

CANADA / JUDGMENT

Clapson v. Knight

2025 BCSC 692

COURT

Supreme Court of British Columbia

DECIDED

11 April 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 692 Clapson v. Knight

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Clapson v. Knight,

2025 BCSC 692

Date: 20250411

Docket: M200008

Registry: Victoria

Between:

Kathryn Martha Clapson

Plaintiff

And:

Erin Nicole Knight, Heatherbrae Builders Co. Ltd.

and Accent Leasing & Sales Ltd.

Defendants

Before: The Honourable Justice LeBlanc

Reasons for Judgment

Counsel for Plaintiff:

S. Missaghi

D. D. McKnight

Counsel for Defendants:

M. D. Wilhelmson

E. Haupt

Place and Dates of Trial:

January 6-10, 13-17,

March 13-14, 2025

Written Submissions (Plaintiff):

February 28, 2025

Place and Date of Judgment:

Victoria, B.C.

April 11, 2025

Table of Contents

OVERVIEW.. 4

THE PLAINTIFF. 5

Pre-Accident Evidence of the Plaintiff 5

The Accident - January 14, 2018. 6

Post- Accident - Evidence of the Plaintiff 6

WITNESSES. 9

COLLATERAL WITNESSES. 9

Colin Jepsen. 9

Dr. Glen Hoar 11

Dr. Gelareh Nouredin. 12

Dr. Steven Shaver 13

MEDICAL EVIDENCE. 14

Dr. Ross Davidson - Tendered by the Plaintiff 14

Dr. William Craig - Tendered by the Defendants. 16

Should one medical expert be preferred over another?. 17

VOCATIONAL EVIDENCE. 19

Claudia Walker - Tendered by the Plaintiff 19

Dr. Quee-Newell - Tendered by the Defendant 21

ECONOMIST EVIDENCE. 22

Nicolas Coleman, M.A. (Econ) - Tendered by the Plaintiff 22

Thomas Steigervald, M.A. (Econ) - Tendered by the Defendants. 25

OTHER EVIDENCE. 26

Dr. Steven Ma - Tendered by the Defendants. 26

CREDIBILITY AND RELIABILITY. 27

DAMAGES. 29

Non-pecuniary losses. 29

Past Loss of Earning Capacity. 32

Future Loss of Earning Capacity. 36

Cost of Future Care. 39

Botox treatments. 41

Active Therapy. 42

Physiological treatment 44

Special Damages. 44

DUTY TO MITIGATE. 45

AWARD.. 46

COSTS. 47

OVERVIEW

[1] The plaintiff, Kathryn Martha Clapson, makes a claim for damages arising out of a motor vehicle accident that took place on January 14, 2018, at or near the intersection of Burrard Street and Cornwall Avenue in Vancouver, British Columbia (the "Accident"). The plaintiff was driving a 2014 BMW X5 (the "BMW") which was stopped when it was struck from behind by a 2013 Mercedes-Benz (the "Mercedes") being driven by the defendant, Erin Nicole Knight. Both vehicles sustained damage.

[2] Liability for the Accident is admitted by Ms. Knight.

[3] The defendants admit causation for the injury but dispute the quantum of the plaintiff's claim. The defendants submit that the plaintiff has not demonstrated on the evidence that she suffered any past or future wage loss.

[4] At the time of the Accident, the plaintiff was in her fourth year of her ophthalmology residency offered through the University of British Columbia. In the period between the Accident and trial, the plaintiff completed her ophthalmology residency, a fellowship in pediatric ophthalmology and became a 50% partner with Dr. Hoar in an ophthalmology clinic in Comox, B.C.

[5] The plaintiff seeks the following:

Non-pecuniary losses: \$200,000.00

Loss of past earning capacity: \$2,329,503.00

Loss of future earning capacity: \$10,141,711.00

Cost of future care: \$110,000.00

Special damages: \$6,194.66

TOTAL: \$12,787,408.70

[6] After considering the totality of the evidence, the applicable legal principles and the parties' submissions, I have assessed damages in the total amount of \$1,606,463.94, consisting of the following:

Non-pecuniary losses: \$150,000.00

Loss of past earning capacity: \$100,000.00

Loss of future earning capacity: \$1,375,000.00

Cost of future care: \$50,000.00

Special damages: \$5,213.94

Failure to Mitigate Discount: (\$73,750.00)

TOTAL: \$1,606,463.94

THE PLAINTIFF

[7] The plaintiff was born on December 16, 1986 in Saskatchewan.

[8] The plaintiff obtained a Bachelor of Science from the University of Saskatchewan and subsequently completed medical school between 2010 and 2014. In 2014, the plaintiff was matched to the ophthalmology residency program in Vancouver, B.C. which she completed in five years. In 2019 (after the accident), the plaintiff attended and completed a one-year fellowship in strabismus surgery in Brisbane, Australia.

- [9] The plaintiff married her husband, Colin Jepsen, in September 2019. Their son was born in February 2022 and their daughter in March 2024. The family resides in Courtenay, B.C.

Pre-Accident Evidence of the Plaintiff

- [10] Before the accident, the plaintiff describes her physical health as being at its peak. She had a regular exercise routine involving two to three fitness classes per week and participated in physical activities with her now husband, including swimming, hiking, running and biking. She testified that she had no underlying health conditions other than migraines experienced every couple of years. The plaintiff described her mental health as good and acknowledged the grief experienced when her mother passed away as being an isolated event.
- [11] Prior to the Accident, the plaintiff was working as a full-time ophthalmology resident in her fourth year of training. She was also the chief resident for the ophthalmology residency group at the University of British Columbia. The residency program is Monday to Friday starting between 7:00 and 8:00 a.m. and finishing around 5:00 p.m. Fourth year residents are also responsible for covering after-hour emergency calls which can vary in frequency and duration. The residency program is intensive. The plaintiff testified that she did not experience any difficulties in any aspects of performing her residency prior to the Accident. On cross-examination, the plaintiff recalled surgical days where she would develop significant fatigue and occasional headaches which she said would resolve themselves with fluids and food.
- [12] The plaintiff testified that she had planned to work at the BC Children's Hospital following the completion of her fellowship and that arrangements had been made for her to take over the Vancouver, B.C. medical practice of Dr. Roy as he wanted to retire.

The Accident - January 14, 2018

- [13] Between approximately 8:00 - 9:00 p.m. on January 14, 2018 the plaintiff was driving home from St. Paul's Hospital in the BMW and was stopped at a red light southbound after the Burrard Street Bridge. She recalls being impacted from behind by the Mercedes and the BMW was pushed forward and over the stop line. The airbags did not deploy. The plaintiff does not recall having head trauma on the front of her face or head but does recall cervical spine tenderness.
- [14] The plaintiff called her husband following the accident and he picked her up and took her to St. Paul's Hospital where she had an evaluation including a CT scan of the cervical spine. The plaintiff was discharged with oral pain control.
- [15] At the time of the accident, the plaintiff was earning \$72,000 per year as a fourth-year resident.

Post- Accident - Evidence of the Plaintiff

- [16] Following the Accident, the plaintiff described her pain as terrible requiring her to miss three days of work. When the plaintiff returned to work she continued to have neck pain and she was accommodated during her residency. The plaintiff was not required to do laser procedures as they required her to wear a weighted hat and she would not perform surgeries with those surgeons that had a large height differential to her. The plaintiff testified that she missed approximately another week and a half of work days when her symptoms worsened. There was no corresponding wage loss.
- [17] Approximately 10 days after the Accident, the plaintiff was seen by a physician who conducted a physical examination and prescribed physiotherapy and massage therapy. The plaintiff attended approximately 30 massage therapy treatments and has since discontinued that treatment indicating that she was no longer experiencing positive results and that her husband gives her a massage from time to time.
- [18] Two weeks after the Accident, the plaintiff started physiotherapy. Initially, the plaintiff attended twice a week and then weekly. As the symptoms improved, it was reduced to every one to three weeks. The plaintiff testified that physiotherapy improved her symptoms as did the intramuscular stimulation (IMS).
- [19] The plaintiff also engages in at-home treatments including applying heat to her neck and back.
- [20] After the Accident, the plaintiff completed her fifth year and residency and then attended her fellowship in Australia which had similar hours to those of her residency. Time was balanced between the operating room and clinical hours. During the plaintiff's fellowship, an accommodation was made so that her surgical day was broken up into half days as she was unable to operate for a full day doing strabismus surgery without an exacerbation of her symptoms. The plaintiff did not experience any loss of wages during her fellowship.
- [21] The plaintiff testified that she is very busy raising two young children and maintaining her full-time practice and that her fitness has since suffered as a result. The plaintiff testified that she attempts to use her treadmill at home once or twice a week. She is still attending physiotherapy.
- [22] The plaintiff described her practice as being 25% pediatric and 75% general ophthalmology due to the demographics of working in the Comox Valley.
- [23] The plaintiff testified to experiencing heightened neck pain when engaging in work that requires maintained neck positioning. Examples include strabismus surgery, cataract surgery, laser treatments and use of the slit lamp (specialized equipment for her profession).
- [24] The plaintiff testified to the number of cataract surgeries she is able to perform and how that has fluctuated over the years. When she returned from her fellowship and started working in the Comox Valley, she was performing 16 cataract surgeries a day and then when

she returned from her first maternity leave, this number was reduced to 14. The plaintiff explained that the number was reduced as a consequence of her neck symptoms. On cross-examination, the plaintiff further testified that due to administrative support and nursing shortages, her colleagues were also performing 14 surgeries a day. She testified that she is now doing 13 surgeries a day and is not using approximately one hour of her operating time.

