
CANADA / JUDGMENT

Block v. Schmitt

2019 BCSC 1575

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Supreme Court of British Columbia

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2019 BCSC 1575 Block v. Schmitt

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Block v. Schmitt,

2019 BCSC 1575

Date: 20190918

Docket: M174684

Registry: New Westminster

Between:

Christina Block

Plaintiff

And

Kevin Schmitt, Perry Schmitt and Laurie Schmitt

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

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Place and Date of Trial:

New Westminster, B.C.

January 21-25, 2019

Place and Date of Judgment:

New Westminster, B.C.

September 18, 2019

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I. OVERVIEW

- [1] The plaintiff, Christina Block, is a 46-year-old self-employed business woman. She claims for damages resulting from injuries sustained in a motor vehicle collision which occurred on November 26, 2013, in Yarrow, British Columbia (the "MVC" or "collision"). Ms. Block was the owner and operator of a Jeep Wrangler motor vehicle (the "Block vehicle") which was struck by a Hyundai Elantra vehicle owned by the defendants, Perry Schmitt and Laurie Schmitt (the "Schmitt vehicle"). Liability is denied.
- [2] The defendant Kevin Schmitt, is the son of Perry Schmitt and Laurie Schmitt. At all material times he was the operator of the Schmitt vehicle. Kevin Schmitt did not have a valid B.C. drivers' licence at the time of the motor vehicle collision, and the defendants deny that they gave their consent for him to operate the Schmitt vehicle.
- [3] A third party proceeding was commenced against the Insurance Corporation of British Columbia pursuant to s. 77 of the Insurance (Vehicle) Act, RSBC 1996, c. 231 and amendments thereto.
- [4] The plaintiff seeks damages for loss of income, past, present and future, as well as loss of earning capacity, costs of future care, and special damages. The defendants and third party (collectively referred to as the "defendants"), while denying liability, do not dispute that Ms. Block was injured in the collision, but question the extent and nature of her injuries and their impact on her employment, recreational and domestic activities.

II. LIABILITY

- [5] There is no dispute that a collision occurred between the Block vehicle and the Schmitt vehicle on November 26, 2013, near the intersection of Yarrow Central Road and No. 3 Road in Yarrow, British Columbia.
- [6] The plaintiff, her husband (Kelly Block) and their two children, were heading home from the movies. Their vehicle was travelling in an eastbound direction on Yarrow Central Road at approximately 10:00 p.m., when the Schmitt vehicle, which was heading in a westbound direction, veered into their lane of travel. The Schmitt vehicle was travelling at a fast rate of speed and Ms. Block was unable to avoid the collision. The Schmitt vehicle sideswiped the Block vehicle, on the driver's side. Both vehicles sustained damage as a result of the collision, with damage to the plaintiff's 2013 Jeep Wrangler of \$3,577[1] and \$5,495 in damage to the defendants' 2012 Hyundai Elantra.
- [7] Ms. Block immediately pulled over and brought her vehicle to a full stop. However, the Schmitt vehicle did not stop. Ms. Block was quite shaken and in shock. She and Mr. Block switched seats and Mr. Block commenced chase of the Schmitt vehicle. At the same time, they called 911 and reported the hit and run.

- [8] The police eventually caught up to the Schmitt vehicle and stopped and questioned the driver, Kevin Schmitt, around No. 3 Road and Highway 1 near Abbotsford, B.C. After speaking to the police, Mr. Block drove the entire family home.

A. Negligence

- [9] Ms. Block's evidence of how the collision occurred was not challenged by the defence. Neither Ms. Block nor Kelly Block (who corroborated the plaintiff's version of events) were cross-examined on the issue of liability.
- [10] The evidence establishes that the defendant failed to remain in his lane of travel, operated his vehicle in a careless manner, and failed to pay due care and attention, contrary to ss. 144 and 155 of the Motor Vehicle Act, RSBC 1996, c. 318. I therefore find that the collision was caused by the negligence of Kevin Schmitt.

B. Liability

- [11] Section 86 of the Motor Vehicle Act provides as follows:

86 (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who

- (a) is living with, and as a member of the family of, the owner, or
 - (b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,
- is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.

- [12] Kevin Schmitt has been unrepresented in these proceedings, and did not testify at the trial. Though Laurie Schmitt did not testify, portions of her examination for discovery evidence were read in.
- [13] Perry Schmitt testified that Kevin Schmitt ordinarily resides in Alberta. Around August 2013, Kevin Schmitt broke his leg while working on the pipelines. He temporarily returned to B.C. to aid in his recovery. Kevin Schmitt moved in with his parents, and resided with them for the next several months. He returned to Alberta about four-to-five days after the collision.
- [14] It was Perry Schmitt's evidence that his son did not have his parents' permission to drive their car as he did not have a valid drivers' licence.
- [15] Although he had been living on his own for eight years, Perry Schmitt stated that Kevin Schmitt used his parents' house as his "home base", using it to receive his personal mail such as T4's. During the time that he was living with his parents while recovering from his injuries, Kevin Schmitt shared meals with his parents and slept in a bedroom in the house.

- [16] The plaintiff argues that s. 86(1) of the Motor Vehicle Act is disjunctive, such that vicarious liability is established on proof that the driver of the vehicle was a member of the family of the owner and living with the owner at the time of the collision. It is argued that in such circumstance, consent of the owner is immaterial.
- [17] The defendants did not make any submissions or provide any authority to challenge the plaintiff's interpretation of s. 86(1). They simply argue that consent was not provided, and that Kevin Schmitt was only temporarily living with his parents while recovering from a broken leg. Presumably, the defendants wish me to find that Kevin Schmitt was not "living with" the owners within the meaning of s. 86(1)(a) because his living arrangements were temporary.
- [18] Neither counsel provided me with any case authorities to support their respective positions. The key principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the body enacting it]": Driedger, E., *Construction of Statutes* (2nd ed. 1983) at pg. 87, quoted with approval in *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.
- [19] Having regard to the principle of statutory interpretation, I find that vicarious liability can be established under s. 86(1) of the Motor Vehicle Act where the driver of the motor vehicle is living with, and as a member of the family of, the owner, without requiring proof of consent.
- [20] There is no dispute that as the biological son of the owners of the subject motor vehicle, Kevin Schmitt is a "member of the family" within the meaning of s. 86(1)(a). There is also no dispute that Kevin Schmitt was "living with" his parents at the time of the collision. He received free room and board while residing with his parents, a courtesy no doubt extended to him because he was a member of the family. While Kevin Schmitt's living arrangements may have been temporary, i.e., while recovering from his broken leg, there is nothing in the Motor Vehicle Act that supports the defendants' argument that the temporary nature of the living arrangements is a factor for consideration. On a plain reading of s. 86(1), the driver needs to be living with the owner at the time of the collision.
- [21] I find that the defendants Perry Schmitt and Laurie Schmitt are vicariously liable for the negligent actions of Kevin Schmitt pursuant to s. 86(1)(a) of the Motor Vehicle Act.

III. THE PLAINTIFF

- [22] At the time of the collision, Ms. Block was employed full-time, operating her own health and wellness business called Yarrow Health. The plaintiff is a holistic healthcare practitioner and licensed light therapist and iridologist. Prior to the collision the plaintiff was very active. She regularly participated in activities such as tennis, badminton, skiing, baseball, biking, hiking, and boating.

[23] Ms. Block was born and raised in the Fraser Valley area of British Columbia, and currently lives in Chilliwack. She left high school after completing grade 10 and performed a variety of jobs before opening a clothing store with her father. Shortly thereafter she met her husband of 22 years, Kelly Block, who is a self-employed construction contractor. Mr. Block also operates a turf company in the interior of BC. The couple have two children - a daughter who is 21 and a son who is 18. The older child moved out approximately two years ago, and now lives on her own. At the time of trial the younger child was living at home and enrolled in grade 12.

A. Pre-Collision Health

- [24] The plaintiff was in generally good health prior to the collision. She had no restrictions on her ability to work or perform her activities of daily living.
- [25] Prior to the collision, Ms. Block experienced occasional low back pain and stiffness in her shoulders. She sought treatment from her chiropractor, Dr. Helen Fadden about two to three times a year for low back or neck pain, or a "tune up".
- [26] In June 2012, Ms. Block fell and hit her head on concrete while attempting to assist her brother during an altercation in a parking lot. A neck x-ray performed in June 2012, revealed mild degenerative changes in the C5-C6 and C6-C7 regions. She experienced headaches, neck pain and back pain, which lasted a few weeks. Injuries from this incident were fully resolved before the collision.

B. Credibility

- [27] My view of Ms. Block's credibility varied depending on the issue. I did not find Ms. Block to be credible when it came to matters related to the financial implications of her injuries. Her evidence on financial matters was contradicted by other witnesses and documentary evidence, or otherwise lacked plausibility. These concerns are detailed elsewhere.
- [28] In matters related to her physical injuries and their impact on her function, I generally found Ms. Block to be a credible witness. Ms. Block's credibility was supported by the following: she made admissions against self interest; she gave her evidence in a forthright manner; and she did not appear to exaggerate her injuries. Much of her evidence regarding her injuries and functional limitations was also corroborated by other evidence at trial.
- [29] Ms. Block's poor memory affected my view of her reliability as a witness. For example, Ms. Block was initially steadfast in her belief that she received some type of diagnostic testing of her right shoulder when she attended at Abbotsford regional Hospital in January 2014. However, upon further questioning under cross-examination, she admitted that she may have been mistaken and that the arthrogram could have been for her left shoulder. Despite the urging of defence counsel, I did not find this late admission to be motivated by a desire to mislead the court. Nevertheless, the force with which Ms. Block insisted that it was her right shoulder and not her left, raises concerns of the reliability of her evidence.

