000 in social assistance a year and continues to receive this amount.

Work History

- [26] Ms. Ayrheart testified about her various jobs over the years. The Court also has her tax returns and records of employment which provide the dates of employment and wages earned from 2012 to 2020. She has not worked since 2020.
- [27] Starting in December 2012, Ms. Ayrheart worked 1,053 hours over a one-year period at Club Flex Athletics. She testified her job at the gym was at the front desk, opening and closing the gym and keeping the washrooms and equipment clean. This was a part-time position for which she earned \$6,561. She was dismissed from this job due to an allegation of theft which was not proven.
- [28] Her next job was at a liquor store in Squamish. She worked there for 30 hours from June 19 to July 3, 2014, earning \$368. Ms. Ayrheart quit this job when she moved to Galiano Island.
- [29] She did not work for two years after the dog attack in April 2014. She returned to Just Call Terry as a delivery driver, working as an on-call driver five or six days per month from February 2017 to June 24, 2018, for a total of 102 hours at \$25 an hour. She stopped working after the accident.
- [30] She also worked providing childcare for her landlord in Squamish from May 2017 until sometime in 2018 after the accident. She received reduced rent.
- [31] She worked part-time at the Shady Tree Pub from January to May 2018, working 325 hours earning \$16 an hour. She earned \$5,135 in total. She testified she was wrongfully dismissed from this job.

- [32] She also worked at the pub Knotty Burl for 18 hours over a few days from May 25 to June 22, 2018. She earned a total of \$232. Ms. Ayrheart testified she worked on weekends when she had childcare, and her duties included ensuring there were a sufficient supply of clean glasses for the bartenders and clearing tables.
- [33] After the accident, Ms. Ayrheart worked from September to November 2018 at Century Signs in Squamish. She worked in total 53 hours earning \$940. She testified she was laid off as she was not capable of the physical demands of the job.
- [34] She started another job a few days later at Freshly Clean, a residential cleaning company. She worked 180 hours in total from November 2018 to February 2019, earning \$3,744. She testified she quit as she could not do the cleaning.
- [35] She worked at Blackcomb Spring Suites as a cook from March to April 2019, working in total 229 hours and earning \$4,668. Her job included rotating through different stations in the dining room and kitchen during breakfast. She testified she had difficulty in some of the stations. For example, she could not flip the waffle makers. She also could not keep up with the cleaning duties such as vacuuming and moving tables.
- [36] She tried working for three shifts at Errington General Store in November 2020. She was being trained but ended up quitting as she saw she could not do part of the duties, which included cashier, stocking the cooler and upkeep of the gas tanks for the gas station. She worked 14 hours, earning \$205.
- [37] Her income tax returns provide the following information:

Year

Source of Income

Total income

2012

T4 \$260, the remainder from universal child care benefits (\$1,000) and employment insurance (\$10,668)

\$11,928

2013

T4 \$12,917, universal child care benefits \$1,200

\$14,117

2014

T4 \$1,804 and \$261; universal child care benefits \$1,200, employment insurance \$3,179, social assistance \$5,128

\$11,572

2015

Universal child care benefits \$3,940, social assistance \$11,751

\$15,691

2016

Universal child care benefits \$1,920; social assistance \$12,336

\$14,256

2017

Business income \$604; social assistance \$12,807

\$13,411

2018

T4 \$8,389; social assistance \$10,557

\$18,946

2019

T4 \$7,012, employment insurance \$10,147, social assistance \$3,129

\$20,288

2020

Employment insurance \$204; Canada Emergency Response Benefit ("CERB") \$19,000; social assistance \$23,049

\$42,253

2021

CERB \$19,600; social assistance \$23,680

\$43,280

2022

social assistance \$25,656 Other \$287

\$25,943

2023

Social assistance

\$24,956

2024

Social assistance

\$24,196

[38] Ms. Ayrheart earned a total of \$31,247 from employment in 2012 to 2024. Specifically, before the accident, she earned \$24,235 from employment, from 2012 to 2018. During this period from 2012 to 2024, she received approximately \$240,330 in social assistance and \$9,260 in childcare benefits.

Plans for Career before MVA

[39] Ms. Ayrheart testified her career plan before the accident was to enroll in the massage course with the Vancouver School of Healing Arts. She planned to start the course part-time in September 2018. She also obtained her level 1 in Reiki in 2017. She testified that she hoped she would eventually be able to become a registered massage therapist ("RMT").

Earnings for RMT

[40] Rhonda Farnham is a part-time RMT and a part-time instructor in the RMT program at the West Coast College of Massage Therapy in Victoria. In 1995, Ms. Farnham graduated from an RMT program. She failed the board examination the first time but was successful the next year. She became an RMT and practiced full-time until she injured her thumb in 2018. She then moved into a part-time instructor role.

[41] Ms. Farnham testified RMTs earn more than non-registered massage workers. Non-registered massage workers mainly provide relaxation massages which are not paid for by insurance. Registered massage therapists provide therapeutic massages which are covered by insurance. She described some students at her college who work part-time doing massages, and they earn approximately \$18 to \$20 an hour plus tips. A person doing spa massages can earn \$50 to \$60 an hour, while an RMT can earn \$80 to \$100 for a one-hour massage. Her evidence is there is a high demand for RMTs; however, for non-registered massage workers, she testified they struggle to make a living. Her evidence is RMTs typically earn \$100,000 a year.