- [25] The plaintiff testified that strabismus surgeries are major triggers for her symptoms so she only performs a maximum of four of these surgeries every two months.
- [26] On clinic days, the plaintiff testified that she has reduced her clinic hours from 5:00 p.m. to 4:30 p.m. due to fatigue she experiences.
- [27] The plaintiff testified that she feels pressure as her waitlists are beyond the benchmark and that she would like to be able to do more to assist the community.
- [28] The plaintiff also testified to the limitations of raising her two children and that she is not able to engage in physical activities with them as it will aggravate her symptoms. The plaintiff testified that her health as a consequence of the Accident has impacted her relationship with Mr. Jepsen negatively.
- [29] The plaintiff took three months and one week off after the birth of her son in 2022 and three months off after the birth of her daughter in 2024.
- [30] The plaintiff earned \$82,759 in gross income in 2019 which consisted of T4 residency income and locum income. The plaintiff commenced her fellowship in Australia in February 2020, completed it in December 2020, and earned \$92,000 (Canadian currency). In January 2021, the plaintiff joined Dr. Hoar's practice and is now earning income through her medical corporation. The plaintiff was not able to recall details of her income as she relies on her husband to take care of those details.

WITNESSES

COLLATERAL WITNESSES

Colin Jepsen

- [31] Colin Jepsen is the plaintiff's husband. Mr. Jepsen was born in Comox, B.C. and moved to Mission, B.C. when he was two years old. Presently, Mr. Jepsen's mother and step-father live in Comox.
- [32] Mr. Jepsen described the plaintiff as prioritizing her career - the plaintiff's career was her "life".
- [33] Mr. Jepsen described the plaintiff as being fit, happy and full of energy before the Accident. He described the activities the two of them would do together including long hikes, swimming, biking and going to the gym. Mr. Jepsen also described the plaintiff as someone that had a healthy state of mind.

- [34] Mr. Jepsen is employed by the plaintiff's medical corporation where he handles the payroll, bookkeeping, MSP billings and client referrals. Mr. Jepsen also cares for the two children on a full-time basis.
- [35] Immediately following the Accident, Mr. Jepsen describes the plaintiff as being an "old person" with limited mobility. The plaintiff would complain to him of constant pain in her neck and head. Mr. Jepsen testified that the plaintiff was motivated to return to work as soon as possible, which she did after a few days; however, she would return home at the end of the day complaining of pain and requiring heat treatment or massage. Mr. Jepsen expressed concern for the plaintiff as he thought she was pushing herself too much.
- [36] Mr. Jepsen described the plaintiff as having an excellent relationship with her son but indicated that she is limited in the interactions she can have with him. For example, she is not able to take him to the park on her own or play rough sports with him due to the limitations presented by her injuries.
- [37] Mr. Jepsen testified that the plaintiff has become "cold" since the Accident and lacks the energy she once had. She often comes home from work and is exhausted. The Accident has negatively impacted intimacy in the relationship.
- [38] Mr. Jepsen testified that nine staff are employed by the plaintiff's medical corporation and that staff will use the plaintiff's MSP billing number and any MSP billing records will include work performed by the plaintiff and her staff.
- [39] With respect to recording the plaintiff's MSP billings, Mr. Jepsen testified that the plaintiff will use a "day sheet" where she lists patients and procedures for a given day and at night he inputs the day sheet data to the MSP billings guide. During cross-examination, Mr. Jepsen confirmed that the MSP remittances show work billed by staff.
- [40] Mr. Jepsen testified that he and the plaintiff are paid in dividends from the plaintiff's medical corporation on a 50/50 split, and in 2024, they each received \$215,000.
- [41] Mr. Jepsen testified that the August 2024 year end financial statements for the plaintiff's medical corporation were not available at the time of trial but that he expected the revenue to be in the range of \$1.5 million.
- [42] Mr. Jepsen was pleasant and forthright and I find his evidence credible and reliable despite his close relationship with the plaintiff.

Dr. Glen Hoar

- [43] Dr. Hoar is a general ophthalmologist working in the Vancouver Island Health Authority, covering the Qualicum/Parksville area to the north end of the Island. Dr. Hoar is the head of the ophthalmology division, associate professor through the UBC residency program, and president of the BC Society of Physicians and Surgeons.

- [44] Dr. Hoar is the plaintiff's colleague and they operate out of the same clinic.
- [45] Dr. Hoar met the plaintiff when she reached out to him to do some locum work between completing her five-year residency and commencing her fellowship. Dr. Hoar agreed and the plaintiff did locum work in his clinic in 2019. Dr. Hoar testified that during this locum the plaintiff expressed an interest in working in the Comox Valley but at that time, there were no open positions. However, around the time the plaintiff completed her fellowship, a position opened up and the plaintiff applied, becoming the successful applicant.
- [46] Dr. Hoar testified that generally ophthalmologists have long careers as they are able to adapt their surgical and medical practices to meet their needs and physical abilities. Dr. Hoar testified that the equipment used in his profession is becoming more ergonomic with technological advancements and acknowledged that the profession is at risk of musculoskeletal changes or concerns and the equipment is evolving, to the extent it can, to address this.
- [47] Dr. Hoar was not asked if he observed any limitations in the plaintiff's ability to perform her work or whether the plaintiff complained of pain to him. Dr. Hoar was asked during cross-examination if he knew why the plaintiff reduced her clinic days to 4:30 and he answered that he believed she did so for a number of reasons, one of those reasons being to protect herself from injury. Dr. Hoar confirmed that was only his belief.
- [48] Dr. Hoar was an excellent witness. He was honest and straightforward and I accept his evidence in its entirety with the exception of his evidence that was based on his belief.

Dr. Gelareh Nouredin

- [49] Dr. Nouredin is a friend and colleague of the plaintiff. They met in 2014 while completing their residency in ophthalmology.
- [50] Dr. Nouredin is the sister of Mr. Missaghi, counsel for the plaintiff.
- [51] Dr. Nouredin testified that the plaintiff was knowledgeable and skilled in ophthalmology. Dr. Nouredin was asked very specific questions concerning her knowledge of the plaintiff before the Accident. With that time frame in mind, Dr. Nouredin testified that she did not have any medical or pain issues arising from the use of the specialized ophthalmology equipment. Dr. Nouredin observed the plaintiff between the time of the accident and 2019; however, Dr. Nouredin was not asked how the accident impacted the plaintiff's ability to perform as an ophthalmologist over that period of time. While Dr. Nouredin has seen the plaintiff over the years at conferences, she last observed the plaintiff working as an ophthalmologist in 2019.
- [52] Dr. Nouredin works out of a clinic in Kerrisdale and has operating privileges at the Vancouver General Hospital. She testified in her experience it was normal for ophthalmologists to carry on a combined medical and surgical practice into their 60's and then transition into a medical practice, giving up their surgical privileges.

- [53] Dr. Nouredin was asked if she is aware of any ophthalmologists that have neck pain issues arising out of their profession and she testified that no one has confided in her about that. On cross-examination, Dr. Nouredin was asked if she was aware of literature commenting on the practice of ophthalmology and resulting neck and back pain. Dr. Nouredin confirmed that she was but that she had not read any of it.
- [54] There was no challenge to Dr. Nouredin's credibility or reliability as a witness. I accept her limited evidence with respect to the plaintiff's work ethic and health between 2014 and the date of the Accident.