IV. INJURIES

- [30] The plaintiff claims damages for injuries to her neck, upper back, shoulders and low back, along with headaches and fatigue. The defendants do not dispute that Ms. Block is injured, but take issue with the extent of her injuries and their significance.
- [31] Ms. Block testified that the morning following the collision, she woke up feeling stiff and anxious. She attended at a walk-in clinic, presenting with pain in her neck, upper back, left shoulder and arm, and headaches. She was prescribed pain medication to help alleviate her symptoms.
- [32] Over the next few weeks and months, her pain intensified. Her neck, left shoulder, and upper back pain persisted, with onset of headaches when her neck symptoms flared up. She also suffered from low back pain which radiated into her legs, stiffness and pain in her right shoulder and arm, and numbness in both her hands.
- [33] In January 2014, the plaintiff attended at the emergency ward of Abbotsford General Hospital for severe left shoulder pain. X-rays were taken and her arm was immobilized in a sling. An arthrogram of her left shoulder was performed in February 2014. It revealed mild supra and infraspinatus tendinopathy, which Dr. Koussaie described as suggestive of "inflammation of the rotator cuff without a tear". There was some suggestion that she might have had a frozen shoulder which resolved.
- [34] Although initially the left shoulder pain was more significant than the right, Ms. Block describes the left and right shoulder symptoms as variable, with pain moving back and forth between both shoulders. A CT of the cervical spine performed in February 2016 showed moderate to severe stenosis of the right neural foramen due to degenerative changes.

A. Treatment

- [35] For most of the post-accident period, Ms. Block has been under the care of her family physician, Dr. Froese. Ms. Block began chiropractic treatments on November 29, 2013, for her collision related injuries. She found the treatments beneficial in reducing her pain. By February 2016 she had attended 23 sessions with Dr. Fadden, and 3 sessions with Dr. Vierboom at Vancouver Integrated Health. She resumed treatment with Dr. Fadden in November 2018, completing 3 treatments by the time of trial. Ms. Block also attended two physiotherapy sessions in January 2014, but did not find them helpful. In August 2018, Ms. Block commenced acupuncture with Yali Hu. As at the date of trial, she had attended three acupuncture treatments.
- [36] Ms. Block testified that she commenced treatments with Candace Brown, a kinesiologist/massage therapist, in December 2014. After receiving six initial treatments ending in January 2015, she resumed treatment with Candace Brown in July 2017. These treatments were provided in the plaintiff's home every Wednesday, and continued at a frequency of one session per week until September 2018. According to Ms. Block, though Ms. Brown was a

kinesiologist, the treatments included physical therapy, adjustments, and manual treatments for her neck, back and shoulder.

B. Expert Evidence

[37] The parties relied on expert evidence from three witnesses: Dr. Adrian and Russel McNeil, who testified on behalf of the plaintiff, and Dr. Kousaie who provided an expert opinion report on behalf of the defendants.

Dr. Adrian

[38] Dr. Mark Adrian was qualified in this trial as an expert in physical medicine and rehabilitation. He assessed the plaintiff in October 2016, and prepared a medical legal report dated January 30, 2017.

[39] Dr. Adrian opined that as a result of the collision, Ms. Block sustained soft tissue injuries to her lower back and left shoulder, mechanical neck and upper mid back pain, and chronic right shoulder rotator cuff tendinopathy. These injuries have caused her to experience ongoing cervicogenic headaches, ongoing numbness and tingling in her upper right arm, and episodic left shoulder pain and lower back pain.

[40] Dr. Adrian gives a poor prognosis for recovery, opining that Ms. Block is permanently partially disabled from her collision related injuries. He believes that these interfere in her ability to work and participate in recreational and household activities which require prolonged static or awkward spinal positioning, prolonged sitting, repetitive or prolonged reaching, heavy or repetitive lifting, or prolonged carrying. In his opinion, Ms. Block is not suited to employment activities whose core components involve these movements.

[41] Though he finds it unlikely that her condition will progressively deteriorate over time, Dr. Adrian opines that the collision has caused Ms. Block to be vulnerable to further injury in her neck, upper mid back, and right shoulder.

[42] Dr. Adrian states that Ms. Block may benefit from nortriptyline to assist in her sleep, and may also derive temporary pain relief from a cortisone injection to the right subacromial space. He also recommends that Ms. Block continue with her at home exercise program to maintain her level of fitness. Though he does not believe that further exercise will resolve her injuries, he says that Ms. Block may benefit from the involvement of a kinesiologist who could review her exercise program and ensure that she is performing the exercises appropriately.

[43] Defence counsel takes several issues with the reliability of Dr. Adrian's opinion, based on what I find are unsupported views of the evidence.

[44] First, defence counsel submits that "under cross-examination Dr. Adrian testified that Ms. Block made no complaints of prior back, shoulder or neck pain to him." Dr. Adrian did no such thing. He was not asked, nor did he provide, any testimony during his cross-

examination about Ms. Block's failure to reports prior back, shoulder or neck pain. In addition, I note that in his medical legal report, which was referenced in his testimony in chief, Dr. Adrian wrote that Ms. Block told him "that prior to the motor vehicle accident, she experienced minor bodily aches and pains that mostly involved her lower back, but at times could also include her neck, shoulder regions, and upper chest".

- [45] Second, defence counsel submits that in diagnosing the right shoulder injury, Dr. Adrian did not review any diagnostic imaging of Ms. Block's right shoulder and rather relied solely on her self reports in arriving at his opinion. As Dr. Adrian testified, there were no images of the right shoulder to review. Further, Dr. Adrian stated that his diagnosis of the right shoulder injury was based on his physical examination of Ms. Block as well as the history provided to him.
- [46] Third, defence counsel submits that Dr. Adrian testified under cross-examination that Ms. Block's left shoulder pain had resolved at the time of his report. This also is not supported by the evidence. Dr. Adrian testified that while he believed that symptoms that specifically stemmed from the left shoulder had resolved, Ms. Block continued to complain of pain over the region of the left shoulder, which he attributed to her neck and back injury.

Dr. Kousaie

- [47] Dr. Kousaie is an orthopaedic surgeon who was retained by the defendants. He prepared a medical legal report dated October 11, 2018, based on his assessment of Ms. Block on the same date. The plaintiff did not challenge Dr. Kousaie's qualifications and did not request his attendance for cross-examination.
- [48] Dr. Kousaie's opinion is generally consistent with that of Dr. Adrian, though it is more current as it is based on an assessment conducted two years later. Where there are conflicts between Dr. Kousaie's and Dr. Adrian's opinions related to Ms. Block's current condition and prognosis, I have preferred the opinion of Dr. Kousaie.
- [49] According to Dr. Kousaie, Ms. Block suffered multiple injuries as a result of the collision, namely soft tissue injuries to the neck, upper back, lower back, both shoulders, and calcific tendonitis in the left shoulder. He opined that Ms. Block likely had adhesive capsulitis in the left shoulder which resolved. This is consistent with Dr. Adrian's opinion and also the clinical profile, which indicates that Ms. Block had severe left shoulder pain in early 2014 which required immobilization of the shoulder, but which eventually healed.
- [50] In relation to Ms. Block's current complaints of pain in her left shoulder, Dr. Kousaie writes at pages 20-21 that:

Associated with this is radiological evidence of inflammation in the left shoulder. Given the symptomology is bilateral, it is likely that similar pathology occurs on both sides. X-rays of the shoulder demonstrate calcific deposits over the greater tuberosity. A magnetic resonance imaging suggests inflammation of the rotator cuff without a tear.

It is difficult to separate the soft tissue injuries of the neck and shoulder from the calcific tendonitis symptomology. I include this as a separate diagnosis given the fact that we have radiological proof.

- [51] Dr. Kousaie further opines at page 22 that "the described adhesive capsulitis, the calcific tendonitis of the left shoulder seen on plain x-ray and the inflammatory process within the tendons of the rotator cuff are all directly due to the motor vehicle accident." According to Dr. Kousaie, while there is evidence of some prior low back pain, in his view, the low back symptomology currently experienced by Ms. Block is directly related to the collision.
- [52] In relation to the impact of Ms. Block's pre-existing neck pain, Dr. Kousaie opines at page 22 that "although Mrs. Block has suffered a soft tissue injury in the area of her cervical spine, the pre-existing degenerative changes has [sic] likely prolonged symptomology", noting that the injury "could have aggravated a pre-existing symptomatic or asymptomatic condition."
- [53] Dr. Kousaie shares Dr. Adrian's poor prognosis for recovery, noting the longstanding nature of the pain complaints without resolution. He concludes that Ms. Block will suffer a permanent partial disability in relation to her occupation. Dr. Kousaie opines that Ms. Block's ability to perform her housekeeping duties and participate in recreational activities has likely been permanently diminished by the collision.
- [54] Dr. Kousaie shares Dr. Adrian's opinion that a cortisone injection should be considered for temporary relief. If this is unsuccessful, re-investigation may be warranted with a magnetic resonance arthrogram to determine if there currently exists a tear of the rotator cuff. He recommends an occupational assessment and suggests that Ms. Block participate in an aggressive exercise program which "may provide" some symptomatic relief.

Russel McNeil

- [55] Russel McNeil is an occupational therapist retained by the plaintiff and qualified as an expert for the purposes of providing work capacity and care evaluations. Mr. McNeil assessed Ms. Block over two days in October 2018, and prepared a functional capacity evaluation and cost of future care report dated October 16, 2018. The assessment consisted of physical testing conducted at the Occupational Assessment Centre of BC, as well as a job site /home assessment conducted in the plaintiff's home.
- [56] In order to obtain a reliable assessment of her functional capacity, Mr. McNeil used a number of formal screening procedures to establish Ms. Block's level of effort and consistency of her effort. Based on these measures, Mr. McNeil concluded that she was putting forth a consistent and high level of effort during the assessment process, and as such, he was of the opinion that the test results accurately and reliably measured her overall physical capacity.