[42] In terms of entry requirements to the RMT program, Ms. Farnham testified some of the requirements are science courses, math and human anatomy. The board examination after completion of the program includes an academic component, testing anatomy, ethics and jurisprudence. There is also an oral practical examination.

- [43] Ms. Farnham had obtained her level 1 and level 2 in Reiki in 1993 and 1994. She obtained a masters in Reiki in 1998. She explained Reiki is not well known and not well respected. She testified not many people request Reiki and it would be difficult to make a living providing Reiki. A person can do a course online and obtain a Reiki certificate over a weekend. She described Reiki as a pseudo-science. She had not done Reiki for seven or eight years, and she was not able to say how much a Reiki practitioner may earn.
- [44] Sandeep Nandhra is an RMT and also an athletic therapist. He obtained a four-year undergraduate degree in 2010 and became an athletic therapist. He recently completed a diploma in RMT and passed the examination in 2024. He practices at the Saanich Massage Therapy and Wellness Center in Victoria. His rate is \$135 for a one-hour massage. He earns approximately \$90,000 to \$100,000 a year for his RMT work. He testified that to become an RMT, it is a two-and-a-half-year diploma program at Camosun College that runs the full year, with no summers off. High school graduation is a requirement to be admitted into the RMT program. He testified the program at Camosun College where he studied is a competitive program with a two-year waitlist when he applied. After the program, there is a board examination. He testified there is a demand for RMTs and he had no difficulty finding clients.

Earnings for non-registered massage worker

- [45] Rhiannon Berry is a friend of the plaintiff who worked as a non-registered massage therapist in Squamish. Ms. Berry became an RMT when she lived in Chile in 2013, but her credentials were not recognized in Canada. She was required to upgrade her education to be a RMT in Canada, a process that would take four years. Ms. Berry decided against trying to upgrade her credentials. Instead, she worked as a certified massage therapist. She explained she had a licence from the city of Squamish to provide massage therapy. She worked for the owner of a company for a couple of months, then she became self-employed. As she was not an RMT, her services were not paid by insurance companies, but by her clients. She charged \$60 for a one-hour massage. She earned approximately \$30,000 to \$40,000 a year working as a certified massage therapist.

Current Plans for Employment

- [46] Ms. Ayrheart has recently completed her Reiki level 1 again and obtained her Reiki level 2 certificate. She wishes to pursue being a Reiki practitioner. She has set up a website and printed business cards. Her posted rate is \$75 for one hour. Ms. Ayrheart explained that Reiki does not have to be hands-on, and she can perform Reiki remotely. She has not had a client yet.

Current Condition

- [47] Ms. Ayrheart does not have full range of motion in her right hand. Her right hand cannot bend as far as her left hand. She feels constant pain from her right hand, arm, and elbow, with the epicentre of the pain emanating from her right wrist. She described pain in her shoulders on both sides and pain in her lower back on the left side, from overcompensating for her weaker right hand. She feels numbness in her right hand especially when she is driving. The pain disrupts her sleep.
- [48] Psychologically, Ms. Ayrheart testified she feels she is in a good space, with support from her partner and her children. She has driving anxiety, especially during heavy traffic.

Expert Witnesses

Medical

Dr. Shalinder Arneja

- [49] He is an orthopaedic surgeon. He assessed Ms. Ayrheart on October 16, 2019. He testified as an expert for the plaintiff.
- [50] Dr. Arneja noted that Ms. Ayrheart has significant restrictions in her right forearm flexion and extension. His view is she is not able to bend her right hand to perform cooking and other physical labour jobs she had done in the past. His view is it is not likely she would be able to work as a massage therapist, as she would probably be unable to bend her right wrist beyond 30 to 40 degrees of extension. He opined that she will also likely have difficulty with grip strength and this may impact her ability to perform strenuous housework. However, his view is she can carry on the majority of her activities of daily living. He believes it is unlikely her functional limitations will substantially improve unless there is evidence from a CT scan that one of the screws is protruding and impeding motion.
- [51] He recommended Ms. Ayrheart to have a CT scan of her right wrist. If a screw is protruding, surgery to remove it may improve range of motion or reduce risk of osteo-arthritis.
- [52] With respect to her whiplash symptoms, his view is these are mild. He suggests occasional massage therapy and an exercise program.

Dr. Kathryn Wynn

- [53] She was the plaintiff's treating psychiatrist from June 2014 to October 2019. She testified as an expert for the plaintiff.
- [54] Ms. Ayrheart was referred to Dr. Wynn after the dog attack. Her first assessment was on June 20, 2014. She described to Dr. Wynn that she was experiencing nightmares and flashbacks whenever she saw dogs. She reported depression.