Dr. Steven Shaver

- [55] Dr. Shaver lives in Courtenay, B.C. and works as an ophthalmologist in the Vancouver Island Health Authority. Dr. Shaver knows the plaintiff as he is one of the five ophthalmologists servicing this area. Dr. Shaver maintains a surgical and clinical practice.
- [56] Dr. Shaver testified that he first interacted with the plaintiff when she was doing locum work out of Dr. Hoar's office but did not meet her until 2021 when she became one of the permanent ophthalmologists serving the area.
- [57] Dr. Shaver testified that when the plaintiff was assisting him with his backlogs and taking some of his operating time, care was taken to how patients were booked throughout the day and that she requested only two blepharoplasty surgeries to be booked in a day, one in the morning and one in the afternoon.
- [58] Dr. Shaver explained that during the COVID-19 pandemic additional surgical time was made available so that surgeons could work on their waiting lists and that the plaintiff picked up two of the additional days provided. Dr. Shaver testified that he took some of the plaintiffs' operating days while she was on a modified maternity leave to assist her with her waitlist.
- [59] Dr. Shaver testified to the current operating time being between 7:45 a.m. and 3:00 p.m. with all staff having to be out of the operating room by 3:15 p.m.
- [60] Dr. Shaver testified that he is currently completing 13 cataract surgeries a day and is easily finished before 3:00 p.m. He hopes to increase this number to 14 but is limited due to staff shortages. If the operating room is not fully staffed, he has to take breaks throughout the day to allow the staff to take breaks which reduces the number of surgeries that can be performed.
- [61] Like Dr. Hoar, Dr. Shaver was an honest and straightforward witness and I accept his evidence in its entirety.

MEDICAL EVIDENCE

Dr. Ross Davidson - Tendered by the Plaintiff

[62] Dr. Davidson was qualified as an expert in physical medicine and rehabilitation (physiatry) and prepared reports dated August 17, 2021 and December 22, 2023.

[63] Dr. Davidson met with the plaintiff on August 17, 2021 and November 30, 2023 and relies on the plaintiff's subjective reports as being accurate. A physical examination of the plaintiff was conducted during both visits.

[64] Dr. Davidson's motor vehicle diagnosis in 2021 was:

- Whiplash associated disorder (cervical spine sprain/strain) grade II;
- Mechanical neck pain (persistent);
- Myofascial pain of the neck and shoulder girdle (persistent);
- Chronic pain (persistent, mild); and
- Concussion (resolved).

[65] Dr. Davidson supplemented his diagnosis in 2023 to include the following:

- Acute headache attributable to whiplash (ICHD-3 criteria);
- Persistent headache attributable to whiplash (ICHD-3 criteria); and
- Possible benign paroxysmal positional vertigo.

[66] In 2021, Dr. Davidson recommended an ongoing comprehensive exercise program guided by a registered kinesiologist. Dr. Davidson described the program as two to four kinesiology visits per month for three months, then monthly for three months, then quarterly for the next six months, with regular "tune up" visits thereafter if symptoms or goals change.

[67] In 2021, Dr. Davidson opined that the plaintiff's prognosis is dependent on her response to an active program promoting scapular stability. It was not expected that the myofascial pain of the neck and shoulder girdle would go away completely, but should reduce to a baseline that will be clear after the comprehensive rehabilitation program. Dr. Davidson's best estimation was that the plaintiff would be able to maintain a work volume of 50 - 80% of a full time, busy, community ophthalmologist.

[68] In 2023, Dr. Davidson's opinion regarding work volume remained unchanged.

[69] In 2023, Dr. Davidson relied on the assumption that the plaintiff had undergone the recommended exercise program which the plaintiff has not completed. Dr. Davidson opined as follows:

2. Today, she continues to experience symptoms of similar frequency, intensity, duration, and quality, as compared to the 2021 report that I completed. She is very clear about the aggravating/alleviating factors which she has observed over time. These symptoms of head

pain and neck pain have induced disability in her vocational, social, and recreational spheres of her life and interfered overall with participation to a mild-to-moderate degree. Symptoms are persistent, and as predicted in my report from 2021 have perhaps improved slightly with a focus toward an active rehabilitation program, and a robust symptom control program, but have not resolved. Her level of disability remains roughly the same compared to 2021, and in certain spheres (vocational, social) is a little worse.

- [70] Dr. Davidson acknowledged that it made sense that musculoskeletal neck and back pain is an occupational risk in the field of ophthalmology.
- [71] Dr. Davidson opined on the biomechanical forces imparted on the plaintiff during the MVA. On cross-examination, he recanted and stated that he was only relying on the mass of the vehicle in providing his opinion. His statements in this regard went into advocacy. His 2023 description of the Accident provided dramatized language of force and impact.
- [72] With respect to Dr. Davidson's opinion on the plaintiff's capacity to perform the duties of an ophthalmologist, he admitted on cross-examination that the range provided was only an estimate to assist the court.
- [73] I accept the opinion evidence of Dr. Davidson with respect to his conclusions on the plaintiff's injuries arising from the Accident which went unchallenged with some minor exceptions. I also accept Dr. Davidson's recommendations regarding the plaintiff's treatment.
- [74] However, where Dr. Davidson provides opinions on the likely level of occupational functionality of the plaintiff, I reject them. The assessment lacks comprehensive consideration of the plaintiff's functionality following the Accident. Dr. Davidson does not provide an explanation as to how he arrived at these estimates - they are his "best estimation". Dr. Davidson does not engage in any type of analysis that considers the plaintiff's past three years of functionality, his medical assessment of her injuries or treatment options to arrive at his conclusion of estimated functionality. Dr. Davidson does not address in his subsequent report, the results of the rehabilitation program, or lack thereof. Further, the assumptions in his report do not support a finding of 50 - 80% of occupational function. For all of these reasons, I find the estimate to be unreliable and of no assistance to me.

Dr. William Craig - Tendered by the Defendants

- [75] Dr. Craig was qualified as an expert in physical medicine and rehabilitation (physiatry) and prepared a report dated November 14, 2023.
- [76] Dr. Craig met with the plaintiff on November 9, 2023 and conducted a physical examination. Like Dr. Davidson, Dr. Craig relied on the subjective information provided to him by the plaintiff.

- [77] The length of the physical examination was in issue during the trial. The plaintiff testified that the examination took three to four minutes and the entire assessment took 15 minutes. Dr. Craig testified that it was impossible to conduct the physical examination that he did in three to four minutes and rejected the evidence of the plaintiff. He stated that the assessment usually takes one hour. On cross-examination, Dr. Craig was presented with a sign-in/sign-out sheet prepared by the third-party clinic. When presented with the document, Dr. Craig explained that he had not previously seen it and that he often sees patients prior to the scheduled start time if they arrive early and that the document does not support a three to four minute physical examination. The document suggests that the plaintiff was in the office for approximately 30 minutes. I find that the physical assessment was likely somewhere between the time the plaintiff testified to and the time Dr. Craig testified to and was likely 20 - 25 minutes. Regardless of the length of the physical assessment, there was no suggestion by the plaintiff that the tests conducted by Dr. Craig and described in his report were not performed.
- [78] Dr. Craig's opinion was that the plaintiff likely had a moderate soft tissue injury to her neck and upper shoulders as a result of the Accident.
- [79] Dr. Craig recommended that the plaintiff would be a good candidate for trigger point injections as she has found some benefit from it in the past. If trigger point injections provide only temporary benefit, Botox injections (repeated up to three times) were recommended. Following this treatment, Dr. Craig recommended an active treatment program with a kinesiologist consisting of 18 - 24 sessions followed by another six to eight over the following 6 - 12 months.
- [80] Dr. Craig's prognosis was that the plaintiff may continue to have symptoms with maintaining prolonged static postures and noted the plaintiff's lack of significant time missed from work. Dr. Craig opined that with further treatment, the plaintiff should be able to better tolerate her work and increase the number of procedures that she does. Dr. Craig further suggested that the plaintiff could vary her schedule between consultations and procedures.
- [81] I accept Dr. Craig's opinion regarding the plaintiff's Accident-related diagnosis and treatment plan which went relatively unchallenged. I do not accept Dr. Craig's suggestion concerning the plaintiff's schedule. Dr. Craig did not have information or evidence available to him to make that assessment.

Should one medical expert be preferred over another?

- [82] I was urged by the plaintiff to accept the opinion of Dr. Davidson over that of Dr. Craig as Dr. Davidson spent more time with the plaintiff. As I have rejected the opinion evidence of Dr. Davidson concerning the plaintiff's level of occupational functionality and rejected the opinion evidence of Dr. Craig concerning the plaintiff's schedule, I find there is no reason to prefer one opinion over the other as it concerns diagnosis and treatment plans. The opinions from Dr. Davidson and Dr. Craig are not markedly different. Both doctors describe a diagnosis as consisting of a soft tissue injury. Both doctors indicate prolonged neck flexion

as being a source of pain for the plaintiff. Both doctors recommend a similar treatment plan for improved symptom treatment.