- [57] Mr. McNeil found that the plaintiff's reports of pain and reported physical restrictions were consistent with her measured and observed abilities. He also noted the consistency between the data obtained during the functional capacity evaluation and the job site evaluation.
- [58] Mr. McNeil's testing revealed measured restrictions in Ms. Block's active range of motion in her cervical spine, left and right shoulder, and back. In particular, she was found to have moderate-to-severe weakness in her right shoulder on extension and abduction, moderate-to-severe weakness in the left shoulder abduction, and slight-to-moderate weakness in the left shoulder extension.
- [59] Limitations were observed in relation to Ms. Block's ability to perform shoulder to head level work, and below shoulder level work. Mr. McNeil opined that the former could only be done on an occasional basis for short periods of time. The latter could be done on a modified frequent basis. Ms. Block required accommodations to complete both types of tasks, and was found to have restrictions in her capacity to obtain a productive or industrial work pace for both above and below shoulder reaching. Her ability to perform below waist work requiring bending was limited to occasional basis (i.e., less than two hours per eight hour work day), however, he found that Ms. Block does not have any restriction with horizontal dynamic reaching at the waist level.
- [60] Testing also indicated limitations with respect to activities requiring prolonged static spinal positioning in trunk flexion (bending), neck flexion (looking down), and neck extension (looking up). Ms. Block was found to be restricted in her capacity to perform activities requiring crouching and kneeling combined with static spinal positioning. The limitations observed by Mr. McNeil were generally consistent with the plaintiff's evidence and other evidence at trial.

C. Conclusion

- [61] Having regard to the whole of the evidence, I find that the plaintiff has established, on a balance of probability, that the impact from the collision caused Ms. Block to suffer: moderate to severe soft tissue injuries to her neck, upper back, both shoulders and low back; aggravation of a pre-existing degenerative condition in her cervical spine; injury to the right shoulder, including right shoulder rotator cuff tendinopathy; injury to the left shoulder, including calcific tendonitis; cervicogenic headaches associated with flare-ups in neck pain; difficulty sleeping; and fatigue.
- [62] There is some dispute as to the diagnosis for the injuries to the left shoulder. Both Dr. Adrian and Dr. Kousaie agree that Ms. Block suffered two different types of injuries to her left shoulder as a result of the collision. They also agree that one of the two injuries has healed and the other continues to be symptomatic. Dr. Adrian opines that the injury which healed was a soft tissue injury to the left shoulder; Dr. Kousaie opines that this initial injury was adhesive capsulitis. While the initial injury to the left shoulder appears to have abated, both experts agree that Ms. Block continues to experience pain over the region of the left

shoulder. Dr. Kousaie opines that this ongoing pain is due to calcific tendonitis, though he allows that it is difficult to separate these symptoms from the soft tissue injuries of the neck and shoulder. Dr. Adrian opines that the left shoulder pain is connected to the injuries to the neck and upper back, though he does not offer the calcific tendonitis diagnosis.

- [63] Dr. Kousaie's assessment of Ms. Block is more recent, and as such, I prefer his diagnosis regarding the left shoulder injury. Having said that, a diagnosis is not necessary in order for an injury to be compensable. Regardless of whether the exact etiology of a condition can be found, it remains compensable so long as the symptoms are causally related to the injuring event: see *Snell v. Farrell*, [1990] 2 S.C.R. 311; and *Clements v. Clements*, 2012 SCC 32.
- [64] With respect to Ms. Block's headaches, there is a discrepancy between Ms. Block's testimony at trial and at her examination for discovery. At trial, Ms. Block testified that her headaches continue to date, though they are "on and off". At her examination for discovery held March 20, 2018, Ms. Block stated that she was no longer having headaches. Ms. Block was unable to provide a satisfactory answer to explain this inconsistency. When Ms. Block was assessed by Dr. Kousaie in October 2018, there is no mention of ongoing headaches. Having regard to the whole of the evidence, I find that the plaintiff's headaches resolved fully by March 2018.
- [65] The evidence establishes that Ms. Block continues to suffer from injuries to both her shoulders that are causally connected to the motor vehicle collision. These result in pain and numbness which radiate down the shoulder into the upper arm. The low back pain has decreased over the years but remains unresolved, and is aggravated by certain activities. Though it has improved over time, the shoulder, neck, and upper back pain is chronic and continues to interfere with Ms. Block's work, home, and recreational activities. Ms. Block continues to have difficulty sleeping and consequently, suffers from fatigue.

V. DAMAGES

A. General Damages

- [66] The defendants submit that a reasonable award for non-pecuniary damages is in the range of \$22,000 to \$30,000. They rely on *Chan v. Kao*, 2009 BCSC 626; *Cummings v. Shanks*, 2012 BCSC 1731; and *Krohn v. Weidner*, 2013 BCSC 767.
- [67] The plaintiff seeks a general damages award of \$90,000, relying on *Gill v. Bhuller*, 2015 BCSC 851; *Kuras v. Repo*, 2014 BCSC 1634; *Pilfold v. Jaswal*, 2014 BCSC 719; *Lauriente v. Schoonhoven*, 2017 BCSC 2246; *Herman v. Paley*, 2017 BCSC 728; and *Reitsema v. Lammers*, 2017 BCSC 1374.
1. Legal Framework
- [68] The essential purpose of tort law is to put the plaintiff in the position that she or he would have been in had the tort not been committed: *Athey v. Leonati*, [1996] 3 SCR 458 at para. 32.

- [69] The assessment of damages is a global exercise and must be based on the effect the injuries have had or will continue to have as a whole on the plaintiff's life: *Engqvist v. Doyle*, 2011 BCSC 1585 at paras. 28-29.
- [70] The award is to be fair to both parties and fairness is measured against awards in comparable cases: *Olson v. Farran*, 2016 BCSC 1255 at para. 156. However, having regard to awards in comparable cases cannot replace the court's duty to undertake an individualized assessment. Each case is to be decided on its own unique set of facts, bearing in mind that no two plaintiffs' experiences are identical: *Kapelus v. Hu*, 2013 BCCA 86 at para. 16.
- [71] The following non-exhaustive list of factors are to be considered in assessing non-pecuniary damages: the plaintiff's age; nature of the injury; severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism: *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46; and *Giang v. Clayton*, 2005 BCCA 54 at paras. 54 and 55.

2. Analysis

- [72] Ms. Block is a 46-year-old self-employed business woman. She is married with two children ages 18 and 21. The children were 12 and 15 years old at the time of the collision. Prior to the collision, Ms. Block was a physically active and healthy individual. She ran her own business, took care of her home, and engaged in regular physical activities such as tennis, badminton, skiing, baseball, biking, hiking, and boating. Though she had some ongoing low back, neck, and shoulder pain, Ms. Block had no restrictions on her recreational or employment activities.
- [73] Carol Devey DeJong is a client and friend of Ms. Block's. She first met Ms. Block in the summer of 2013 for treatment. Ms. DeJong described Ms. Block as being very energetic and a "go-go-go gal". This evidence was consistent with that of other collateral witnesses, such as Trevor Davies, a retired paramedic. He first met Ms. Block while taking a light therapy course in 2011. They have been friends ever since. He frequented Ms. Block's business several times a week prior to the collision, and assisted her on a voluntary basis. Mr. Davies described Ms. Block as someone who had "phenomenal energy", and could do whatever task was needed.
- [74] However, all this changed on November 26, 2013, when Ms. Block was involved in a motor vehicle collision during which the drivers' side of her car was sideswiped. As a result of the collision, Ms. Block suffered moderate to severe soft tissue injuries to her neck, upper back, both shoulders and low back. In addition, she suffered an aggravation of a pre-existing degenerative condition in her cervical spine. She has been diagnosed with right shoulder rotator cuff tendinopathy and left shoulder calcific tendonitis. As a consequence of the accident, she has been rendered more vulnerable to further injury to the affected parts of her body.

- [75] Ms. Block's over-riding pain is in the neck and upper back, which extends into her shoulders and arms, and from the base of her skull to her back. This pain is experienced on a daily basis, though it varies in intensity between the left and right shoulder and arms. It interferes in her sleep and, consequently, she suffers from fatigue and loss of energy. The low back pain has diminished but continues to cause difficulty, with pain radiating down into the upper right leg. Her headaches, which were associated with flare ups of neck pain, fully resolved by about March 2018.
- [76] The injuries have and continue to interfere with Ms. Block's work, home, and recreational activities. They have affected her mood and her relationship with her family and friends. She is no longer "happy-go-lucky", and is less cheerful. She often feels sad and frustrated, and is less patient with her children. Ms. Block experiences pain on normal daily activities such as reading, cutting vegetables, cleaning dishes, housecleaning, and shopping. Though she is stoic by nature, and has tried to minimize the impact of the injuries on her life, there is no doubt that they have, and continue to have, a deep impact on Ms. Block.
- [77] Ms. Block is no longer able to participate in many of the "family day" activities that she engaged in with her family every Sunday, such as mountain biking, hiking, boating, tubing, and skiing. This has been upsetting to Ms. Block, as it has impacted her ability to enjoy her time with her children while they still lived at home.
- [78] Ms. Block has a passion for gardening. Prior to the collision, she spent many hours every week working tending to the various trees, plants, and flowers on her two-and-a-half acre property. She found this calming and satisfying. Ms. Block is now compromised in her ability to garden. The pleasure she enjoyed from gardening is replaced with frustration and sadness as she can no longer garden pain free.
- [79] Ms. Block's working life is an enormous part of her identity as a health and wellness provider. Though the circumstances that resulted in her having to shut down her business at the Yarrow Road location were unrelated to the collision, the collision-related injuries impacted her ability to work pain free.
- [80] Bearing in mind that no two cases are the same, I have found the authorities relied on by the plaintiff to more closely resemble Ms. Block's situation. In particular, I found *Pilfold v. Jaswal* (\$80,000) and *Lauriente v. Schoonhaven* (\$100,000) to be instructive. Having regard to the evidence, the guiding principles for general damage awards, and the authorities provided to me by counsel, I consider that an award of \$85,000 fairly compensates Ms. Block for her non-pecuniary losses.