- [55] In 2017, after Ms. Ayrheart returned to Squamish, she was again referred to Dr. Wynn for anxiety and depression. Ms. Ayrheart reported improvement in her symptoms from 2014. She reported to Dr. Wynn that she had a second dog scare in 2017 while doing delivery work, which triggered her fear of dogs.
- [56] On November 6, 2018, Ms. Ayrheart reported her accident to Dr. Wynn, describing it as a major setback in her recovery.
- [57] Dr. Wynn's opinion is Ms. Ayrheart has PTSD of moderate severity in partial remission. Her opinion is Ms. Ayrheart developed PTSD from the dog attack in 2014, which was exacerbated by a second dog incident in 2017, the motor vehicle accident in 2018 and a sexual assault in 2018. Dr. Wynn's opinion is she expects Ms. Ayrheart will be able to make a partial recovery.

Dr. Alan Richardson

- [58] Dr. Richardson is an orthopaedic surgeon. He assessed Ms. Ayrheart on May 24, 2024. He testified as a defence expert.
- [59] Dr. Richardson's opinion is the plaintiff's fracture of the right wrist has resulted in probable permanent loss of range of motion.
- [60] His opinion is her current neck symptoms and upper back pain were caused by the accident. Her low back pain was probably caused by the accident. Her right hand, wrist, and forearm symptoms were caused by the accident. Her right shoulder symptoms are a secondary consequence of the accident, as deconditioning of the right upper extremity and difficulty with movement of the right wrist put a strain on the right shoulder.
- [61] With respect to the right wrist, Dr. Richardson's opinion is the prognosis is guarded. He recommends she obtain a CT scan to evaluate if any of the hardware is protruding.
- [62] His view is she is not suitable for manual or labour-intensive work, as she has a permanent partial disability.

Dr. Julian de Ciutiis

- [63] Dr. de Ciutiis is a physiatrist. He assessed Ms. Ayrheart on May 27, 2024. He testified for the defence.
- [64] He diagnosed Ms. Ayrheart with a right wrist fracture, with whiplash, post-traumatic headaches, sleep disruption and mood disruption. His opinion is the wrist fracture and whiplash symptoms were caused by the accident. As for the headaches, his view is they were probably caused by the accident. As for the sleep disruption, his view is the accident worsened her sleep. Dr. de Ciutiis would defer to psychiatry on the cause of the mood disruption.

- [65] His prognosis is complete symptom resolution of the headaches, right wrist pain, and whiplash symptoms is of low probability. His view is there will likely be an improvement with regard to her pain levels if she enrolls in a multidisciplinary pain clinic.
- [66] His opinion is she will probably no longer be able to do work requiring increased physicality, especially that involving use of her right upper extremity. He notes that she is probably capable of engaging in full-time work in some capacity.

Functional capacity

Margherita Bracken

- [67] Ms. Bracken is an occupational therapist. She performed a functional capacity evaluation of the plaintiff on March 14 and 15, 2023. She testified for the plaintiff.
- [68] Ms. Bracken found the plaintiff had significant limitations for her right hand. Her right-hand grip strength was below the norm. She found that the plaintiff is poorly suited for work that requires more than incidental, light grasping or dexterity functions, and that she is unable to perform work that requires forceful or repetitive gripping with her right hand. She found that Ms. Ayrheart is not suited for a sitting job, but can perform work that requires dynamic standing, meaning she can move around.
- [69] Her opinion is Ms. Ayrheart is unable to work as a massage therapist. Ms. Bracken found the plaintiff is poorly suited to be a delivery driver, a cook or a housecleaner.
- [70] Ms. Bracken recommends hand therapy from a certified hand therapist, and the use of a splint and/or a brace. Once the plaintiff has done this therapy, a further assessment specific to her right hand should be undertaken. Ms. Bracken recommends a complete vocational assessment to determine if the plaintiff retains any residual earning capacity.

Ralph Cheesman

- [71] Mr. Cheesman is an occupational therapist. He assessed the plaintiff on April 15, 2025. He testified for the defence.
- [72] His opinion is Ms. Ayrheart has diminished mobility of her right wrist, weakened grasp and pinch strength.
- [73] He recommends Ms. Ayrheart try a working splint to support her right wrist. In his opinion, she will likely obtain some benefit from a splint.
- [74] His opinion is the plaintiff cannot work in jobs that regularly require vigorous tooling and forceful grasping with the right hand. She will be able to manage sedentary strength demands likely up to light strength demands should a splint be effective for her. His view is she can work in an administrative role, working on computers, attending meetings and talking on the telephone. His opinion is she can work in jobs that allow for both sitting and standing. His view is she can do a job that requires prolonged standing.

[75] He does not believe she can work in massage therapy.

[76] His view is the plaintiff can continue to perform a wide range of household activities, using pacing techniques and adaptive equipment. She will require assistance for medium-strength jobs around the home. He suggests she work with a vocational rehabilitation counsellor to review her aptitudes for retraining purposes.

Economics

Robert Wickson

[77] Mr. Wickson is an economist who provides calculations based on statistics. He provided expert evidence for the plaintiff.

[78] He provided evidence of the present value of future average earnings of British Columbia women with high school graduation to age 70, with considerations of negative contingencies of unemployment, part-time work, and non-participation in the labour force. His evidence is that from June 2025 to June 2057, the present value of future earnings of women in B.C. after contingencies are accounted for are approximately \$1,025,500. The plaintiff argues this figure should anchor her award for future loss of income.

