
CANADA / JUDGMENT

Doberstein v. Zhao

2020 BCSC 1788

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1788 Doberstein v. Zhao

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Doberstein v. Zhao,

2020 BCSC 1788

Date: 20201120

Docket: M09464

Registry: Courtenay

Between:

Jay Doberstein

Plaintiff

And:

Ming Hui Zhao

Defendant

- and -

Docket: M09533

Registry: Courtenay

Between:

Jay Doberstein

Plaintiff

And:

Margaret Delmos

Defendant

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Plaintiff:

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J. D. Zanatta

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Place and Date of Trial:

Courtenay, B.C.

September 21-25, 28-30, 2020

and October 1-2, 2020

Place and Date of Judgment:

Courtenay, B.C.

November 20, 2020

INTRODUCTION

- [1] Ms. Doberstein claims damages for injuries she incurred in two motor vehicle collisions. The first occurred on September 3, 2015, the second one on December 13, 2016.
- [2] The plaintiff says that the accidents have left her with daily chronic pain, and that her life has been irreparably altered as a result of the accidents. She says her capacity to work and perform household tasks, as well as her family, recreational and social life, have been detrimentally impacted by the accidents.
- [3] The defendants have admitted liability. While acknowledging Ms. Doberstein suffered soft tissue injuries, the defendants contend that any psychological complaints have their origin in factors unrelated to the accidents, and as such, any assessment of damages should be reduced to reflect this reality. They also say Ms. Doberstein has failed to mitigate her damages. In addition, they take issue with Ms. Doberstein's failure to declare a substantial portion of her income from her private massage practice, saying her evidence is not

credible when assessing loss of earning capacity.

BACKGROUND

- [4] Ms. Doberstein is now 50 years of age. She lives in Black Creek, British Columbia, with her husband of 23 years, Rick Doberstein. Ms. Doberstein has five children from her marriage to Mr. Doberstein as well as an earlier marriage. The family has suffered some tragic and unfortunate incidents over the years, in addition to the fact that their youngest child, Max, who is now 18 years old, suffers from cerebral palsy and, as Ms. Doberstein's counsel has written in their opening statement, "a myriad of other severe health concerns which render him completely incapacitated."
- [5] Ms. Doberstein spent her early years in Victoria. She was abused by her father and as a teenager suffered an eating disorder. The family moved to Courtenay, where Ms. Doberstein graduated from high school. After graduation, she was steadily employed at a local 7-11 as a manager and then in Edmonton in a similar capacity. After the breakdown of her first marriage, she returned to Courtenay in 1993. She obtained work as a cashier at Superstore but quickly advanced to a supervisory role. She met and married Mr. Doberstein and remained employed at Superstore until the birth of her third child, Drew, in 1996. I accept that Ms. Doberstein has demonstrated, over the years, "an excellent work ethic."
- [6] Ms. Doberstein was a "stay-at-home mom" and a "farmer's wife" until 2007, when after obtaining various certificates in holistic medicine, massage and reflexology from the Windsong School of Healing in Campbell River, she opened her massage practice in the family home in Black Creek, a rural community outside of Courtenay. Ms. Doberstein testified that her practice grew steadily and she had a loyal clientele.
- [7] Ms. Doberstein says this all changed on September 3, 2015. As counsel has put it, Ms. Doberstein "enjoyed and was dedicated to her work as a massage therapist, and that it provided her community and identity." Ms. Doberstein says the accidents have "significantly and negatively impacted" her life - it has been "irreparably changed."

THE FIRST ACCIDENT

- [8] In September 2015 Ms. Doberstein and her husband had taken Max to Vancouver Children's Hospital where he was to undergo yet another significant medical procedure in an attempt to enhance his quality of life. At approximately 4:15 p.m. on September 3, she decided to return to Ronald McDonald House where she was staying in order to obtain some food so she and Max could "picnic" in his hospital room. She left the hospital and was about to cross the street at a marked crosswalk. Ms. Doberstein testified it had just started raining and it was a fairly busy intersection. She testified she saw an SUV driven by the defendant, Ms. Zhao, some distance away when she entered the crosswalk. She testified she was about three-quarters of the way across the street when she was "blind-sided" and "tumbled" to the ground.