B. Mitigation

- [81] The defendants argue that any damages awarded to the plaintiff should be reduced by 25% for the plaintiff's failure to mitigate her damages. They submit that the plaintiff failed to mitigate her damages by:

- a) failing to take a cortisone injection as recommended by Dr. Adrian in January 2017 and later by Dr. Kousaie in October 2018; and
 - b) failing to participate in an aggressive physical therapy program to maintain normal spine mobility and to improve muscle strength, as recommended by Dr. Kousaie.
- [82] The onus is on the defendants to prove that the plaintiff could have avoided all or a portion of her loss had she followed the step(s) advocated by them. This requires establishing that: (1) the plaintiff acted unreasonably by not taking a particular step; and (2) the extent, if any, to which the plaintiff's damages would have been reduced had she taken that step: *Chiu* (Guardian ad litem of) v. *Chiu*, 2002 BCCA 618 at para. 57.
- [83] The mitigation test is a "subjective/objective" one, which considers whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have taken the recommended step or treatment: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56.

Cortisone Injection

- [84] I conclude that the defendants have failed to establish that the plaintiff was unreasonable for not getting a cortisone injection to the right shoulder. The plaintiff testified that she was aware that the cortisone injection had certain side effects, namely that it can create inflammation and tissue damage, and as a result she decided not to get it. While Dr. Adrian testified that the plaintiff may derive benefit from a cortisone injection to her right shoulder area, he confirmed that this was risky, as it can result in increased pain and weakening of the tissues. As such, I find that the plaintiff's refusal to get the cortisone injection was not unreasonable.
- [85] The defendants have also failed to establish the extent to which the plaintiff's damages would have been reduced, if at all, had she gotten the cortisone injection. As in *Chiu*, the defendants did not adduce any medical evidence demonstrating the consequences of the plaintiff's failure to have the cortisone injection. Given the timing of the recommendation (some three years after the collision), the myriad of other injuries that the plaintiff was suffering from at the time, and the risk that her condition could be made worse, it is speculative at best to conclude that the plaintiff's damages would have been reduced had she gotten the cortisone injection.
- [86] As such, breach of the duty to mitigate has not been established in relation to the plaintiff's failure to get a cortisone injection.

Aggressive Physical Therapy Program

- [87] Dr. Kousaie's opinion regarding the physical therapy treatment is set out at pg. 24 of his report:

Mrs. Block also relies on alternate therapy for symptomatic relief of her soft tissue injuries in the area of her spine. She stated today that she received minimal treatment in physiotherapy. It is my opinion that physical therapy to improve proper spine mechanics and exercises to recondition muscles is the sole means of attempting to lessen symptomology. She should embark on an aggressive exercise program to maintain normal spine mobility as seen today and to improve muscle strength in the area of the whole spine. I feel that some symptomatic relief can occur this late post-motor vehicle accident give [sic] a deconditioned state that has arisen from a general lack of physical activities.

- [88] There is no dispute that the plaintiff attended physiotherapy on two occasions in January 2014, but discontinued as she did not find it beneficial. There is also no dispute that the plaintiff subsequently sought treatment from Candace Brown, whom she saw in late 2014/early 2015, and then again in 2017 and 2018. The plaintiff testified that Ms. Brown provided her with physical therapy, chiropractic adjustments, and manual treatments for her neck, back and shoulder.
- [89] The defendants' take issue with the nature of the treatments provided by Ms. Brown, and her qualifications to provide them. However, the plaintiff has not argued that Ms. Brown's treatments qualify as an "aggressive exercise program" Rather it is the plaintiff's position, with which I agree, that the defendants have failed to meet the evidentiary burden needed to establish a breach of the duty to mitigate by failing to participate in an aggressive physical therapy program as recommended by Dr. Kousaie.
- [90] Determining if the plaintiff acted unreasonably by not embarking on an "aggressive exercise program", requires some assessment of the plaintiff's reasons for not doing so. However, the defendants' failed to cross-examine the plaintiff on why she did not follow Dr. Kousaie's recommendations. I note that Dr. Kousaie's report is dated October 11, 2018, leaving very little time prior to the trial for Ms. Block to act on Dr. Kousaie's recommendation, even if she had wanted to.
- [91] In addition, the evidence does not establish that by participating in an aggressive exercise program, Ms. Block's damages would have been reduced. Dr. Kousaie provides the following reasons for the treatment: to maintain normal spine mobility; to improve muscle strength; and to provide some symptomatic relief. However, as Dr. Kousaie points out, Ms. Block's spine mobility was normal on the day that he examined her. Presumably, whatever home exercises or other treatment that Ms. Block was undergoing, had allowed her to achieve normal spine mobility.

C. Special Damages

- [92] The plaintiff claims \$9,656.29 for her past out of pocket expenses as follows: therapy and user fees of \$3,153; transportation costs of \$1,367.57; and miscellaneous costs of \$5,135.72.

1. Therapy and User Fees

- [93] The defendants do not dispute \$473 claimed in therapy and user fees from various practitioners. Rather, they say that the \$2,680 claimed in therapy and user fees for Candace Brown is not compensable. They argue that the plaintiff was not referred to Candace Brown for treatment; there is no clear evidence as to Candace Brown's qualifications; there is no credible evidence as to the number of treatments Ms. Brown provided or their cost; and there has been a double accounting for \$120 for the month of March 2018.
- [94] After her initial treatments from Ms. Brown in 2015, the plaintiff next attended with her in 2017. By then, Ms. Brown had sold her business to someone else, and Ms. Block had closed down Yarrow Health and moved her business into her own home. The treatments with Ms. Brown ended when she moved to Coquitlam.
- [95] Sometime after opening up her home based business in late 2015, Ms. Block offered to let Ms. Brown provide treatments to some of Ms. Block's clients. The model proved successful, and arrangements were made for Ms. Brown to attend at Ms. Block's home clinic one day per week. The financial arrangement was a loose one, in that initially Ms. Brown was permitted to operate out of Ms. Block's home without any charge. As her attendance became more regular, Ms. Brown would pay \$10/session to Ms. Block as a fee for using her home facilities. Payments were in cash, and sometimes included the buying of a free lunch.
- [96] In addition to providing treatment and services to Ms. Block's clients', Ms. Brown also performed treatment on Ms. Block at a cost of \$40/session, which Ms. Block found helpful in alleviating her pain, thus enabling her to work. Treatments were paid for in cash. Ms. Brown did not provide Ms. Block with any receipts.
- [97] The only records documenting the number of treatments and their costs, are two documents created by Ms. Brown for the purposes of trial (collectively referred to as the "Invoices"). The first is an undated document entitled "INVOICE #100" (the "First Invoice"). It details treatments provided from December 3, 2014 until March 21, 2018, for a total cost of \$1,760. The document suggests that the treatments occurred with remarkable regularity, every Wednesday of every week of every month, with no breaks for the Christmas season or other holidays. The second document is entitled "To Whom It May Concern", and details the cost of treatment provided from March 7, 2018, until August 29, 2018, in the amount of \$1,040 (the "Second Invoice"). The Second Invoice duplicates three treatments in March, which are referred to in the First Invoice. Again, the treatments purportedly occur every Wednesday, of every week, of every month.
- [98] I agree with defence counsel that the Invoices are insufficient to prove the special damages claim on their own. The documents were not entered as business records, and were not admitted for the truth of what is contained in them. Ms. Brown, who presumably could have corroborated the accuracy of the Invoices, did not attend at the trial. No explanation was provided for her absence.

- [99] Though Ms. Block testified that she attended all the treatments set out in the Invoices, I do not find it plausible that she would have attended the treatments with such regularity, with no breaks for vacation or illness. It is inconsistent with her position on past wage loss, which is premised on her working 48 weeks of the year.
- [100] Ms. Block's evidence that Ms. Brown worked in her home until August 2018, was contradicted by Mr. Davies. He testified under cross-examination that Ms. Brown had ceased practicing for about a year prior to his testimony. This would put Ms. Brown's last treatment session in Ms. Block's home, around January or February 2018, instead of August 2018.
- [101] In addition, while Ms. Block testified that she charged Ms. Brown \$10/session for use of Ms. Brown's home clinic, she did not explain how that impacted the cost of the treatments which Ms. Brown provided to Ms. Block.
- [102] Finally, it is evident that there has been a double accounting in Ms. Brown's treatment costs for March 2018, in the amount of \$120.
- [103] Thus, while I accept that Ms. Block did attend treatments with Ms. Brown at her home in 2017 and 2018, I am not convinced that she attended all the visits indicated in the Invoices, or that she paid \$40 for each treatment session.
- [104] In the absence of clear evidence, I am left to make a global assessment of the cost of treatments from Ms. Brown. I find that \$2,000 represents a fair and reasonable sum for the treatments received by Ms. Block from Ms. Brown.
- [105] I turn now to the larger question of whether the fact that the plaintiff was not referred to Ms. Brown for treatment, is sufficient reason to reject this claim. Neither counsel referred me to any case authorities on this issue during their submissions.
- [106] In *Redl v. Sellin*, 2013 BCSC 581 at para. 55 (quoted in *Park v. Abd El Malak*, 2015 BCSC 223, at para. 133) the court noted that evidence of medical justification for an expense incurred in relation to treatment aimed at promotion of a plaintiff's well-being, is a factor in determining reasonableness.
- [107] Though there may not have been a specific medical referral to Ms. Brown, the defendants do not dispute that there was medical justification for Ms. Block to get medical treatment aimed at her neck, back and shoulders, during the periods of time that Ms. Brown treated Ms. Block. Indeed, they accept the reasonableness of the chiropractic and acupuncture treatments that Ms. Block received during the same period as some of the treatments received from Ms. Brown. The defendants have not challenged Ms. Block's evidence that Ms. Brown's treatments were beneficial in helping her manage her pain.
- [108] Aside from putting their theory to Ms. Block that Ms. Brown was not a qualified kinesiologist, defence did not provide any evidence to support this claim. Ms. Block testified that she understood that Ms. Brown was an advanced applied kinesiologist. This is

what she was told and Ms. Block had no reason to disbelieve her. Mr. Davies and Ms. Campbell, who also both received treatment from Ms. Brown, also believed her to be a kinesiologist. This is sufficient in my view, to establish Ms. Brown's qualifications on a balance of probability.