[79] He calculated the average earnings from June 24, 2018 to June 19, 2025 of B.C. women with high school graduation to be \$208,700 during these seven years. The plaintiff argues this figure should anchor her award of past loss of income.

Credibility and Reliability

[80] The factors to be considered when assessing credibility were summarized by Madam Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal to SCC *ref'd*, 35006 (7 March 2013):

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

- [81] The defendants argue the plaintiff exaggerated and misrepresented the extent of her injuries and limitations. They argue the plaintiff is not as disabled as she presents herself to be. Specifically, the defendants point to the video the plaintiff posted on her social media account in 2022, showing the plaintiff playing with her dog with her right hand with no difficulty. They further point to the surveillance video of the plaintiff while she was shopping at Costco on June 16, 2025. They say the surveillance video shows the plaintiff pushing her cart to her vehicle and handling grocery items with her right hand, including a 4L jug of milk.
- [82] I do not place much weight on the videos. They are short snippets of the plaintiff's life. I accept the plaintiff's explanation that some days are better for her and depending on what she had been doing that day she may have more mobility with her right wrist. She explained that she had used her left hand to place the milk jug into her right hand, which was resting on the cart. I do not find the videos to contradict the evidence of her functionality.
- [83] I do not find the plaintiff exaggerated her injuries. She testified in a straightforward manner. She did not recall specific details of when she moved where, or the dates she held down certain jobs. However, she did not dispute the contents of the records of employment or her tax returns showing her historical earnings. I find her lack of recall of some of these details of her life was not intended to mislead, but simply the product of having lived a somewhat chaotic life. I find the plaintiff credible and I accept her evidence of her injuries.

Causation

- [84] The basic legal principles respecting causation are found in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 [Athey]. The general test for causation is the "but for" test requiring the plaintiff to prove on a balance of probabilities that her injury and loss would not have occurred but for the negligence of the defendant: *Athey* at paras. 13-14. This causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense: see *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328, 1990 CanLII 70.
- [85] It is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable. The contribution to the cause of the injury must be material, in the sense that there is a substantial connection between the accident and the injury, beyond a *de minimus* range: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9-11.
- [86] A plaintiff is only to be restored to her original position, and not a better position. A defendant is not required to compensate a plaintiff for any debilitating effects arising from a pre-existing condition that the plaintiff would have experienced anyway, and if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, this is to be taken into account in reducing the overall award: *Athey*, at para. 35.

[87] As I understand it, the defendants do not seriously dispute the accident caused injuries to the plaintiff, the most serious being the injury to her right wrist. The defendants argue though that the plaintiff had pre-existing depression, anxiety and PTSD from the dog attack, and they should not be held accountable for any debilitating effects of these conditions that the plaintiff would have suffered in any event without the accident. In my view, this issue arises not in analysis of causation but compensation. The issue is whether there was a measurable risk that the pre-existing depression, anxiety and PTSD would have detrimentally affected the plaintiff in the future, without the accident. I will discuss this issue in assessment of damages.

[88] On the totality of the evidence, I find the accident caused the following injuries:

- Fracture of the right wrist with a loss in range of motion and strength;
- Chronic pain in her right hand, wrist, arm, and shoulder;
- Soft tissue injury to her neck, shoulder, and the low back; and
- Continuation or aggravation of PTSD from dog attack.

[89] Currently, Ms. Ayrheart suffers from chronic pain emanating from her right wrist. She has learned to adapt by using her left hand, which was her non-dominant hand. Her strength, grip and dexterity in her right hand have been diminished.

Failure to mitigate

[90] A plaintiff has a duty to mitigate damages by taking reasonable steps to limit their losses, including pursuing appropriate medical treatment: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, 1985 CanLII 62, at paras. 24, 36 [*Janiak*]. To determine if the plaintiff has acted unreasonably in not following medical recommendations, the court must consider the degree of risk of the proposed medical treatment, the gravity of the consequences of refusing it and the potential benefits to be derived from it: *Janiak* at para. 31.

[91] The defendants argue the plaintiff was unreasonable in not obtaining a CT scan of her right wrist as recommended by Dr. Arneja in 2019 to see if a screw was out of place. His opinion was if a screw was protruding, surgery to remove it followed by specialized hand therapy may improve range of motion and reduce risk of development of osteo-arthritis.

[92] In my view, the defendants have not proven a failure to mitigate. There is no evidence a CT scan would have reduced the plaintiff's damages. The evidence does not show the plaintiff has a protruding screw in her right wrist. In Dr. Arneja's opinion, a protruding screw is a possibility. The evidence shows a CT scan would have been exploratory and may or may not have led to further medical treatment. As such, the defendants have not proven obtaining a CT scan would have limited the plaintiff's damages.

Assessment of Damages

Non-Pecuniary

[93] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities caused by a tortious act. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46 [Stapley], leave to appeal to SCC ref'd, 31373 (19 October 2006), the Court of Appeal outlined certain factors to be considered when assessing non-pecuniary damages:

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

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

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

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

[94] The plaintiff seeks an award of non-pecuniary damages in the range of \$170,000 to \$200,000. The plaintiff relies on *McNabb v. Rogerson*, 2022 BCSC 1514 at para. 225 (\$170,000 now \$204,500); *Gark v. Lauzon*, 2023 BCSC 1930 at para. 129 (\$220,000, now \$228,500); *Woo v. Khaira*, 2024 BCSC 1114 [Woo] at para. 288 (\$165,000, now \$168,000); and *Cheema v. Pandha*, 2025 BCSC 724 at para. 133 (\$225,000).