- [83] The only distinguishing factor in the two reports is the opinion regarding future prognosis; the expert for the plaintiff providing a negative opinion and the expert for the defendant providing a positive opinion. As both experts have relied primarily on the same diagnosis, and subjective factors from the plaintiff, I am left to evaluate why the opinions can differ so significantly.
- [84] Dr. Davidson in his first report provides a concluding opinion that the plaintiff will continue to have a threshold over which she will develop mechanical neck pain symptoms, which will depend on duration of awkward positions of the neck and then concludes functionality between 50 - 80%, which I have rejected. In Dr. Davidson's second report he wrongly assumes the plaintiff has participated in an active rehabilitation program without improvement in her disability. The plaintiff's evidence in this regard was that she was trying to use her treadmill one to two times per week and had not undertaken the active rehabilitation program recommended as her physiotherapist was providing exercises for her to do which she believes are similar. Dr. Davidson also commented on the plaintiff's ability to maintain a busy ophthalmology practice but had concerns regarding her ability to maintain it long-term and recommended reducing the general anesthesia day.
- [85] Dr. Craig concluded his opinion by acknowledging the plaintiff's symptoms have lasted over five years and she may continue to have symptoms with maintaining prolonged static postures. The favourable prognostic factors include the lack of significant concurrent mood issues and lack of significant time missed from work. Dr. Craig's opinion was that the plaintiff may have mild to moderate improvement in symptoms with a good treatment plan in place. Dr. Craig's opinion was that the plaintiff should be able to continue working as an ophthalmologist. Dr. Craig encouraged the plaintiff to become more physically active.
- [86] Based on my review of the medical opinions provided by Dr. Davidson and Dr. Craig, I make the following findings concerning the plaintiff's future prognosis:
- a) the plaintiff experiences pain symptoms while maintaining prolonged static postures and this will likely continue into the future;
 - b) an active rehabilitation treatment plan combined with other therapies may provide some systemic relief for the plaintiff but it is not likely to fully resolve the disability;
 - c) the plaintiff will most likely be able to continue an ophthalmology practice into the future with some modifications; and
 - d) prolonged neck flexion may result in escalating pain and increased stress which will need to be accommodated.

VOCATIONAL EVIDENCE

Claudia Walker - Tendered by the Plaintiff

- [87] Ms. Walker is a registered occupational therapist who conducted a 5.5 hour functional capacity evaluation of the plaintiff over two days. Ms. Walker indicated on her report that the evaluation was conducted on October 5 and 6, 2023; however, the plaintiff testified that the evaluation was conducted on October 4 and 5, 2023. Based on my review of the evidence, I find that the evaluation occurred on October 4 and 5, 2023. Ms. Walker has provided a report dated October 16, 2023.
- [88] The plaintiff was pregnant during the assessment which limited some of the tests Ms. Walker could conduct. The plaintiff drove from her home to Victoria, B.C. for the assessment.
- [89] Ms. Walker commenced the assessment with having the plaintiff engage in the construction of a work bench. Ms. Walker explained that this test was conducted first to have the plaintiff experience real life conditions before engaging in the other activity tests. Ms. Walker then had the plaintiff work continuously for 80 minutes on a series of tasks designed to simulate the postural demands of the plaintiff's work. Ms. Walker did not indicate that the plaintiff had to take any breaks during the assessments.
- [90] Ms. Walker was provided with a working schedule for the plaintiff.
- [91] Ms. Walker opined that the plaintiff is not suited to the postures required during surgical procedures (forward leaning and working with unsupported upper limbs or fine dexterous work which requires full concentration). Ms. Walker further opined that the plaintiff's restrictions could be accommodated by reducing the time spent doing surgeries and procedures if that is available to her. Ms. Walker's opinion was that the plaintiff had no restrictions for walking, standing upright, accessing low areas and sitting.
- [92] On cross-examination, Ms. Walker was confident that the assessment was conducted on a Thursday/Friday as those are the days she always conducts assessments. I have found that the assessment was conducted on Wednesday/Thursday as there is evidence of the plaintiff attending work on the Friday following the examination. Further, when questioned, Ms. Walker was unsure whether the plaintiff drove to the appointment the day of or the day before. Ms. Walker testified that when the plaintiff drove to the appointment could impact the conclusions drawn regarding the fatigue experienced by the plaintiff.
- [93] Ms. Walker received an email from the plaintiff the Monday following the assessment, as part of the post-test monitoring. The plaintiff wrote that any pain did not stop her from working on Friday. Notwithstanding, this email being listed in her report, Ms. Walker remained confident in her recollection that the assessment occurred on Thursday/Friday. When cross-examined, Ms. Walker stated that such activity on Friday reinforces her view that the plaintiff is working in spite of her symptoms.

- [94] I find Ms. Walker's report to provide little assistance to me. I found Ms. Walker to be unreliable with respect to the dates of the assessment. Ms. Walker acknowledged that the plaintiff's activities the day before the assessment may impact the results but did not consider them in her assessment. Further, Ms. Walker acknowledged that a long commute the morning of the assessment may impact the results; however, Ms. Walker did not obtain this information. Additionally, Ms. Walker relies on a number of factors to support her conclusion that the plaintiff is not suited for a surgical practice; however, she does not address the modifications made by the plaintiff and her ability to sustain a modified surgical practice over the past four years.
- [95] I found that on cross-examination, Ms. Walker veered into advocacy for the plaintiff and her treatment recommendations tended to be a catch-all list which was not tailored to the plaintiff.
- [96] For these reasons, I give little weight to Ms. Walker's opinion.

Dr. Quee-Newell - Tendered by the Defendant

- [97] Dr. Quee-Newell is a registered occupational therapist who provided a report dated February 8, 2024, critiquing the opinions of Mr. Coleman (economist tendered by the plaintiff) raised in his December 26, 2023 expert report.
- [98] Dr. Quee-Newell did not meet with the plaintiff.
- [99] Dr. Quee-Newell's main criticism concerns Mr. Coleman's methodology. Dr. Quee-Newell criticizes Mr. Coleman for not reviewing the plaintiff's financial information with statistical data and accepting the anecdotal information provided by the plaintiff of what she believes she should be doing.
- [100] Dr. Quee-Newell provides statistical revenue information for B.C. ophthalmologists obtained from the National Physician Database (2023). The gross fee-for-service payments amount in 2021-2022 was:
- 20th percentile: \$320,674
- 40th percentile: \$699,688
- 50th percentile: \$857,103
- Mean: \$1,013,094
- 60th percentile: \$995,466
- 80th percentile: \$1,490,292
- [101] Based on these fee-for-service payment statistics, Dr. Quee-Newell provides her opinion that the plaintiff's gross earnings are well above the median and mean for her profession in a year where she took a four-month maternity leave.

[102] Dr. Quee-Newell further criticizes Mr. Coleman for assuming the plaintiff would work to the age of 75 without reference to any statistical data. Dr. Quee-Newell relies on the National Occupational Classification for surgeons, of which ophthalmologists are included, to suggest that the median retirement age in 2021 was 65 years.

[103] Dr. Quee-Newell summarizes research literature concerning the prevalence of musculoskeletal disorders among ophthalmologists which suggests a near 50% of ophthalmologists report musculoskeletal pain while performing surgical tasks.

ECONOMIST EVIDENCE

Nicolas Coleman, M.A. (Econ) - Tendered by the Plaintiff

[104] Mr. Coleman is a forensic economist and was asked to develop multipliers and information that could be used by the court in estimating the pecuniary losses of the plaintiff.