[109] I find that it was reasonable for Ms. Block to obtain treatments from Ms. Brown, and that the treatments received were necessitated by the collision. As such, Ms. Block is entitled to reimbursement for the cost of these treatments, in the amount of \$2,000. Adding in the \$473 already accepted by the defendants, Ms. Block is entitled to reimbursement for therapy and user fees of \$2,473.

2. Transportation Costs

[110] This expense consists of mileage and parking for attendance at medical appointments. The defendants initially took issue with the mileage claim, arguing that mileage should be calculated at \$0.25 per kilometer, instead of \$0.45 per kilometer as sought by the plaintiff. During closing arguments they indicated that they would no longer challenge the approach for mileage suggested by the plaintiff.

[111] In the event that I have mis-apprehended defence counsel's position on this issue, I note that the case law supports a mileage charge of \$0.50 per kilometer: see *Park* at para. 138; and *Valuck v. Challandes*, 2012 BCSC 324, para. 86.

[112] The plaintiff's claim for mileage and parking fees of \$1,367.57 is reasonable and was necessitated by the motor vehicle collision. Consequently, the plaintiff is entitled to reimbursement for the same.

3. Miscellaneous costs

[113] The plaintiff seeks \$1,050 as reimbursement for the deductible that she was required to pay for repair of her vehicle. The defendants do not dispute this amount.

[114] Rather, the defendants dispute a Fraser Valley Chem-Dry carpet cleaning cost of \$256.72. I agree with the defendants that there is insufficient evidence that this expense was necessitated by the collision. The services are for what would normally constitute a seasonal type of expense. The expense was incurred on December 4, 2013, only a week after the collision.

[115] The remaining expenses in this category are for housecleaning services through Molly Maid and Totally Clean. The defendants did not dispute payment of these expenses, and I accept the plaintiff's evidence that the housekeeping services were necessary and the costs are reasonable.

[116] Thus, the plaintiff is entitled to recovery of \$4,879 in miscellaneous expenses.

D. Past Loss of Earning Capacity

1. Legal Framework

- [117] When determining damages related to income that may have been lost due to the defendant's negligence, the compensable loss is not the actual lost income but the loss of capacity to earn: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 18, referring to *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141.
- [118] Damages are quantified on the basis of what the plaintiff would have earned, rather than what the plaintiff could have earned, absent the injury: *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [119] The test to be applied to past and future hypothetical events is "whether there is a real and substantial possibility that the events in question would occur": *Rousta v. MacKay* 2018 BCCA 29 at paras. 14 and 17.
- [120] Loss of earning capacity is defined as the "claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury": *Rowe* at para. 30.
- [121] Evidence of the value of the work may take many forms. For example, the court may make reference to the actual earnings a plaintiff would have received; or to a replacement cost evaluation of tasks which the plaintiff is not able to perform; or to an assessment of reduced company profits; or to the amount of secondary income lost, such as shared family income: *Rowe*, at para. 31, quoting with approval, Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at pages 205-06.
- [122] An award for loss of earning capacity is not a calculation made according to some mathematical formula; rather, it requires the assessment of damages: *Ibbitson* at para. 19.
- [123] Taking into account all of the evidence, the court must consider the overall fairness and reasonableness of the award: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

2. Yarrow Health

- [124] The plaintiff opened a home-based business around 2003, selling various natural food products and creams. The business grew, and in 2007 Ms. Block opened a store called "Yarrow Health & Décor" in Yarrow, B.C. She offered health and wellness products, quilts made by her mother, and other natural products such as locally made candles. In time, the plaintiff began offering reflexology and foot detoxification services, and also added a full body vibration unit. Though Ms. Block ran the business on her own, her aunt would occasionally come by to help.

- [125] Yarrow Health & Décor was successful and by March 2011 it had outgrown its 500 square foot space. The plaintiff moved her business to larger premises on Yarrow Central Road, and renamed the business "Yarrow Health". Some space was sub-let to an aromatherapy and massage practitioner named Shelley, who paid rent of about \$400/month. Ms. Block did not report this rental income on her tax returns.
- [126] After obtaining her iridology licence, Ms. Block purchased a light therapy unit and began offering light therapy treatment in 2012. Unfortunately, in May 2012 Yarrow Health premises suffered fire damage due to a fire in the building next door. Yarrow Health was closed for six months for renovations. Shelley left and Ms. Block decided to expand the business into the space previously occupied by her.
- [127] Ms. Block testified that she performed about 80% of the renovations herself. This included pulling out the linoleum floor and carpeting, painting, and tearing down the previous built in shelving and replacing it with new shelves. However, this testimony was contradicted in part by Ms. Block's mother, Darlene Campbell. Under cross-examination, Ms. Campbell testified that the renovation of the floors was performed by Ms. Block's husband, father-in-law, and brother-in-law, while some of the construction for the walls was done by her uncle. She confirmed that Ms. Block did the painting, but stated this was with the assistance of her brother. Mr. Davies testified that he did some minor work on the drywall (taping), and also helped Ms. Block with some of the painting and shelving.
- [128] Ms. Block re-opened her business in November 2012. The front of the business was a health store, selling products such as vitamins, supplements, natural food, and natural cleaners. The back of the business was used for wellness services, and had a light therapy bed, three chairs for foot detox treatment, and two tanning beds. The business operated Monday to Saturday, from 9:30 am to 5:00 pm. Ms. Block testified that she worked six days per week, and performed all the job duties herself, with the occasional assistance of family and friends.
- [129] Around December 2012, Ms. Block hired Ingrid Jones (who I will refer to by her current name, Ingrid Sterling) to assist her on a part-time basis. In 2013, Ms. Block hired Pauline Todoruk. Both employees worked part-time, putting in about 20-25 hours per week, and were paid \$10.25 per hour plus holiday pay. Also in 2013, Denali Moss was hired as a casual employee. Ms. Sterling and Ms. Moss were initially paid in cash, and at some point in 2013, were "placed on payroll".
- [130] Following the collision of November 2013, Ms. Block was not able to perform all her duties. Many of Ms. Block's customers had physical limitations, and could not move easily on their own. Ms. Block had difficulty positioning her clients, and performing foot detoxes, foot massages, light therapy, and cleaning the tanning beds. She experienced pain when she sat at the desk for too long. Ms. Block testified that she limited her work to talking with customers, booking appointments, and answering customer queries.

- [131] Consequently, Ms. Block testified that she needed extra assistance from her employees. She said that she increased Ms. Sterling's and Ms. Todoruk's hours to full-time, and placed Ms. Moss on payroll. Trevor Davies, who had previously been a volunteer, was temporarily put on payroll to fulfill extra duties.
- [132] Ms. Sterling testified on behalf of the defendants. It was her evidence that Ms. Block's injuries did not appear to interfere in her ability to perform her job. She also stated that hers and Ms. Todoruk's hours of work did not measurably increase following the collision. I have some concerns regarding Ms. Sterling's credibility. Ms. Sterling was terminated by Ms. Block in 2015, and it was clear at trial that she still harboured resentment towards Ms. Block in relation to that termination. Thus, where there is conflict in evidence between Ms. Block and Ms. Sterling, I have resolved it by looking at the other available evidence in this case.
- [133] The evidence shows that while Ms. Sterling and Ms. Todoruk did not reach full-time hours as indicated by Ms. Block, their hours of work did increase in 2014.
- [134] In 2014, on the advice of the occupational therapist, Ms. Block purchased a new front desk chair, back office chair, and foot detox stool. Ms. Block's condition began to improve, and she began to assume more of her foot detox and light therapy duties.
- [135] In January 2015, Ms. Block and Ms. Sterling had a falling out, and Ms. Block terminated Ms. Sterling. Ms. Sterling was not replaced with another employee.
- [136] Around September 1, 2015, Ms. Block was given notice by her landlord that her lease was being terminated as the building was to be torn down. She was required to relocate her business by the end of the month. Ms. Block researched the cost of leasing a new store and testified that she was unable to afford the higher cost of leasing and the salaries required to keep her business open. Consequently, she decided to close her business. Ms. Block sold most of her products and furniture, and closed Yarrow Health at the Yarrow Central Road location in October 2015.
- [137] Ms. Block retained one light therapy unit, and had it installed in her home. She had one loyal client who followed her to her home, and attended for light therapy once per week. Ms. Block performed this work throughout 2016, and estimates that she earned \$3,000.
- [138] Ms. Block also kept one pedicure chair and one detox machine. As Ms. Block could not afford to have plumbing installed for the pedicure chair, she did not perform any foot detox work for over a year. She was not able provide detox services without the plumbed in chair, as this required her to fill and carry heavy buckets of water. Ms. Block continue to sell merchandise, but on a limited scale.
- [139] In March or April 2017, Mr. Block renovated the plaintiff's home and installed the plumbing for the pedicure chair. Some additional clients returned, and Ms. Block began performing foot detox services and light therapy. Due to ongoing restrictions, it was Ms. Block's evidence that she could only work part-time. She estimated that she earned about \$5,000 for the light therapy and foot detox work. This figure did not include an estimate for the

subleasing arrangement with Ms. Brown, who paid Ms. Block \$10/client for an unknown number of clients per week.