[95] The defendants argue the award for non-pecuniary damages should be \$80,000 to \$100,000. The defendants rely on *Rezaei v. Leland*, 2013 BCSC 1650 at para. 61 (\$45,000 now \$62,000); *Khan v. Bhangoo*, 2020 BCSC 2053 at para. 87 (\$90,000 now \$108,262); and *Salame v. Sutherland*, 2016 BCSC 1610 at para. 156 (\$99,000 now \$126,729).

[96] While the cases cited are helpful, as noted in *Stapley* at para. 45:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, [[1981] 2 S.C.R. 629 at 637, 1981 CanLII 35] is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton v. School District No. 57 (Prince George) et al.*, [1978] 2 S.C.R. 267 at 284, 1978 CanLII 12)).

[Emphasis added in Stapley.]

[97] Ms. Ayrheart has suffered soft tissue injuries to her neck, shoulder and lower back from the accident. She has chronic pain in her right side, the epicentre of the pain from her wrist. Her most significant injury from the accident is the fracture of her right wrist where she has a permanent decreased range of motion and strength. The accident also aggravated her PTSD symptoms.

[98] She suffered significant pain immediately following the accident and during the three-day waiting period for her surgery. After the surgery, she could not put weight on her right hand for three months. Since then, she had to learn to adapt from being right-hand dominant to now using her left hand for tasks. The medical prognosis is her decreased range of motion and strength in her right hand is likely permanent. This has significant impact on her, as she is a single mother to two young boys who needs to continue to be in a caregiving role. Instead of assisting her sons, she has had to rely on them to help her with daily tasks. Today she suffers from persistent pain. Psychologically, she has driving anxiety, particularly when she drives for longer periods or during heavy traffic.

[99] The evidence is she was recovering from her dog attack before the accident. She had returned to delivery work. She had found an exercise program she enjoyed, doing jiu-jitsu regularly. She had undergone surgery to treat the deformity on her lip, feeling more confident. I accept the plaintiff was starting to feel more optimistic about her life before the accident. She suffered a setback to her recovery after the accident.

- [100] My understanding is that loss of housekeeping capacity can be included either as a separate head of damage or included as part of the non-pecuniary award. Where there is evidence the plaintiff is still able to perform household tasks but with difficulty, that loss may be compensated by a non-pecuniary award: *Kim v. Lin*, 2018 BCCA 77 at para. 33. It is at the discretion of the trial judge.
- [101] The evidence is the plaintiff can complete most daily household tasks, such as vacuuming or dishes, but she takes longer to do them and experiences some pain. She requires the assistance of her partner or children to do some of the more strenuous tasks such as seasonal yard work. I find it is appropriate to include her loss of housekeeping capacity in the award for non-pecuniary damages.
- [102] The cases cited by the parties show a range of awards for injuries to the wrist with impacts to range of motion and strength, and ongoing psychological impacts from the accident to her mood. In my view, I prefer the cases of the plaintiff as being more recent. I find Woo to be the most comparable on the facts. However, the plaintiff in this case had pre-existing PTSD from the dog attack, along with depression and anxiety from her adolescence, which must be considered in the assessment of damages. In all the circumstances, I find a fair and reasonable award for non-pecuniary loss to be \$130,000.

Past Wage Loss

- [103] Ms. Ayrheart argues in June 2018, she was on the path of recovery after the dog attack. She returned to work in early 2017 as a delivery driver. She babysat her landlord's child for reduced rent starting in May 2017. She got jobs at a pub and a bar. She obtained her level 1 Reiki certificate in November 2017. Most importantly, she had enrolled and been accepted into a spa massage course at Vancouver School of Healing Arts, to start in September 2018. She argues from the date of the accident, June 24, 2018, to the date of trial, she would have earned the same as the average woman with high school graduation. She relies on the calculation provided by Mr. Wickson that this figure is \$208,700 after consideration of contingencies. She seeks to deduct from this figure what she actually earned during this time period without the CERB payments, which is \$161,257 before taxes. Thus, her past loss of income is \$46,772 after deductions for employment insurance ("EI") and Canada Pension Plan ("CPP"). She seeks an award in this amount for her past wage loss.
- [104] The plaintiff cited no authority for why the court should rely on statistical average wages compiled by Mr. Wickson, with no consideration of the plaintiff's specific circumstances. Mr. Wickson's report sets out that he assumed "Ms. Ayrheart's experience in the labour market (in terms of the impact of employment contingencies) would have been typical of that of females in British Columbia of her age and education level, but beyond this our estimates do not rely on any information or documents specific to Ms. Ayrheart". His calculations are based on a high school graduate--which Ms. Ayrheart is not--working full-time--which Ms. Ayrheart has never done. His calculations are not anchored in the evidence of Ms. Ayrheart's actual employment history. Ms. Ayrheart is a 37-year-old woman

who has been in the work force for more than 20 years. Any assessment of her damages for loss of income must consider her specific circumstances. I put no weight on Mr. Wickson's report.