- [9] Ms. Doberstein testified she felt immediate pain in her left shoulder. She was driven to Vancouver General Hospital by the defendant, Ms. Zhao. At the hospital, an X-ray of her shoulder was negative. She was prescribed Tylenol. She was driven back to Children's Hospital by Ms. Zhao. That night she experienced considerable pain in her rib, which she described as "sharp", and she had a headache. The next day, Ms. Doberstein and Max travelled back to Courtenay in an ambulance provided by Children's Hospital. During this trip she was in "a lot of pain." She had bruises and abrasions. When she got home, her husband had to help her out of the ambulance and upstairs to bed. After going to a walk-in clinic the day after she got home, the next day her eldest daughter, Sasha, drove her to her family doctor, Dr. Williams, who prescribed more medication with a view to helping Ms. Doberstein get some sleep.
- [10] Ms. Doberstein testified that in the following days and weeks this experience was difficult and frustrating, as well as painful, because it affected her ability to care for Max, who after his surgery needed her more than ever. She testified she was quite sore, had constant headaches, could not sleep and was extremely stressed given Max's situation and her aches and pains. She testified she could not work due to the pain in her neck and shoulders and rib. She had pain in her right knee and left foot. Her headaches were pretty constant, depending on how much she tried to do during the day. She struggled with her neck pain and whilst her left shoulder did heal somewhat, when she eventually went out and did some raking in the garden or some other activity, she "paid the price the next day" and would suffer some "flare-ups." She also testified the "shooting" pain in her hand was very difficult to deal with. The pain in her right hip eventually resolved. Because of these symptoms, for a period of time she needed help from a registered nurse and two licensed practical nurses in caring for Max.
- [11] As a result of all this, Ms. Doberstein says she was emotionally and physically exhausted and has testified that "I haven't had a good night's sleep since the first accident." She testified the pain in her hand, which results in tingling and numbness, is her most significant symptom at this point in time. She has not worked as a massage therapist since September 3, 2015.

THE SECOND ACCIDENT

- [12] The second accident occurred December 13, 2016, at the Departure Bay ferry terminal. Ms. Doberstein and her husband were taking Max back to Vancouver for further surgery. Another son, Chad, was with them in the van. Both children were asleep. Ms. Doberstein and her husband were sitting in the van. She turned to speak to her husband when they were hit from behind by the defendant, Ms. Delmos. Ms. Doberstein testified she "got knocked around." Her husband got out of the vehicle to see what had occurred, but a ferry employee told him he had to get moving as they were loading. Once on board, he attended the Chief Steward's office. An announcement was made and in due course Ms. Delmos came forward and advised she was driving the vehicle that hit the Dobersteins.

- [13] Ms. Doberstein testified that at the time of the second accident her pain symptoms had still not resolved, and while she did not sustain any significant new injuries, the impact caused her ongoing symptoms to worsen. She testified her neck and shoulders were quite painful. Her headaches continued to be significant. Her lower back was apparently now more of an ongoing issue with some pain in her right foot. She had increased pain in her hands.
- [14] Once again, these aches and pains contributed to her being unable to return to her massage practice.

LIFE BEFORE AND AFTER THE ACCIDENTS

- [15] Prior to the first accident, Ms. Doberstein testified that she was pleased with how her massage business had progressed since she opened in 2007, due to her low rates and good service. She acknowledged performing massage was physically difficult, having to stand for an hour each session and exert pressure on her patients, but she was in "pretty good shape." She acknowledged she was tired at the end of a day's work, sometimes having seen four or five clients a day. Even though it was physically demanding, she testified she "loved it." The extra income also allowed her to buy expensive gifts, such as a \$5000 mountain bike for her husband and for the family to take tropical vacations.
- [16] Ms. Doberstein and her family live in a home they built on the Doberstein family's 860 acres, where her husband's parents started a dairy farm, and where Mr. Doberstein and his brothers run this significant operation. Ms. Doberstein did not work at the dairy but testified she was busy tending to her large yard and garden, as their property is about one acre. She testified she was busy on weekends tending flower beds and cleaning up debris from large fir and maple trees, although she left riding the lawn mower and cutting the lawn to her husband.
- [17] As far as housework is concerned, Ms. Doberstein said she "did everything before the accident." She had a lot of laundry to do for the obvious reason she had to change the sheets on her massage table after each client. She did the usual every-day cooking, but stopped doing some of the more exotic chores such as baking bread due to her busy practice. Her biggest duty however, was to take care of Max. She was his primary caregiver and testified that on a typical day she would get him out of bed and bathed, change his diaper, dress him, get him in his wheel chair, make breakfast and have him ready for school.
- [18] Nevertheless, she testified she had time to do yoga, some bike riding, and kick a soccer ball around with her two other sons. The family were out and about a lot, hiking in the Courtenay area and going up Mt. Washington. She testified that after Max was born their social life had not been that busy, but more so than it is now. Ms. Doberstein added that as Max liked to stay home a lot, she would spend a lot of time with him while her husband and her sons would be out doing "fun" things, but testified later the family was out "all the time."