[140] Ms. Block also started subleasing her home to a traditional Chinese medicine practitioner, Richard, who paid \$20/client, averaging two-to-three clients per week.

[141] In 2018, Ms. Block "got serious" and let people know that she was open for business. She purchased an elapromed spa massage table, and began giving facial treatments in addition to the light therapy and foot detox work. Because of increased pain to her neck and back, she says she was limited in how often she could use the elapromed unit, and has only performed a few facial treatments.

[142] The plaintiff currently runs her business out of her home, but at a much smaller scale. She sells health and wellness products, and provides foot detox and reflexology massages, light therapy, and facial treatments.

[143] Ms. Block estimates that she earned \$12,000 to \$18,000 in 2018. This figure does not include any sublease payments received from Ms. Brown and Richard.

3. Functional Capacity Evaluation

[144] It is Mr. McNeil's opinion that the plaintiff is capable of performing sedentary to light work, but that "she would struggle to maintain a productive work pace, depending on the work, and she would need accommodations which could adversely affect her ability to compete for work in the open job market" (para. 78).

[145] To understand the connection between Mr. McNeil's functional capacity testing on Ms. Block's ability to perform her date of injury employment, it is important to understand her job duties, the frequency with which she must perform them, and her demonstrated capacity.

[146] Mr. McNeil classifies Ms. Block's pre-accident employment in the "light" category based on the low physical demands of her work. Job duties are divided according to how often she must perform them, i.e., constantly, frequently, and occasionally. The only duty that must be performed on a constant basis is "reaching out". Mr. McNeil opines that Ms. Block is moderately restricted in her ability to perform this function.

[147] The duties she is required to do on a frequent basis are set out below, together with Mr. McNeil's view of her demonstrated capacity:

- standing - slightly restricted;
- gripping/pinching - able;
- bending/stooping - moderately restricted; and
- handling - able.

[148] Duties that she must perform on an occasional basis, and Mr. McNeil's opinion of her demonstrated capacity to perform them, are as follows:

- sitting - slightly restricted;
- walking - slightly restricted;
- reaching overhead - able;
- crouching - able;
- lifting (10 lbs) - able; and
- carrying (10 lbs) - able.

[149] Mr. McNeil opines at para. 83 that "based on assessment results she could perform 2 to 3 treatments per day 3 days per week, depending on what she is performing. For example, if all she was doing is performing the light therapy she could manage more clients. If she were performing more clients for detox/foot massage or facials, she would see fewer clients."

[150] To a large degree, the functional capacity evaluation findings support the plaintiff's evidence that she has difficulty performing some aspects of her job. The question then is, how this correlates with the plaintiff's loss of earning capacity claim.

4. Positions of the Parties

[151] The plaintiff submits that the evidence supports a finding that she has suffered a loss of capacity to earn an income, both past and future. She quantifies her past losses as follows:

- a) Replacement labour costs of \$6,551.21, representing increased staffing costs for the 2013 and 2014 years; and
- b) \$45,000 as past income loss representing a diminished capacity to operate her business for the 2017 and 2018 years.

[152] No replacement labour cost is claimed for 2015, and no income loss is claimed for 2015 and 2016.

[153] The defendants argue that no compensation is payable under this head of damages as the plaintiff did not suffer any loss of income. They point to the lack of credible evidence supporting such a claim, as well as the increase in gross revenues of the business in the year following the collision, as proof of no loss.

5. Analysis

- [154] The evidence supports a finding that Ms. Block suffered injuries from the collision which impacted her capacity to earn an income following the collision. Dr. Kousaie, Dr. Adrian, and Mr. McNeil all agree that the plaintiff's work capacity has been impaired. Mr. McNeil opines that she is no longer capable of full-time work at her date of injury employment.
- [155] However, assessing Ms. Block's loss is a difficult exercise. This is due to a number of factors, including my concerns about the plaintiff's lack of credibility in relation to financial matters, and the absence of reliable documentary or other objective evidence to corroborate her claims.
- [156] The plaintiff's pre-MVC income tax returns are of minimal assistance. Neither the 2011 and 2012 tax returns provide an accurate picture of the plaintiff's date of injury earnings, since Yarrow Health started in 2011, and there was a fire in 2012 shutting down the business for six months. The 2013 income tax returns are also suspect, as Ms. Block's business was in part, cash based, such that many transactions were not reported on her tax returns. In addition to paying some of her employees "under the table", the plaintiff received payments from some of her customers, such as Ms. DeJong, in cash. She also dealt with tenants and service providers such as Richard on a barter system, where they would give her products or services in exchange for her letting them use her premises.
- [157] The 2016 and 2017 tax returns are also unreliable. The plaintiff did not report her 2016 and 2017 health and wellness business income to Revenue Canada, though she did report money earned through "income splitting" with her husband's business. In the years following the closure of the Yarrow Health store and up to the date of trial, all of Ms. Block's transactions were cash based. Though she testified that she would provide receipts to customers who paid in cash, none of the receipt books were put into evidence.
- a) Replacement Labour Cost 2013-2104
- [158] The replacement labour cost claim is comprised of monies paid to Denali Moss in 2013; Trevor Davies in 2014; Pauline Todoruk in 2014; and Ingrid Sterling in 2014. Though Ms. Moss was also paid in 2014, the plaintiff does not seek to categorize that payment as a replacement labour cost.
- [159] The defendants argue that the replacement labour costs are not proven because (1) the costs would have been incurred regardless of the collision; and (2) the evidence with respect to the costs is unreliable and lacks credibility due to the plaintiff's admitted practice of paying her employee's in cash.

Trevor Davies

- [160] I turn first to the claim with respect to Mr. Davies. Mr. Davies testified that prior to the collision, he would frequently attend at the plaintiff's business and help her out on a voluntary basis. However, after the collision, the plaintiff was restricted in the duties she could perform, and asked him to come on a more regular basis. Mr. Davies complied, and

for several months was there on an almost daily basis. Mr. Davies testified that Ms. Block insisted on paying him something for his time, though he did not seek compensation. Mr. Davies did not track his hours, and was not able to correlate the \$362.44 paid to him, to a specific number of hours worked. However, it was his evidence that he provided far more assistance than what he was paid for. This included helping with foot detoxes, stocking shelves, moving boxes, or performing other duties that were physically too difficult for Ms. Block.

[161] I found Mr. Davies to be a credible witness. Though he is a friend of the plaintiff, I did not find him to embellish his testimony to assist her. Rather, Mr. Davies provided his testimony in a clear and forthright manner.

[162] Despite the fact that Mr. Davies and Ms. Block were unable to stipulate the number of hours that his T4 earnings represented, the evidence supports a finding that \$362.44 paid to him was reasonable and fair, and incurred due to Ms. Block's impaired work capacity following the collision.

Denali Moss

[163] Ms. Block testified that she decided to put Ms. Moss on payroll following her MVC. Up to that point in time Ms. Moss worked on a casual basis, and her assistance was only required when the store was busy, such as during the Christmas Crawl or Yarrow days. It is her position that but for the collision she would not have hired Ms. Moss in December 2013 to assist her in the business.

[164] While I accept that Ms. Block did experience an increased labour cost in relation to Ms. Moss, I am not convinced that the entire amount of \$1066 is attributable to the motor vehicle collision.

[165] First, the evidence with respect to whether Ms. Moss' employment in 2013 was necessitated by the collision, is entirely dependent on Ms. Block's credibility. That credibility is brought seriously into question by Ms. Block's decision to pay Ms. Moss "under the table" prior to the collision. Second, there was no evidence of how much money Ms. Moss received, or the number of hours she worked prior to the collision, making a "before and after" comparison extremely difficult. Third, Ms. Block's testimony with respect to the circumstances which led her to put Denali Moss on her payroll, was confusing and contradictory. Initially, Ms. Block testified that she hired Ms. Moss for a few days in 2013 around the time of the Christmas Crawl. Later under cross-examination, she stated that she hired her for one month in 2013. Yet later she said that Ms. Moss may have continued working for her into January 2014.

[166] Based on her T4 earnings, calculated at an hourly rate of \$10.25/hour and a 20-25 hour work week, the evidence suggests that Ms. Moss likely worked for a total of one month in 2013 and about 1.5 weeks in 2014. The collision happened shortly after the Christmas Crawl, and the plaintiff had a practice of hiring extra staff around the time of the Christmas Crawl.

Thus, the preponderance of probability is that the T4 earnings relate partially to pre-collision events (ie. she was hired to assist during the Christmas Crawl) and partially due to the collision.