- [105] The plaintiff's position on past wage loss relies on a hypothetical event--that she would have pursued a job as a massage worker without the accident. Proof of a hypothetical event is the same whether it is a past or future event, and proof on a balance of probabilities is not required. This was made clear in *Grewal v. Naumann*, 2017 BCCA 158:
- [45] The governing authority in this Court is *Smith v. Knudsen*, 2004 BCCA 613. In *Smith*, this Court, after an extensive review of the authorities, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. Rowles J.A. wrote for the court. She explained that the plaintiff in the first instance was required to establish both liability and causation on a balance of probabilities. This required the plaintiff to establish that the respondent's negligence, in whole or in part, caused the accident, and that the injuries the appellant sustained in the accident caused or contributed to the loss for which damages were sought (para. 26).
- [46] Rowles J.A. then went on to discuss the assessment of damages. She noted that the same test applies regardless of whether you are assessing past or future loss of earning capacity. In both situations the judge is considering hypothetical events. She reasoned:
- [29] What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [47] I note that neither *Reynolds [v. M. Sanghera & Sons Trucking Ltd.]*, 2015 BCCA 232 nor *Ostrikoff [v. Oliveira]*, 2015 BCCA 351 referenced *Smith [v. Knudsen]*, 2004 BCCA 613]. To the extent that those decisions could be read to hold that a past hypothetical event must be proven on the balance of probabilities, they must be regarded as per incuriam.
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [106] As I understand it, Ms. Ayrheart argues without the accident, she would have completed the massage course at the Vancouver School of Healing Arts and began working as an unregistered massage therapist. She argues it was also likely that she would have completed training later to become an RMT. She had completed her level 1 Reiki certification in 2017, as she had hoped to combine Reiki work with massage therapy. She argues the evidence shows she was serious about this career, as she had spent months researching the industry with the assistance of her social worker. She had been approved for government funding to take the massage course, and she was enrolled to start in September 2018.
- [107] The onus is on the plaintiff to show that working as a massage therapist was a real and substantial possibility, and not mere speculation. The plaintiff does not need to prove this on a balance of probabilities. If the court finds this hypothetical event was a real and substantial possibility, the court will have to assess the relative likelihood of this event occurring.
- [108] I do not find the plaintiff would have become an unregistered massage worker or a registered massage therapist, without the accident. I find on the evidence that she has not shown massage therapy was a real and substantial possibility for her, without the accident. Ms. Ayrheart had never completed any massage training. She testified to doing massages briefly while she was working with a woman in Whistler, but the evidence was vague as to what she actually did and for how long. Her evidence is her experience with massages was providing massages to her partners. She had not yet started the bodyworks course and there is no evidence as to her aptitude and inclination for massage work. She had been accepted into the full-time course but then decided to take a part-time course instead. In my view, the plaintiff signing up for a bodyworks course part time to take advantage of government funding is insufficient to show becoming a massage worker was a real and substantial possibility.
- [109] Her work history shows she has difficulty committing to one job for a prolonged period of time. As the defendants pointed out, all her jobs were part-time and short in duration. The evidence shows from 2012 to 2024, the plaintiff worked in total approximately 2,000 hours, which is roughly equivalent to one year of full-time work in a 12-year period. While she only needs to upgrade her English 12 to receive her high school graduation, she has not done so in the almost 20 years since she left secondary school. Other than 2013, her tax records show her income every year was mainly from EI, childcare benefits, social assistance and CERB payments. This pattern of part-time work and reliance on government assistance does not show a real and substantial possibility that the plaintiff would complete the bodyworks course and obtain a full-time job doing massages.

- [110] Further, the plaintiff does not meet the entry requirements for the RMT program. She does not have high school graduation. The evidence is the RMT program is competitive, with a waitlist at one of the colleges. The workload in the program is heavy, and some candidates do not pass the board examination on their first try.
- [111] I find without the accident, the plaintiff would have continued working in similar entry-level jobs part time. Her children in 2018 were ages six and four, and this would have limited her ability to work. However, I find moving forward, she would have worked more hours than before, though not full-time. I find her total income from 2018 to 2025 would have been about \$18,000 a year, without the accident. This would require her to work approximately 17 hours a week at \$20 an hour. She would have earned approximately \$126,000 from 2018 to 2025. Her total actual income from 2018 to 2025 before taxes was approximately \$199,862. Deducting the CERB payments of \$38,600 from this income calculation leaves a total income of approximately \$161,262. As social assistance payments are to be deducted from tort awards for past loss of income, she has suffered no past loss of income: *M.B. v. British Columbia*, 2003 SCC 53 at paras. 25-43.
- [112] There is no award for past loss of income.