[105] In preparing his report, Mr. Coleman was provided with the following assumption upon which he relied:

12. You have indicated that Dr. Clapson's typical Monday to Friday schedule as a result of the accident has been (and in the absence of the accident would have been) as follows:
 - a. On Monday mornings Dr. Clapson completes 14 cataract surgeries, while other ophthalmologists in the same health region are required to complete [sic] 16 to 17 cataracts surgeries within the same timeframe. In certain other health regions, some ophthalmologists will perform up to 30 procedures in the same timeframe (this is not a requirement, but some surgeons meet this target);
 - b. On Monday afternoons Dr. Clapson performs eye injections for 30 minutes, completing 4 to 6 injections. In the absence of the accident she would have performed eye injections for 1 to 2 hours at a rate of 4 to 6 injections every 30 minutes.
 - c. On Tuesdays Dr. Clapson conducts 60 to 70 patient examinations. She would have conducted a similar number of patient examinations within the same timeframe in the absence of the accident;
 - d. On Wednesday Dr. Clapson conducts 20 eye injections and 2 hours of eyelid surgery in the morning (4 hours total), followed by 30 patient examinations in the afternoon (4 hours). In the absence of the accident would have conducted additional injections and surgeries in the afternoon rather than the patient examinations. We have assumed that she will complete (and would have completed) eyelid surgeries at a rate of 1 surgery per hour both as a result of the accident and in the absence of the accident;

- e. On Thursdays Dr. Clapson typically focuses on administrative tasks and performs 4 to 6 general anesthesia surgeries once a month whereas other physicians perform such surgeries about one a week and complete 6 to 8 surgeries per surgery day. In the absence of the accident she would have performed general anesthesia surgeries twice per month at the same rate as her peers;
- f. On Fridays Dr. Clapson conducts up to 70 patient examinations. She would have conducted a similar number of patient examinations within the same timeframe in the absence of the accident.

[106] Mr. Coleman was also provided with the MSP billing fee numbers for the following procedures:

Patient Examination: \$101.10

Cataract Surgery: \$367.05

Eye Injections: \$134.43

Eyelid Surgery: \$596.64

General Anesthesia Surgery: \$539.11

[107] Based on the information provided by the plaintiff, Mr. Coleman suggests the plaintiff would have had the following work week absent the Accident:

- (a) performed 2 additional cataract surgeries for 48 Mondays per year;
- (b) performed 5 additional eye injections for 48 Mondays per year;
- (c) performed 20 additional eye injections for 48 Wednesdays per year;
- (d) performed 2 additional eyelid surgeries for 48 Wednesdays per year;
- (e) performed 30 fewer patient examinations for 48 Wednesdays per year;
- (f) performed 2 additional general anesthesia surgeries on her current 12 surgery days per year; and
- (g) performed 7 additional general anesthesia surgeries for an additional 12 surgery days per year.

[108] Based on the assumptions listed above, Mr. Coleman estimates that the plaintiff would have earned income \$166,470 higher per year than she did. Mr. Coleman did not adjust these figures for income taxes noting that the plaintiff could have employed tax-saving strategies through her medical corporation to reduce tax payable.

[109] Mr. Coleman's conclusions are all based on the assumption that the plaintiff is accurate in her assessment of what she could have done.

- [110] With respect to cataract surgeries, Dr. Hoar testified that he is presently restricted to 13 surgeries per day due to the available operating time and staffing restrictions. The other ophthalmologists that testified for the plaintiff were not asked to provide evidence on how many surgeries they are completing within a specific time frame. While the plaintiff believes that she could do more, the evidence suggests that notwithstanding the Accident she may be limited due to external constraints.
- [111] With respect to eye injections, the only evidence available is that of the plaintiff's belief that she can do more and should be faster. The other ophthalmologists were not questioned on the speed upon which they perform eye injections or the numbers they typically perform.
- [112] With respect to the general surgery days, there is an assumption that the surgery time will be made available. While there was evidence of possible fallow days, the evidence did not support there being 12 additional surgery days per year available for the plaintiff. The evidence suggests that the number of days available is unknown and variable.
- [113] While I found Mr. Coleman to be forthright and understanding of his duty to the Court, his opinion is based on assumptions that have not been established by the evidence. Mr. Coleman's opinion is of some limited use to me and I have relied on it only with respect to the economic multipliers he has provided.

Thomas Steigervald, M.A. (Econ) - Tendered by the Defendants

- [114] Mr. Steigervald provided the court with two reports: February 8, 2024 and February 21, 2024.
- [115] Mr. Steigervald criticizes Mr. Coleman for not undertaking an analysis of the statistical gross clinical revenue of ophthalmologists in B.C. Mr. Steigervald's report includes this type of analysis and he provides the following opinions:
- a) The B.C. Ministry of Health fiscal year end data for March 31, 2023 lists 225 ophthalmology practitioners with the average expense to the Ministry being \$1,041,414;
 - b) The Canadian Institute for Health information shows that in the year 2021/2022 (fiscal year end March 31, 2022), in B.C. the average "gross clinic payment per physician" for a "full-time equivalent" ophthalmology was \$986,911 per year and that the "gross clinical payment per physician" at the 80th percentile was \$1,502,736;
 - c) The plaintiff's actual revenues in fiscal years 2022 and 2023 (\$1,551,883 and \$1,628,186) were about 50 - 60% higher than the average levels and similar to the 80th percentile level. This level occurred despite the plaintiff taking a four-month maternity leave in 2022;
 - d) Mr. Coleman's estimates assume the plaintiff's absent-accident revenues would be about 1.7 to 3.4 times the average gross clinical earnings of B.C. ophthalmology physicians in B.C.

- [116] Mr. Steigervald provides an analysis for income tax deductions from the plaintiff's actual income and opines that the plaintiff would receive income as dividend income from her corporation and that the purpose of the preferred taxation of dividend income is to account for initial taxation of the corporation's net (after-expenses) income and later taxation of dividend income in the hands of the shareholder who receives dividends. A simplification of this multi-step taxation is to assume income would be taxed as ordinary income.
- [117] I found Mr. Steigervald's opinions to be helpful and they went primarily unchallenged during cross-examination.

OTHER EVIDENCE

Dr. Steven Ma - Tendered by the Defendants

- [118] Dr. Ma is an ophthalmologist and between 2010 and present has practiced ophthalmology in the cities of Langley, Burnaby, Richmond, Vancouver, Surrey, Terrace, Victoria and Nanaimo.
- [119] Dr. Ma was tendered by the defendants to provide expert evidence concerning the operation of an ophthalmology clinic and critique Mr. Coleman's factual findings. Dr. Ma provided a report dated February 12, 2024.
- [120] The report of Dr. Ma was challenged by the plaintiffs. Following a voir dire, I found that portions of Dr. Ma's report were to be struck for a variety of reasons, including advocacy and drawing conclusions without foundation.
- [121] I have accepted some limited portions of Dr. Ma's report as being helpful as set out below.
- [122] Dr. Ma reviewed the MSP billing code rates and provided his opinion that the billing code for eye injections has not changed between March 2019 to March 2023 and that the MSP billing code rates do not change with inflation. They are subject to review from time to time and may increase or decrease.
- [123] Dr. Ma testified that many factors impact the number of cataract surgeries that can be performed in a given time period, including: equipment factors, technical skills of the surgeon, facility factors including operating room layout and whether two rooms are available to bounce back and forth, as well as patient factors as some patients take more time.

CREDIBILITY AND RELIABILITY

- [124] The credibility and reliability of the evidence tendered by the plaintiff is a central issue in this case. I am guided by the following principles.
- [125] The factors to be considered when assessing credibility were summarized by Dillon, J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A No. 392, as follows:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [126] Credibility and reliability are not the same thing. Reliability analysis "is concerned with the accuracy of a witness's testimony"; it involves consideration of a witness's ability to accurately observe, recall and recount the events in issue: *Ford v. Lin*, 2022 BCCA 179 at para. 104; *R. v. Khan*, 2015 BCCA 320 at para. 44.
- [127] There is need to carefully scrutinize the evidence in cases where the plaintiff's claim depends on their subjective reports of pain: *McGlue v. Girvan*, 2024 BCCA 208. I find the same equally true when the plaintiff's claim depends on their subjective reports of performance capacity based on subjective reports of pain.
- [128] The court may accept some, all or none of the witness's evidence: *R. v. R.E.M.*, 2008 SCC 51 at paras. 49, 65.
- [129] If the plaintiff's evidence is not convincing, any hypothesis upon which an expert opinion rests will be undermined: *Samuel v. Chrysler Credit Union Ltd.*, 2007 BCCA 431 at paras. 15, 49 - 50.
- [130] The plaintiff testified over two days and was cross-examined. I accept the plaintiff's evidence regarding her injuries sustained as a result of the Accident and the symptoms experienced since the Accident. I accept the plaintiff's evidence that the injuries have impacted her life and that she has had to make modifications to her practice as an ophthalmologist.
- [131] I am not convinced by the plaintiff's testimony concerning her thoughts on what she feels she could be doing but for the Accident. The plaintiff has not accounted for external factors which would impact her productivity. An example of this relates to cataract surgeries. The evidence of her peers confirms they are performing cataract surgeries at the same rate as the plaintiff due to external factors beyond their control. With respect to the other procedures, the plaintiff's peers were not asked about their productivity rates. The plaintiff has arrived at this conclusion based on her own perception of what she believes others are

doing.