Ingrid Sterling and Pauline Todoruk

- [167] It is Ms. Block's position that the T-4 income earned by Ms. Sterling and Ms. Todoruk in 2013 represented part-time earnings of 20 to 25 hours a week, at \$10.25 per hour. This evidence was corroborated by Ms. Sterling, and was also supported by the documentary evidence, which shows T-4 earnings for Ms. Sterling of \$10,117.68 for the 2013 year, and \$9,644.94 for Ms. Todoruk in the 2013 year. These earnings roughly correspond to 20-25 hours per week at \$10.25 an hour.
- [168] Ms. Block testified following the collision, both Ms. Sterling and Ms. Todoruk were required to work full-time due to Ms. Block's impaired capacity to work. Ms. Block did not specify what she meant by full-time hours, however, one can assume that the term was used in its ordinary sense, i.e. 40 hours per week.
- [169] The T-4 earnings for Ms. Todoruk for the 2014 year are \$13,309.16, representing an increase of 38%, or a change from 20-25 hours per week in 2013, to 28-35 hours per week in 2014. This documentary evidence partially corroborates Ms. Block's evidence, in that Ms. Todoruk's hours come close to full-time after the collision. However, this is not the case with respect to Ms. Sterling.
- [170] The 2014 T-4 earnings for Ms. Sterling are \$11,901.36. On the face of it, this represents an increase of 17% from her hours worked in 2013, or a change from 20-25 hours per week before the collision, to 23-29 hours per week in the year following the collision, measurably less than the full-time hours that Ms. Block says Ms. Sterling worked in 2014. I note also that Ms. Sterling received cash payments from Ms. Block in 2013. Depending on the amount, it is questionable if Ms. Sterling even experienced a 17% increase in hours between 2013 and 2014.
- [171] Thus, while I accept that part of the increase in hours worked by Ms. Sterling in 2014 represents replacement labour costs, I am unable to attribute the total amount.

Conclusion

- [172] Bearing in mind that the loss of earning capacity claim is to be assessed and is not a strict mathematical calculation, having regard to the concerns that I have outlined above, I assess the replacement labour costs attributable to the MVC for the 2013 and 2014 years, at \$6,000.
- b) Diminished Capacity 2017-18
- [173] The second aspect of the plaintiff's claim for past income losses, is related to the 2017 and 2018 years. The plaintiff submits that but for the collision, she would have:

- a) begun operating her business out of her home around March 2017;
- b) worked five days per week in her home based business;
- c) performed a mix of foot detoxes, light therapy, and facial treatments;
- d) averaged \$80/hour;
- e) performed at least 2 hours of sessions per day, 5 days per week; and
- f) worked at least 48 weeks in the year.

[174] The plaintiff estimates her loss as follows:

Table 1: Plaintiff's Claim for Past Earning Capacity Loss

Year

Absent MVA Projected earnings

Actual earnings

Gross Earnings Loss

Net Earnings Loss (20% Tax)

2017

\$38,400

\$5,000

\$33,400

\$26,050

2018

\$38,400

\$12,000 to 18,000

\$26,400 to \$20,400

\$20,600 to \$16,000

Total

\$46,650 to \$42,050

[175] Consequently, the plaintiff claims that in addition to the claim for labour replacement, her past loss of earnings capacity should be assessed at \$45,000.

- [176] I accept that Ms. Block's injuries posed restrictions in being able to perform the heavier aspects of her job in 2017 and 2018. These manifested themselves once she moved her business into her home, and no longer had employees to help her. However, I do not accept that the loss is as great as claimed by the plaintiff.
- [177] There are several problems with the plaintiff's methodology for assessment of her loss for 2017 and 2018. First, missing in Ms. Block's "actual earnings" at Table 1 is the sublease income earned by Ms. Block from Ms. Brown and Richard. Second, Ms. Block's failure to report her 2016 and 2017 income on her tax returns seriously detracts from her credibility. Third, although the trial commenced in January 2019, just weeks after her 2018 financial year had ended, Ms. Block provided no documentation to corroborate the "actual earnings" figures. Though she testified that she provided receipts to clients for their cash payments, no receipt book or other documents were produced. Her failure to do so leads me to make an adverse inference, and conclude that such documentation either does not exist, or that it shows considerably greater income than disclosed.
- [178] Fourth, whereas the plaintiff claims that her diminished capacity to earn an income continued in 2017 and 2018, she does not claim a diminished capacity in 2015, when her business was still operating at full speed. One would expect that if the plaintiff's injuries continued to be as disabling in 2015 as they had been in 2014, or as they had been in 2017 and 2018, she would have continued to incur replacement labour costs in 2015. The plaintiff explains that she did not need to incur the replacement labour costs in 2015 due to the generous assistance of her friends and family. However, this is not a credible explanation, especially when we look in detail at the plaintiff's staffing situation in 2015.
- [179] The evidence reveals that the plaintiff was actually working with fewer staff in 2015 than she was in each of 2013 and 2014. Ingrid Sterling was terminated around the end of January 2015, having earned \$930.08. She was not replaced by any other employee, nor did Ms. Todoruk's hours increase to compensate for Ms. Sterling's absence. In fact, Ms. Todoruk's hours appear to have returned to their pre-accident levels. In 2015, Ms. Todoruk earned only \$7,317.26. As the business was closed in October 2015, this wage is consistent with Ms. Todoruk working 20-25 hours per week until about September 2015. There is also no evidence that Ms. Block obtained extra assistance from Mr. Davies or her mother, to make up for Ms. Sterling's departure.
- [180] Notable also is that the plaintiff's 2015 revenues remained at the same level as they had been in 2014, despite Ms. Sterling's departure, and the lack of replacement labour costs from Mr. Davies, Ms. Todoruk, or Ms. Moss. The following table shows Ms. Block's gross business revenues, net income, and employee salaries:

Table 2: Yarrow Health Income and Salaries

Year

Gross Income

Average Monthly Income (approx.)

Net Income

(Loss)

T4 Salaries Paid

2013

98,267

\$8,200/month

5,019

20,828.62

2014

111,549

\$9,300/month

(1,962)

25,951.39

2015

76,846

\$9,000/month*

(38,817)

8,247.34

*based on active business operations until August 31, 2015, as the business started winding up in September 2015

[181] As can be seen, in 2015 Ms. Block was on track to earn the same revenues as 2014, though with fewer employees and no extra help. This can only lead to the conclusion that her earning capacity was not as impaired as her evidence would suggest.

[182] Finally, I note that there is a significant discrepancy between Ms. Block's position about her post collision capacity, and the evidence of Mr. McNeil. It was Mr. McNeil's opinion that with her injuries, Ms. Block is able to perform two-to-three treatments per day, three days per week. This translates to six-to-nine treatments per week, at an average hourly rate of \$80/hour, calculated over 48 weeks, i.e., an income of \$23,040 to \$34,560, per year. Comparing this to the plaintiff's evidence that Ms. Block would have earned \$38,400 per year, we arrive at a loss of \$3,840 to \$15,360, per year (without factoring in the sublease income). Calculated another way, accepting the plaintiff's argument that there is a real and

substantial possibility that she would have performed two hours of sessions per day, five days per week, Mr. McNeil's evidence translates to a loss of one-to-four sessions per week, which also yields the same results, i.e. losses of \$3,840 to \$15,360 for each of 2017 and 2018.

[183] Thus, while I accept that Ms. Block's injuries did affect her ability to earn an income in the 2017 and 2018 years, I find that this impact was substantially less than what is claimed. Having regard to all of the evidence, and bearing in mind that this is an assessment rather than a mathematical calculation, I assess Ms. Block's past loss of earning capacity for the 2017 and 2018 years, at \$14,000.

[184] Adding in the replacement labour costs for 2013 and 2014 of \$6,000, I assess Ms. Block's total past loss of earning capacity at \$20,000.

E. Future Loss of Earning Capacity

[185] The plaintiff seeks an award for future loss of earning capacity in the range of \$250,000, using a capital asset approach, but grounded in the replacement cost of labour. Though various scenarios are provided, this number most closely resembles the figures provided by the plaintiff for a part-time employee (i.e., 20 hours per week) paid at minimum wage of \$12.65/hour, to assist the plaintiff until age 65-70. The defendants argue against any award, submitting that the claim is too speculative and not supported by the evidence.

[186] The appropriate approach in assessing claims for loss of future earning capacity, was summarized by Mr. Justice Savage in *Parker v. Lemmon*, 2012 BCSC 27 at para. 42. It requires proof of a real and substantial possibility of a future event leading to an income loss. Two available methods of quantifying the loss are an earnings approach or a capital asset approach. An earnings approach is more useful when the loss is more easily measurable; the capital asset approach is more useful when the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 25-32.

[187] The court must consider both positive and negative contingencies when conducting this analysis: *Kellett v. Stam*, 2018 BCSC 1127 at para. 77.

[188] The questions to ask in assessing whether loss of earning capacity has been proven were set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at 356 (S.C.), and were summarized in *Kellett* at para. 76. Those questions are:

- a) Has the plaintiff been rendered less capable overall from earning income from all types of employment?
- b) Is the plaintiff less marketable or attractive as an employee to potential employers?
- c) Has the plaintiff lost the ability to take advantage of all job opportunities which might otherwise have been open to her had she not been injured?

- d) Is the plaintiff less valuable to herself as a person capable of earning income in a competitive labour market?

[189] Having regard to the evidence, I find that the plaintiff has met the initial burden of proof, such that based on the evidence and medical opinions, there is a real and substantial possibility that she will suffer a future income loss. Although she has essentially returned to her date of injury employment, she continues to have difficulty performing the heavier tasks at work and is restricted in overhead reaching. She is also less productive than she was prior to the accident.

[190] The medical evidence supports a finding that her condition is chronic and permanent. There is a real and substantial possibility that her collision related injuries will continue to impair her function such that she is less marketable as an employee to other potential employers, and is less valuable to herself as a person capable of earning income in a competitive labour market. I find also that she has been rendered less capable overall of earning income from all types of employment.

[191] However, Ms. Block's loss is not easily measurable, and as such, a capital asset approach is the more appropriate way of measuring this loss. A capital asset approach should use factual and mathematical anchors (where they are available) as a starting foundation to quantify such loss: *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.