Loss of Future Earning Capacity

- [113] Justice Grauer in *Rab v. Prescott*, 2021 BCCA 345 described the three steps to assess damages for the loss of future earning capacity:
- [47] The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown [v. Golai]* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan* at paras 93-95.
- [114] This three-step approach was further explained by the Court of Appeal. In *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 [Ploskon], at para. 11 Justice Harris set out under the first step the two broad types of cases involving the loss of future earning capacity: (1) where the plaintiff is injured and unable to work at the time of trial and into the foreseeable future; and (2) less clear-cut cases, where the injuries have led to limitations but the plaintiff has not lost income. In the second set of cases, the factors in *Brown v. Golai* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) [Brown] to assess whether there has been an impairment of a capital asset are to be considered: Ploskon at para. 12. The four factors at p. 4 of the Brown decision are:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;

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

[115] The second step is to consider whether, on the evidence, there is a real and substantial possibility that the future event will cause income loss. The third step is to assess the value of that possible future loss, including the relative likelihood of the possibility occurring. This third step may involve either the "earnings approach" or the "capital asset approach": Ploskon at para. 16, citing Perren v. Lalari, 2010 BCCA 140 at para. 32.

[16] The earnings approach is often appropriate where there is an identifiable loss of income at the time of trial,

[17] Where there has been no loss of income at the time of trial, courts should generally undertake the capital asset approach. This approach reflects the fact that in cases such as these, it is not a loss of earnings the plaintiff has suffered, but rather a loss of earning capacity, a capital asset

First Step

[116] The first step is whether the evidence discloses a potential future event that can lead to a loss of earning capacity.

[117] Ms. Ayrheart has injuries that restrict her mobility and strength in her right hand. I find it is not her psychological injuries but the physical injuries to her right wrist which restrict her earning capacity. As such, there is no need to analyze how her pre-existing PTSD impacts her capacity to earn income. She has been rendered less competitively employable in physical labour jobs, due to her physical limitations. She is less marketable as an employee for entry-level jobs such as a cook, a server, or a cleaner, all of which require agility and strength of the hands. These are the types of jobs she held before the accident. It may take her longer to complete tasks such as vacuuming or cooking, compared to other employees without the limitation. She has lost the ability to take advantage of all physical labour jobs that may have been available to her, without the accident.

[118] I find on the evidence that due to her injuries, the plaintiff may have more difficulty securing a job and working more hours. There is a potential future event that can lead to a loss of earning capacity.

Second Step

[119] The second step is whether on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss.

[120] This requires an analysis of whether there is a real and substantial possibility that her injuries would cause a loss of future earning capacity for her. The evidence is Ms. Ayreheart has worked part-time in the past in manual labour entry-level jobs. Some of these jobs she may not be successful in obtaining anymore due to her injuries. I find there is a real and substantial possibility that her injuries would cause her a loss of income in the future.

Third Step

[121] The third step is to assess the value of that possible future loss, which includes assessing the relative likelihood of the possibility occurring.

[122] The parties differ on how to value the loss of her future earning capacity. The plaintiff argues the valuation should be based on her becoming a registered massage therapist, earning \$80,000 a year. That occupation is no longer open to her. The defendants dispute on the evidence that the plaintiff would have qualified as an RMT, without the accident. The defendants point to evidence that the plaintiff's historical income is minimal. They argue a reasonable award would be \$30,000 to \$50,000, representing her averaged annual income of \$10,000 from employment for three to five years.

[123] The plaintiff argues without the accident, she would have become an RMT by now. She argues she would be earning \$80,000 a year as an RMT, as the evidence is there is high demand for them with new graduates working to full capacity within months. She argues the present value of an \$80,000 a year income to age 70 is more than \$2 million. Alternatively, she relies on Mr. Wickson's calculation of present value of income for an average female high school graduate after contingencies to age 70 of approximately \$1,025,475. The plaintiff argues her income from social assistance payments of \$25,000 a year to age 65 (\$559,675) should be deducted. If her social assistance income is deducted from her RMT earnings, her total loss of future earnings is approximately \$1.44 million (\$2 million subtract \$559,675). If the court does not accept she will become an RMT, then her social assistance income is to be deducted from the average future earnings of female high school graduates (\$1,025,475 subtract \$559,675). The plaintiff says her loss of future income is from \$465,000 to \$1.44 million.

[124] As earlier discussed under loss of past income, I do not find there is a real and substantial possibility the plaintiff would have become an RMT or an unregistered massage worker, without the accident. I will not use earnings as an RMT or an unregistered massage worker to value her loss of future income earning capacity.

[125] In my view, without the accident, the plaintiff would have continued working part-time in a variety of entry-level jobs. Her employment history shows there is a real and substantial possibility that the plaintiff would continue to do part-time entry-level work in a variety of industries, though as her children get older and need less care, I expect the plaintiff will work more. However, based on the evidence, I do not find there is a real and substantial possibility that the plaintiff will work full-time, without the accident. Her employment

history does not support she will engage in full-time work on a sustained basis, without the accident. Her loss of income earning capacity should be anchored in that finding.

[126] I find the capital asset approach is appropriate to value her loss. I find she has not lost any income yet due to her receipt of social assistance, but she has lost opportunities to take advantage of all entry-level labour jobs that may be available to her. The plaintiff was not on any clear career path before or at the time of the accident, making the capital asset approach more appropriate. Further, I find based on the plaintiff's history of part-time work with minimal hours, frequent job changes and periods of lengthy gaps in employment, the capital asset approach is preferred over an earnings approach, as there is no reliable evidence of consistent employment income on an annual basis that can be projected over the long term. For the same reasons, I do not find the plaintiff's proposal to value the projected loss of income over the plaintiff's lifetime and then apply contingency factors to be appropriate, as the evidence does not lead to any reliable method of projecting her income loss over her lifetime.