[132] The plaintiff takes the view that absent the Accident, she would be performing at 100% capacity all of the time until the age of 70. I find this to be unrealistic. For example, the plaintiff has a young family at home and there will be times when the plaintiff is required to attend to matters outside of the office. Other factors and realities of life will require the plaintiff to step away from her work from time to time.

[133] Additionally, the plaintiff has switched out some of the procedures that cause her pain with those that do not. This is both practical and reasonable. An example of this includes the modifications made on Wednesdays where the plaintiff is taking on more clinical appointments instead of eyelid surgeries. Based on the evidence of the other ophthalmologists, I find it reasonable that the plaintiff would have the ability to attend to further modifications to accommodate her injury from the Accident.

[134] I accept the plaintiff's evidence that she has shortened her days as a consequence of the Accident and such modification will have an impact on her earning capacity.

DAMAGES

Non-pecuniary losses

[135] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44 [Matthews]. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide and damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

[136] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

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

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

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

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

[137] An award for non-pecuniary damages is determined by a functional approach that depends not only on the gravity of an injury but also on the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44; *Matthews* at para. 44.

[138] Assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[139] The plaintiff submits that a proper award for non-pecuniary damages is \$200,000. In support of this position, counsel relied on the following case authorities:

- a) *Lee v. MacLean*, 2022 BCSC 312: \$130,000 (\$144,315.21 adjusted for inflation);
- b) *Moreira v. Crichton*, 2018 BCSC 1281: \$130,000 (\$159,217.92 adjusted for inflation);
- c) *Ferguson v. Watt*, 2018 BCSC 1587: \$140,000 (\$171,465.45 adjusted for inflation);

[140] In addition, counsel for the plaintiff submit that I should consider the plaintiff's stoicism and impact the injuries have had on her preferred choice of ophthalmology work. I was referred to *Firman v. Quina*, 2020 BCSC 1424 [Firman] and *Burdett v. Eidse*, 2010 BCSC 219 [Burdett].

[141] The plaintiff relies on the following passage of *Firman*:

[13] In *Giang v. Clayton*, *Liang and Zheng*, 2005 BCCA 54 at paras. 54 - 55, Justice Southin stated that a stoic "plaintiff who continues to work when it would be reasonable for him or her not to work should not be penalized for his or her grit." That guidance is particularly apt in this case.

[142] In *Burdett*, Mr. Burdett was unable to carry on with his construction work - work that he had undertaken all of his life, and of which he was very proud. Relying on the findings of this decision, counsel for the plaintiff submits that I should consider the impacts the accident has had on the plaintiff's self-worth and emotional well-being.

[143] The defendant submits that an award of \$100,000 to \$140,000 would not be unreasonable in all the circumstances. In support of this position, counsel relied on the following case authorities:

- a) *Waltmans v. Murovec*, 2024 BCSC 1398: \$140,000 for Mrs. Waltmans;

- b) Moon v. Yaranon, 2021 BCSC 818: \$100,000 (\$117,350.61 adjusted for inflation);
- c) Yang v. Lockhart, 2022 BCSC 32: \$140,000 (\$155,449.59 adjusted for inflation);
- d) Dhanda v. Thind, 2022 BCSC 1003: \$100,000 (\$111,035.42 adjusted for inflation);

[144] The plaintiff's injuries have created stress within her marriage. The plaintiff is no longer able to contribute to the household cleaning and maintenance and her husband is taking on a greater burden. Her pain also limits her activities with her son, causing guilt and a sense of loss. The injuries have also affected marital intimacy. Balancing this is Mr. Jepsen's evidence that the plaintiff likely would have prioritized her career notwithstanding the Accident.

[145] As a measure of pain control, the plaintiff has modified some of her occupational tasks to ones that do not require prolonged neck flexion. As a result, the plaintiff may not be performing as many pediatric surgeries, a field that the plaintiff completed her fellowship in and had hoped to pursue as a full-time practice.

[146] On review of the case authorities provided to me, I find that an award of \$150,000 is reasonable to compensate the plaintiff. The Accident left the plaintiff with ongoing soft tissue pain that has impacted the plaintiff's home life. The plaintiff pursued a career that specialised in strabismus surgery and while she is able to perform some of these surgeries, it is not the career path the plaintiff envisioned. In making this award, I have also considered the plaintiff's age at the time of the Accident.

Past Loss of Earning Capacity

[147] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[148] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The trial judge has a discretion to determine what period or periods of time are appropriate for the determination of net income loss: *Lines v. W & D. Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181-186. In exercising this discretion, the trial judge should keep in mind that the plaintiff is to be put back in the position he or she would have been in had the accident not occurred: *Lines* at paras. 185-186.

[149] The burden of proof of actual past events is a balance of probabilities. The court must make an assessment rather than a calculation in assessing damages and ultimately, the court must base its decision on what is reasonable in all of the circumstances: *Jurczak v. Mauro*, 2013 BCCA 507 at para. 36.

- [150] The plaintiff seeks an award in the amount of \$2,329,503.00 for past wage loss. This number is calculated by taking the plaintiff's work capacity as being 65% and then using Mr. Coleman's figures to arrive at this number.
- [151] The defendants submit that an award of this magnitude would result in an enormous windfall to the plaintiff and is based on speculation and not on the evidence presented. I agree.
- [152] I find that the evidence does not establish any wage loss during the plaintiff's residency or locum. I also accept that the wages earned by the plaintiff while completing her vocational training are not representative of her ability to earn revenue as an ophthalmologist.
- [153] Notwithstanding the modifications implemented by the plaintiff, I find that the plaintiff's ongoing pain symptoms caused her to suffer a pecuniary disadvantage that is compensable through an award of damages.
- [154] I am satisfied that the plaintiff's injuries caused a decrease in her efficiency and productivity as an ophthalmologist and there is a real and substantial possibility of a resulting pecuniary loss. I do not find that the loss was as significant as the plaintiff claims.
- [155] While I have found that the plaintiff has had a past loss of earning capacity, determining what that is has been difficult on the evidence before me. Mr. Coleman's report has not assisted me as I find it inflates revenue the plaintiff says she ought to have received which has not been established on the evidence.
- [156] The plaintiff joined Dr. Hoar's clinic in January 2021 which involved transitioning patients left by the exiting ophthalmologist. She was able to start her practice with a relatively established patient base.

[157] The total revenue and net earnings for the plaintiff's medical corporation are as follows:

Year:

Total Revenue:

Net Earnings:

2020

\$251,308

\$216,505

2021

\$825,732

\$440,893

2022

\$1,551,883

\$742,841

2023

\$1,628,186

\$1,111,413

[158] Even though the plaintiff's income has increased year after year, I am to assess the actual lost capacity to earn income which can occur even when income is increasing: *Ibbitson v. Cooper*, 2012 BCCA 249, at para. 19.

[159] The "day sheets" or appointment lists which would have established a base for the plaintiff's actual working day were not put into evidence by the plaintiff. I understand these were not disclosed by the plaintiff. I was provided with MSP billing records which are a combination of billings performed by the plaintiff and her staff and the plaintiff's medical corporation financial statements which again include the work performed by all staff. I find this evidentiary gap to be problematic to the plaintiff's claim as I am unable to find on a balance of probabilities that the plaintiff's productivity was impacted by 35%. Considering the income the plaintiff was earning along with the statistical markers available to me, I find it highly unlikely that the plaintiff would have increased her income by a further 35%, but for the Accident. Instead, the evidence establishes that the plaintiff missed very little work and modified her practice to manage her pain symptoms and maximize her productivity.

[160] Considering all of the evidence, I find that the plaintiff's loss of earning capacity to have commenced on April 1, 2021 when she had established her ophthalmology practice in the Comox area and continued until the date of the trial for a total of 165 weeks. I have chosen April as the plaintiff would have had a few months of "start up" before reaching full capacity. During this period, the plaintiff took 27 weeks of maternity leave and I would not include this time in the assessment of loss. The amended total would be 138 weeks.

[161] I find it reasonable based on the evidence that the plaintiff has suffered a modest past loss of earning capacity which I have averaged to be one hour per week. I make this finding based on the evidence I have accepted concerning the modifications made by the plaintiff, including the reduction in her clinic hours.

[162] To assist with my decision, I have considered the plaintiff's loss of earning capacity based on two different procedures that are the most likely based on the evidence presented:

- a) If the plaintiff can perform 30 patient examinations in a four-hour period, a loss of one hour would equate to a loss of 7.5 examinations per week and \$758.25 per week. At 138 weeks, the loss would be \$104,638.50.