- [19] Turning to the Doberstein's family situation, even before the first accident, Ms. Doberstein had to deal with not only Max's most unfortunate medical issues, having been born four months premature with quadriplegic cerebral palsy, but also other traumatic and unfortunate incidents in her life. In 2010, her daughter Hailey sustained serious brain damage in a significant motor vehicle accident. Ms. Doberstein says Hailey was "lucky to survive" and had to learn how to walk and talk after a lengthy period of rehabilitation at Victoria General Hospital. Needless to say, this was a most stressful time for Ms. Doberstein. Fortunately, Hailey is well enough to live outside the family home, with financial assistance from her parents.
- [20] In addition, her oldest son Drew, who is now 24 years old, had significant behavioural issues and a "severe anxiety" issue. Even before the first accident he was abusive towards his mother. Ms. Doberstein told a psychiatrist, Dr. O'Breasail, that this "has been very stressful for her." She added that Drew suffers from agoraphobia and according to Ms. Doberstein, he has "not left the home in years." In September 2016 her other son, Chad, who will be 22 next month, had a fall that resulted in a fractured skull and a traumatic brain injury. He then had a stroke, which resulted in some ongoing brain damage. Chad has psychological issues and is not independent. He too lives at home with Mr. and Ms. Doberstein and works at the dairy, though Ms. Doberstein says he cannot work outside of the home. I pause here to note that even though Ms. Doberstein says both boys are basically wholly dependent on their parents, they did play hockey, went skiing, and participated in the usual family outings.
- [21] The significant adverse effect these traumas had on Ms. Doberstein was dramatically illustrated in September 2013 when Ms. Doberstein was "really struggling" with a lot of things going on in her family. She testified every day there was something very stressful involving Hailey, as well as Drew, who was becoming very violent towards her, yelling and using "extreme profanity." Making it more difficult, according to Ms. Doberstein, was the lack of support from her husband when she was attempting to deal with Drew. Ms. Doberstein testified that on September 3, 2013, after Drew was in a "rage," she consumed alcohol and ingested a bottle of Max's medication. She testified, "I was intoxicated. I did it." She testified it was spontaneous and this attempted suicide was "not planned". She testified that because of "everything I had to deal with I couldn't handle it anymore." 911 was called. She saw a psychiatrist at the hospital and was released the next day. However, Ms. Doberstein states that "the incident didn't change anything at all" and that she simply carried on dealing with all the various family "stressors" and continued with her massage practice and taking care of her domestic duties, as well as caring for Max. Both Ms. Doberstein and her husband did not view this event as that disturbing, contrary to the views of the medical professionals who dealt with Ms. Doberstein at that time and diagnosed anxiety and depression. In my view, it is difficult not to conclude that Ms. Doberstein minimized the significance of this incident. Be that as it may, there is no doubt that for the next two years Ms. Doberstein did carry on running the home, caring for Max and operating her massage business. As a result, the defendants agree that Ms. Doberstein is a "strong woman" who has overcome "significant pre-accident episodes of depression and psychological" stressors,

generally without the use of anti-depressant medications or professional assistance. In addition, it is clear that from the time of the first accident to last June when Max started living at a facility in Maple Ridge, Ms. Doberstein was still able to do what was necessary in caring for Max, albeit with some difficulty.