[192] In my view, the replacement employee approach advocated by the plaintiff does not provide the basis for a reasonable and fair assessment of the plaintiff's loss. The evidence does not support a finding that there is a real and substantial possibility that Ms. Block will purchase or lease a commercial space to re-open her business outside her home. Ms. Block did not provide any such evidence. In addition, given that Ms. Block's 2013 net income was barely \$5,000, I find it highly unlikely that Ms. Block would return to the same business model that was in place at the time of the collision. In fact, at the time of trial, Ms. Block had not taken any steps to set up her business outside her home, despite the passage of over three years.

[193] In my view, the appropriate starting point for assessing this future loss, should be to consider the \$3,840 to \$15,360 figure arrived at in the past loss analysis using Mr. McNeil's evidence. In my view, the evidence supports a real and substantial likelihood of a loss closer to the lower end of the \$3,840 to \$15,360 range. Factoring in various negative and positive contingencies, such as early retirement, failure of her business, worsening of her condition, or unexpected success of her business, I assess Ms. Block's impaired future earning capacity at \$60,000.

F. Loss of Housekeeping Capacity

- [194] The plaintiff seeks a loss of housekeeping capacity award of \$25,000, and also seeks a pecuniary award for housekeeping services. The pecuniary award is quantified on the basis of weekly and seasonal cleaning. These figures amount to \$142,812 to age 80 for weekly cleaning services, and \$9,966 for seasonal cleaning to age 75.
- [195] The defendants argue that there is no evidentiary basis to make such an award as the plaintiff has returned to her pre-MVC household duties.
- [196] In *LaRocque v. LaRocque*, 2019 BCSC 655, at paras. 160-162, I noted the following principles which apply to loss of housekeeping capacity awards:
- [160] In *Morena* [*Morena v. Dhillon*, 2014 BCSC 141] at paras. 169-174, the Court outlined the principles related to the distinction between an award for loss of housekeeping capacity and an award for costs of future care. The former is "an asset that is lost" whereas the latter is "an additional expense one will incur in the future": *Morena* at para. 170. An award for future care costs compensates for costs provided to the plaintiff; loss of housekeeping capacity is a loss to the plaintiff's own ability to do household work.
- [161] Loss of housekeeping capacity may be compensated by a pecuniary or non-pecuniary award. The non-pecuniary approach may be preferred where the plaintiff is limited, but not unable, to do household tasks, whereas a pecuniary award may be more appropriate where replacement services are hired or family members provide gratuitous support: *Kim v. Lin*, 2018 BCCA 77, paras. 27-37.
- [162] Whichever approach a court takes, the award must be reasonable, that is, "tied to the actual loss of capacity which justifies the award in the first place": *Kim* at para. 34.
- [197] Turning to the evidence, Mr. McNeil opined that the plaintiff had moderate restrictions in completing a number of daily household duties, such as shopping, vacuuming and washing floors. He found her to be completely unable to, or severely restricted in, completing virtually all seasonal cleaning, such as carpet cleaning, cleaning drapes, washing walls and cleaning appliances.
- [198] Prior to the collision, Ms. Block was responsible for virtually all of the household cleaning tasks in the family home, including vacuuming, washing floors and windows, cleaning all three washrooms, cleaning windows, and doing all the laundry. For the 2013 and 2014 years, Ms. Block relied on a housecleaning service. However, by 2015, she stopped using a housekeeper, preferring to do her own weekly cleaning with some minor assistance from her family.
- [199] The plaintiff argues that the decision to stop using a housecleaning service was due to the fact that she was working full-time and could not be home for the cleaner to attend. She said that she was barely managing, and her house was not clean to her standards. However, I note that even after the plaintiff closed Yarrow Health, she did not retain a housecleaning

service. Rather, it was not until October 2018, a few months before the trial, that the plaintiff sought the assistance of another housecleaning service. The plaintiff argues that this was necessitated as she was now running a home based business requiring her to have a clean home. I do not find this evidence credible. The plaintiff was actively working out of her home in 2017 and 2018, but did not resort to a cleaning service until shortly before the trial.

- [200] Thus, while I accept that Ms. Block has restrictions in her housekeeping capacity which will continue to affect her into the future, she is nevertheless able to perform her regular household tasks. This loss is best compensated through a non-pecuniary award of \$10,000, which I find is fair and reasonable.
- [201] With respect to the loss of housekeeping capacity to perform seasonal cleaning, I find Ms. Block is unable to do this without the gratuitous assistance of family or paid help. As such this is best addressed through a pecuniary award. In that regard, I find that the seasonal cleaning figure sought by the plaintiff of \$456/year, for 16 hours (eight hours twice per year) at \$28.50/hour is reasonable and fair. The plaintiff is entitled to a pecuniary award for loss of housekeeping capacity to perform seasonal tasks, in the amount claimed of \$9,966.
- [202] Regarding yard services, Mr. McNeil opined that Ms. Block has moderate restrictions in yard work such as planting and maintaining flowers, and severe restriction in yard work involving general cleaning.
- [203] The plaintiff's 2.5 acre lot contains a large patio, grassy backyard, and forested area with trails. The yard and flower beds require constant weeding, watering, and raking. The plants require planting, trimming, pruning and deadheading. The plaintiff and her husband testified that prior to the collision, she shared about 50% of the responsibility for yard work with her husband. Mr. Block performed all the heavier tasks such as mulching, weed whacking, pruning trees, grass cutting and raking, leaving Ms. Block to manage the gardening, and maintaining the numerous trees, shrubs, and plants on the property. Since the accident, Ms. Block plants fewer flowers, and purchases more perennials. According to Ms. Block, the weeding, pruning, and raking, is now done by her husband, although Mr. Block testified that Ms. Block still assists with the pruning.
- [204] Having regard to the evidence, I am satisfied that Ms. Block has suffered a loss of housekeeping capacity also in relation to her ability to do yard work. This loss is best addressed through a pecuniary award, as she requires gratuitous assistance from her husband to help her perform the duties that she is no longer able to do. However, due to the conflicting evidence from the plaintiff and Mr. Block regarding the pruning, and the lack of evidence as to how much additional time Mr. Block spends doing yard work after assuming Ms. Blocks' duties, I am unable to determine with any real precision the value of Ms. Block's loss.

[205] Mr. McNeil's recommendation for yard services is calculated at the rate of \$45/hour, for two hours per week, 30 weeks of the year until age 75. However, I am unable to conclude that this is fair and reasonable. The evidence does not support a finding that there is a substantial likelihood that Ms. Block's capacity for yard work has been reduced to the degree opined by Mr. McNeil. Having regard to the evidence, and factoring in various contingencies, such as the Block's downsizing to a smaller yard prior to age 75, I find that \$20,000 is a fair and reasonable assessment of the loss of Ms. Block's ability to do yard work.

[206] The plaintiff is entitled to a total lost housekeeping capacity award of \$39,966.

G. Cost of Future Care

[207] I turn now to the award sought for cost of future care in the amount of \$216,129. This award is comprised of pain management services (\$2,472), homemaking services (\$152,778), yard services (\$59,008), and rehabilitation/health related costs (\$1,872). The defendants resist the making of any such award.

[208] A future care cost award is made based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health. The purpose of the award is to restore the plaintiff as best as possible with a monetary award, to the position that she would have been in had the collision not happened: *Gignac v. Rozylo*, 2012 BCCA 351 at para. 29.

[209] A claim for future care is established if there is medical justification for the claim, the claim is reasonable, and the expense is likely to be incurred by the plaintiff: *Audet v. Chan*, 2018 BCSC 1123 at paras. 113-115, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 83 (S.C.); see also *Hardychuck v. Johnstone*, 2012 BCSC 1359 at paras. 210-212.

[210] I have already addressed homemaking services and yard services under the loss of housekeeping capacity claim.

[211] Mr. McNeil recommended the following pain management tools to be purchased every two years: body pillow, contoured pillow, and TENS machine. The total net present value claimed for these items is \$2,472. As Ms. Block did not provide any evidence that she would actually purchase or use these items, I find that this expense is not likely to be incurred by the plaintiff.

[212] I turn to the final category, rehabilitation and health related costs. This expense is claimed for 12 sessions with an occupational therapist to assist Ms. Block in increasing her activity level, and improving her pain management strategies. The defence takes issue with Mr. McNeil making such a recommendation, as his is not medically qualified. However, the recommendation for treatment with an occupational therapist is consistent with Dr. Kousaie's recommendation that the plaintiff embark on a physical therapy program. I find that an occupational therapist is qualified to provide such treatment, the amount claimed is

reasonable, and given the plaintiff's past history of participating in various types of therapies, the expense is likely to be incurred by the plaintiff. Thus, Ms. Block is entitled to \$1,872 in future care costs for occupational therapy treatment.

H. Summary of Damages

[213] In summary, Ms. Block is entitled to damages as follows:

Non-Pecuniary Damages \$ 85,000.00

Special Damages \$ 8,719.57

Past Loss of Earning Capacity \$ 20,000.00

Future Loss of Earning Capacity \$ 60,000.00

Loss of Housekeeping Capacity \$ 39,966.00

Cost of Future Care \$ 1,872.00

Total Loss \$215,557.57

[214] The plaintiff is also entitled to interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

VI. Costs

[215] The plaintiff is entitled to her costs at Scale B, subject to settlement offers or other matters that I have not been made aware of. If a party wishes to make submissions on costs, they may prepare written submissions up to a maximum of five (5) pages in length, for the Court's consideration. These should be submitted through Supreme Court Scheduling within 21 days of this Order.

"Shergill J."

[1] All figures are rounded to the nearest dollar, unless otherwise indicated.

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