- b) If the plaintiff can perform on average five eye injections in a 30-minute time period, a loss of one hour would equate to 10 eye injections and \$1,344.30 per week. At 138 weeks, the loss would be \$185,513.40.
- [163] To put a value on this loss of earning capacity, I have allocated the higher of the two scenarios to the plaintiff to account for any other contingencies that may have weighed in her favour.
- [164] I have reduced the \$185,513.40 by 50% to account for income tax, medical supplies and the operational costs for a total of \$92,756.70. I have not further discounted for holidays, which favours the plaintiff.
- [165] By way of comparison, I note that this assessment does not differ significantly from Mr. Coleman's loss assessment of a 5% reduction of \$227,695 from January 1, 2021 to January 6, 2025 without accounting for income tax, which after a 50% reduction would equate to \$113,847.50.
- [166] Based on the above, and allowing for a small further contingency in favour of the plaintiff, I find the plaintiff suffered a loss of past earning capacity in the sum of \$100,000.

Future Loss of Earning Capacity

- [167] The plaintiff seeks an award of \$10,141,711 for future loss of earning capacity.
- [168] An award for loss of future earning capacity is appropriate where the plaintiff has established a "real and substantial possibility of a future event leading to an income loss": *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 14; *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [169] The central task before the court in considering damages for loss of future earning capacity is to compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25; *Rab v. Prescott*, 2021 BCCA 345 at para. 65.
- [170] The Court of Appeal issued three decisions in 2021 regarding the approach to assessing a claim for damages for loss of future earning capacity: *Dornan*; *Rab*; and *Lo v. Vos*, 2021 BCCA 421.
- [171] In *Rab*, the Court identified a three-step process for assessing damages:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to

assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in Dornan at paras 93-95.

[172] Justice Laurie recently discussed these three stages in *Harris v. Anderson-Wulff*, 2025 BCSC 85:

[217] At the first step, there are, broadly, two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and for the foreseeable future; and (2) less straightforward cases, for example, those in which a plaintiff's injuries have led to continuing deficits or exposed them to future problems, but the plaintiff's income at trial is similar to what it was at the time of the accident: *Rab* at paras. 29-30. In the former set of cases, the first and second step of the analysis may well be foregone conclusions: *Ploskon-Ciesla* at para. 11. However, it will be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, and the court may make allowance for positive and negative contingencies: *Rab* at para. 29; *Ploskon-Ciesla* at para. 11.

[218] The second step of the analysis requires the plaintiff to prove there is a real and substantial possibility that the future event in question will give rise to pecuniary loss. Here, after determining that the plaintiff may suffer a loss of capacity, the court evaluates the likelihood that it will affect the plaintiff's ability to earn income. The standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": *Gao v. Dietrich*, 2018 BCCA 372 at para. 34; *Ploskon-Ciesla* at para. 15.

[219] At the third step - the valuation stage - there are two possible approaches to assessing loss of future earning capacity, being the earnings approach and the capital asset approach: *Davies* at para. 28; *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach will generally be more useful when the loss is easily measurable: *Lamarque* at para. 38; *Perren* at para. 32. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: *Perren* at para. 12.

[220] The approach taken to the assessment of loss must be based on the evidence: *Rab* at para. 75. The ultimate award is a matter of judgment as opposed to purely mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18. The assessment includes consideration of general contingencies as well as any specific contingencies relied on by the plaintiff or defendant: see *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 71 citing *Graham v. Rourke*, (1990), 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.). Specific contingencies pertain to the plaintiff in particular and must be grounded in evidence establishing them as realistic possibilities: *Dornan* at paras. 92-95. To the extent possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.

- [221] The earnings approach involves a form of math-oriented methodology that can include: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or, ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Corp. of British Columbia*, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 46 (C.A); *Ng v. Corness*, 2023 BCCA 185 at para. 18; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.
- [222] The capital asset approach involves consideration of the factors described in *Brown v. Golaiv*, 26 B.C.L.R. (3d) 353 at 356, 1985 CanLII 149 (S.C.), including whether the plaintiff i) has been rendered less capable overall of earning income from all types of employment; ii) is less marketable or attractive as a potential employee; iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and iv) is less valuable to himself as a person capable of earning income in a competitive labour market: see also *Ploskon-Ciesla* at para. 13. Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Dornan* at paras. 151, 158; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [173] I accept that the first two steps of the Rab test have been met. The plaintiff's ongoing functional and vocational limitations have been confirmed by the evidence. The evidence shows that the plaintiff is modifying her work days on account of the pain symptoms she experiences from the Accident which results in a pecuniary loss.
- [174] With respect to the third step, the plaintiff says that I should use the "percentage valuation method".
- [175] I agree with the plaintiff that the earnings approach is appropriate in the circumstances as the evidence I have accepted permits a reasonable estimation of the plaintiff's loss, similar to the analysis I conducted for the past loss.
- [176] I accept that the plaintiff may suffer greater losses in the future than she has in the past. In coming to this conclusion, I accept that the plaintiff has worked through pain and it is recommended that she monitor her symptoms and adjust accordingly. I accept that ophthalmologists often work past typical retirement age; however, they do so in a clinical setting. As the clinical work is not aggravating the plaintiff's symptoms, I would start the analysis at January 1, 2025 and conclude on December 1, 2051, the month the plaintiff turns 65. I have further concluded that the plaintiff's work year will be 46 weeks, allowing for holiday and other absences away from her practice.
- [177] I have used the same formula as above, but increasing the amount of productivity lost on account of the Accident to 1.5 hours:
- a) If the plaintiff can perform 30 patient examinations in a four-hour period, a loss of 1.5 hours would equate to a loss of 12.5 examinations per week and \$1,263.75 per week. The loss in 2025 would be \$58,132.50.

b) If the plaintiff can perform on average five eye injections in a 30-minute time period, a loss of 1.5 hours would equate to 15 eye injections and \$2,016.45 per week. The loss in 2025 would be \$92,756.70.

[178] To account for the contingency that the plaintiff is likely to continue to modify her practice, by taking on more procedures that do not aggravate her symptoms with those that do, I have taken the average of the two figures above which equates to a loss in 2025 of \$75,444.60.

[179] Using Mr. Coleman's economic multiplier of 18.075% which accounts for labour market contingencies and premature death to calculate the net present value of the plaintiff's loss from the date of trial to the plaintiff's anticipated retirement age from surgical practice at 65, the resulting amount is: \$1,363,661.14.

[180] With respect to the plaintiff's claim for loss of future earning capacity, I assess a fair and reasonable award to be in the amount of \$1,375,000.

Cost of Future Care

[181] Insofar as possible, the plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the accident had not occurred. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the available medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (BC SC) [Milina]; *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 paras. 29-30.

[182] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence, and it must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58, [Pang]. For an award of future care: (1) there must be a medical justification for claims for cost of future care; and, (2) the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62 - 63; *McGuigan Estate v. Pevach*, 2024 BCCA 106 at para. 92 citing *Paur v Providence Health Care*, 2017 BCCA 161 at para. 109 [Paur]. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff.

[183] An award of damages for costs of future care is partly prediction and prophecy: *Pang* at para. 58. In *Pang*, at para. 57, Justice Voith identified three additional considerations of which the court must be satisfied in this analysis: first, that the plaintiff would, in fact, make use of the particular care item; second, that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred, and third, that there is no significant overlap in the various care items sought.

- [184] It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: Paur at para. 109.
- [185] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case is to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253 [Gilbert].
- [186] An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang* at para. 58.
- [187] Mr. Coleman's report provides a present value of expected future costs of \$260,162. The plaintiff submits that this amount should be adjusted as there is no claim being advanced for household cleaning, yard maintenance, and massage therapy.
- [188] The plaintiff submits that the evidence supports a claim of \$110,000 for her cost of future care. This consists of Botulinum (Botox Treatments), radiofrequency ablation, trigger point injections, medial branch blocks, pain clinics, active rehab, cardiovascular equipment, basic gym equipment, yoga, Pilates, chiropractic treatments, physiotherapy, remedial massage, clinical psychologist, Obus form back support and household assistance/cleaning/gardening.
- [189] The defendants submit that the plaintiff is seeking payment for treatments she has refused to pursue, and it is unlikely that she will pursue them in the future, even if the treatments are reasonably justified.