[127] There is no evidence that after the accident, the plaintiff is permanently incapable of all work. What Ms. Bracken found was the plaintiff was unsuitable for massage work, work as a cook, delivery driver or a house cleaner. Ms. Bracken recommended hand therapy from a certified hand therapist, and the use of a splint and/or a brace. She recommended a further assessment specific to her right hand after the hand therapy, with a complete vocational assessment to determine if the plaintiff retains any residual earning capacity. Dr. de Ciutiis and Mr. Cheesman also found the plaintiff is able to work, though not doing strenuous physical labour.

[128] In *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) [Pallos], the Court of Appeal identified three acceptable methods of assessing damages using the capital asset approach:

[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so

[Emphasis added.]

[129] Of the three methods of assessing damages using the capital asset approach from *Pallos*, awarding the plaintiff's entire annual income for one or more years is the most appropriate in the circumstances. I find a fair and reasonable award for loss of future earning capacity is \$125,000. This represents an annual income of \$25,000 for five years. In my view, it is

likely that Ms. Ayrheart will be able to sustain more work hours for a five-year period, as her children grow older. Twenty-five thousand a year represents working approximately 105 hours a month at \$20 an hour. That is working about 26 hours a week, which is a healthy part-time job that still accounts for time she must spend doing household and childcare activities. An award of five year's income will allow her an opportunity to do vocational counselling and retraining if needed. The award is not a calculation but an assessment. In my view, this award will fairly compensate her for her loss of earning capacity.

Cost of future care

- [130] The plaintiff in her reply sought more items under cost of future care than she had originally sought in her closing submissions, such as the cost of Emgality, abortive migraine medication, anti-depressants and counselling. The plaintiff argues the defendants admitted these costs should be awarded in the defendants' closing submissions. In my view, the defendants did not make any such admission. The defendants in their closing submissions referred to these treatments and provided a dollar value; however, my understanding was the defendants provided the information as an alternative scenario for how the court can assess the cost of future care. The items and dollar value were not provided to the court as an admission they should be awarded. In my view, the Court can only award the items on which there was evidence.
- [131] Mr. Cheesman recommended the plaintiff purchase a commercial working splint (\$30) and then if she finds it helpful, a custom splint (\$600). The plaintiff would benefit from an assessment with a certified hand therapist to fit and instruct on splint use. At this point, it is unclear if the plaintiff will use a splint. I award \$2,000 for these items, as I find they are reasonably necessary to promote the plaintiff's rehabilitation.
- [132] Mr. Cheesman recommended vocational rehabilitation assessment and counselling service to find alternate jobs. The cost of this ranges from \$1,500 to \$3,000. I find \$3,000 should be awarded to promote the plaintiff's rehabilitation and re-entry into the work force.
- [133] Mr. Cheesman recommended a home visit by an occupational therapist to review the plaintiff's ergonomic needs. This home visit cost \$750. Further, devices to assist the plaintiff at home such as a bed wedge, body pillow, jar and can opener, and food processor may be helpful. I find \$1,250 should be awarded for the purchase of these devices and the home visit.
- [134] Mr. Cheesman recommended a heated vest for the winter to provide the plaintiff spinal comfort and assist her functioning in the colder months, which costs from \$100 to \$250. I find a fair award for this is \$1,000 for the purchase and replacement of this item.
- [135] The plaintiff seeks the cost of allied health treatments such as physiotherapy, massage, and chiropractic visits for flare ups. She proposes these treatments for once a month to continue for 45 years, until she is 82 years old. I do not find the evidence supports that the plaintiff will find these sessions helpful for such a long duration. The evidence shows the

plaintiff did not attend all her insurer-funded sessions. I find a reasonable award to promote the plaintiff's rehabilitation is access to treatments once a month for five years. At an average cost of \$110 a session, the annual cost is \$1,386 plus GST. An award for five years is \$6,840.

[136] I award \$14,090 for the cost of future care.

Special damages

[137] I understand the parties agree on the special damages, except for \$4,000 paid to the plaintiff's friend Ms. Yousuf who came to live with the plaintiff for two months after the accident to assist her. The defendants argue the two invoices for \$2,000 each were not legitimate invoices, as Ms. Yousuf testified she did not create the invoices and they were likely issued by the plaintiff or her counsel.

[138] In my view, the evidence supports the \$4,000 was for housekeeping assistance for the plaintiff for two months immediately after the accident. In my view, this was a reasonable expense, as the plaintiff could not put weight on her right hand for three months after the accident.

[139] I award \$8,665 for special damages.

Conclusion

[140] I make the following awards:

Non-pecuniary:

\$130,000

Past wage loss:

\$0

Loss of future earning capacity:

\$125,000

Cost of future care:

\$14,090

Special damages:

\$8,665

[141] The total award is \$277,755. On a preliminary view, the plaintiff is successful and is entitled to her costs at the ordinary scale. If either party wishes to make different submissions on costs, they are to contact the registry within 30 days of this ruling to schedule a hearing.

"Chan J."

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Prepared on 27 October 2026 · Esheria