Botox treatments

- [190] The plaintiff claims 50% (\$58,838.50) of the recommended Botox treatments valued by Mr. Coleman at \$117,677.
- [191] Dr. Davidson's August 17, 2021 treatment plan contained the following comments concerning orthopaedic or spinal intervention, including Botox injections:

At this point I do not believe the patient is a good candidate for any type of orthopaedic or spinal intervention. However, she has persistent neck and pain that may be amenable to injections at a later date. One could consider trigger point injections, intermuscular stimulation or other higher-level treatment such as branch blocks, epidurals, trigger point injections or even botulinum toxin injection for soft tissue pain. A Pain Clinic referral would be reasonable in this case. Botulinum toxin injections are relatively contraindicated during pregnancy and given the severity of the patient's symptoms, I would not offer them at the current time.

[192] Dr. Davidson provided an updated report on December 22, 2023 containing the following comments:

31. Treatment recommendations are largely the same as to my August 2021 Report. I would make a few changes based on the interval history, including:
32. The patient probably does not need Botulinum Toxin injections for chronic migraine, as she does not have a diagnosis of chronic migraine. The head pain diagnosis today is chronic headache attributable to whiplash, which should be treated in the same way as mechanical neck pain. Botulinum toxin may be used off label for refractory myofascial pain, so does remain an option, though must be used with great caution because the same muscles that are painful for the patient are postural neck muscles integral in maintaining static neck flexion, a position important in her vocational life.

[193] The plaintiff's evidence indicated it is unlikely that she will pursue this line of treatment:

A. So through the assessments that I've had I've had other recommendations. One of them is - being Botox injections to my neck. Because of my pregnancies and then breastfeeding this has not been something that I've been actually able to proceed with. I would be open to it. However, I do have concerns about it. Because what Botox does is it paralyzes muscles, so I would be having muscles in my neck paralyzed, and if that does anything to destabilize my neck, it would actually put my work at further jeopardy, because I need to maintain such static neck postures in my Monday to Friday work. So would I consider it? Yes. But I would need assurance that it truly would be of benefit for me.

A. So again, yes, I would be open to it, but I would need an assurance that it would not worsen my symptoms to the point where I'm not able to work and put my career further at jeopardy.

A. Yes. Well, some of the ones that we have gone over are ones that would put my career at further jeopardy, particularly the Botox injections.

[194] Although the plaintiff indicated that she may be open to pursuing this treatment, she also indicated that she would require guarantees and assurances that are not reasonably medically possible, which she would know as an ophthalmologist.

[195] I find that it is unlikely that the plaintiff will make use of this treatment care item in the future and decline to award compensation for Botox treatments.

Active Therapy

[196] Mr. Coleman combined physiotherapy with remedial massage and provided a total present value for both of \$57,523 to the age of 75. In addition, values are provided for kinesiology, yoga, large and small exercise equipment at a combined present value of \$28,494.

[197] Counsel for the plaintiff submits that an award of 50% (\$28,761.50) of the \$57,523 is reasonable as the plaintiff's evidence did not support massage therapy.

- [198] Counsel for the defendants submit that although active rehabilitation has been recommended since 2021 the plaintiff has not engaged in the same. Notwithstanding, the defendants are prepared to accept this is reasonable medically to finally reduce the plaintiff's pain perception and increase her function. The defendants further submit the active rehabilitation should be followed by a few years of physiotherapy to ensure that the plaintiff is able to continue with maintenance. The defendants suggest an award to the plaintiff for physiotherapy, massage and chiropractic treatments based on what is working, although, they question whether she will make the time to undertake the treatments. The defendants submit that the plaintiff does not participate in yoga and there should be no award for that.
- [199] The plaintiff has been unwilling to see a kinesiologist on the basis that her physiotherapist provides similar treatment support. The historical pattern of treatment does not support compensation for this treatment as I find it is unlikely the plaintiff will pursue it.
- [200] The plaintiff has demonstrated that she is not interested in participating in yoga and online remote yoga classes are already available to her. I do not find it likely that the plaintiff will undertake this treatment.
- [201] I find that it is likely that the plaintiff will utilize some home-based exercise equipment and is entitled to some compensation for this.
- [202] The approach taken by the counsel for the plaintiff to reduce the physiotherapy/remedial massage by 50% is reasonable. I also find the position taken by the defendants' counsel to allow the plaintiff to pick and choose the treatments that are benefiting her to be reasonable.
- [203] Based on these conclusions, I assess the cost of future care for active therapy at \$50,000.

Physiological treatment

- [204] Mr. Coleman provides the total present value of physiological treatments representing one visit per year at \$2,791.
- [205] Although the plaintiff has previously utilized physiological treatment for other aspects of her life, there was insufficient evidence that she would pursue this treatment in the future or that it is being recommended.
- [206] I decline to award the plaintiff compensation for physiological treatments.

Special Damages

- [207] An injured person is entitled to recover the reasonable out-of-pocket expenses incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position they would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281.

[208] The plaintiff seeks special damages in the amount of \$6,194.66 consisting of:

Physiotherapy and massage therapy: \$4,843.36

Posture Medic Back Device: \$51.41

Robotic Vacuum: \$235.99

Rotating car seats: \$1,063.90

[209] The defendants take issue with the robotic vacuum and the rotating car seats. With respect to the robotic vacuum, the defendants submit the plaintiff does not do the housekeeping as it is undertaken by her husband or the housecleaner. With respect to the rotating car seats, the defendants submit only a portion of the car seats should be recoverable as the plaintiff would have been required to purchase car seats regardless of the Accident.

[210] The plaintiff is not advancing a claim for household cleaning and her evidence was that she would have retained a cleaning service regardless of the Accident. I find that the robotic vacuum is an expense the plaintiff would have incurred regardless of the Accident.

[211] I agree that the plaintiff would have been required to purchase car seats regardless of the Accident. I was not provided with evidence of the difference between the cost of a regular car seat and rotating car seat. Accordingly, I am discounting the plaintiff's claim for rotating car seats by 70%.

[212] I award \$5,213.94 in special damages.

DUTY TO MITIGATE

[213] A plaintiff has an obligation to take all reasonable measures to reduce their damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[214] Once the plaintiff has proved the defendant's liability for his or her injuries, the defendant(s) must prove that the plaintiff acted unreasonably and that reasonable conduct would have reduced or eliminated the loss. Whether the plaintiff acted reasonably is a factual question and it involves a consideration of all of the circumstances: *Gilbert* at para. 202.

[215] The test for failure to mitigate by not pursuing recommended treatment was set out in *Chiu v. Chiu*, 2002 BCCA 618:

- [57] The onus is on the defendant to prove that that plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably
- [216] Defendants bear the onus of proving both branches of the Chiu test on a balance of probabilities: *Haug v. Funk*, 2023 BCCA 110 at paras. 55 and 61.
- [217] In determining whether it is reasonable to refuse recommended treatment, the court can consider the degree of risk to the plaintiff from the treatment, the gravity of the consequences for refusing it, and the potential benefits derived from it: *Janiak v. Ippolito*, [1985] 1 SCR 146, at para. 31.
- [218] The defendants say that the plaintiff failed to mitigate by refusing to participate in the active rehabilitation program. The defendants submit that the experts qualified to give an opinion, all agreed that active rehabilitation would benefit the plaintiff with little risk to her. During cross-examination, the plaintiff admitted that she has been too busy to participate in the active rehabilitation and admitted that a potential outcome of going through the process might result in a gain of a surgery day.
- [219] With the level of pain the plaintiff testifies to, I am troubled by the fact that she has not undertaken this treatment plan. Other than the time required for the program, there was no risk to the plaintiff.
- [220] Both doctors testified that they would expect to see some positive benefits to the plaintiff by participating in an active rehabilitation program.
- [221] I find that the defendant has met its burden of demonstrating that the plaintiff has failed to mitigate her losses by not participating in the active rehabilitation program. I do not accept that her participating in physiotherapy provided the same level of treatment as one would have received in a dedicated rehabilitation program provided by a qualified practitioner.
- [222] Accordingly, in all of the circumstances, I am applying a 5% reduction in the award for past and future loss of earning capacity.

AWARD

[223] Based on my findings above, I make the following award in favour of the plaintiff:

Non-pecuniary losses:

\$150,000.00

Loss of past earning capacity:

\$100,000.00

Loss of future earning capacity:

\$1,375,000.00

Cost of future care:

\$50,000.00

Special damages:

\$5,213.94

Failure to Mitigate Discount:

(\$73,750.00)

TOTAL:

\$1,606,463.94

COSTS

[224] If the parties are unable to agree on costs, they may schedule a hearing before me within 60 days of my decision.

"LeBlanc, J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/06/2025BCSC0692.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/clapson-v-knight-2025>

Prepared on 25 October 2026 · Esheria