- [22] Nevertheless, even with these significant pre-accident traumas, I accept the accidents have resulted in Ms. Doberstein's emotional state being compromised. Since the first accident she does not sleep and consequently is always exhausted. She finds herself being more impatient and "grumpy" with her children and her husband. Intimacy with her husband has been affected.
- [23] She spends less time with her son and believes Drew's anxiety increased because he did not like what she described as his "new mom," as she was not able to do the same things around the house that she used to be able to do.
- [24] As far as housekeeping is concerned, Ms. Doberstein testified it is "not what it once was." She testified she likes a really clean house, but she has now learned "to let things go." She testified that she can do most of the housekeeping, just not to the meticulous standards she once set for herself. She has "made adjustments." For example, she bought a different vacuum cleaner and "this helps." She "tries to manage." She testified the biggest anxiety she has had since both accidents is her inability to work and contribute to the household finances. She testified that her lack of income is a constant concern for her and her husband.

THE FUTURE

- [25] Ms. Doberstein testified she has "benefited" somewhat from massage, physiotherapy and chiropractic treatments since the accidents, but there has not been any significant improvement. Nevertheless, she is of the view that she needs chiropractic treatments every two to four weeks, but because of COVID-19 she has not had as many treatments as she once did. She testified that in the past the combination of these treatments reduced her pain and helped her sleep. She is cautiously optimistic that when she is able to get more frequent treatments once the COVID-19 situation settles down, things will improve somewhat.
- [26] However, even if there is some improvement, Ms. Doberstein does not foresee a return to her massage practice, as massage, especially Shiatsu, is a "very physically demanding job--it's like working-out all day long," and at this point in time she says she is physically unable to do that type of work. Moreover, she testified that before the accidents and since, because of her "high needs" sons, especially Max (his move to the Maple Ridge facility has been traumatic for Ms. Doberstein as she has cared for him all his life), and the many hours her husband spends working on the family dairy farm, she is unable to participate in any other work outside of the home, even if it were sedentary or "light" work.

- [27] As far as her future plans, Ms. Doberstein testified that before the accident she had no plans to retire, noting that, in her opinion, most people cannot afford to retire at 65. She added that in the future she could have reduced her work load to something like two clients a day, thereby balancing getting older and being less able to do such a physically demanding job, while still being able to earn some income. However, her present claim for damages is based on the premise she is "completely vocationally disabled" and is unable to ever work again as a massage therapist or indeed in any other capacity.
- [28] As far as lifestyle activities are concerned, Ms. Doberstein testified she now does not participate in yoga, or play soccer with the children. She does not go on long hikes or go up Mt. Washington. She does walk her two dogs twice a day for 20 minutes each time. When the family went on a 2016 vacation to Mexico, and when Ms. Doberstein went on a trip with her husband in 2018, it was "not the same" due to the pain she was experiencing. A similar negative experience occurred in 2019 when she and her husband went on a Caribbean cruise with Chad.

EXPERT EVIDENCE

Occupational Therapists

Brent Armstrong & Lydia Phillips

- [29] The plaintiffs called Mr. Brent Armstrong to testify as an expert in occupational therapy and functional capacity assessments. The defendants retained Ms. Phillips, an occupational therapist with a degree in rehabilitation medicine, to provide an expert responsive report to Mr. Armstrong's functional capacity evaluation. Ms. Phillips testified and was cross-examined at the request of Ms. Doberstein's counsel. Both Mr. Armstrong and Ms. Phillips have many years of experience in providing functional capacity assessments.
- [30] On April 1, 2019, Mr. Armstrong spent a day assessing Ms. Doberstein's functional capacity with a view to providing an opinion on whether Ms. Doberstein "is capable of performing her pre-injury job as a Shiatsu massage practitioner," as requested in counsel's instruction letter.
- [31] As a result of his assessment, Mr. Armstrong was of the opinion that Ms. Doberstein "is not competitively employable as a Shiatsu practitioner (Massage Therapist)" as it "requires that she use her whole body against the client (while they lie on the floor) demanding full trunk activation for sustained periods. She does not feel able to exert this effort for any appreciable length of time."
- [32] However, Mr. Armstrong agreed that as Ms. Doberstein is trained in reflexology, a dramatically different type of therapy than Shiatsu massage or even regular massage therapy, she is able to practice this type of treatment. In cross-examination, Mr. Armstrong stated, "based on function, she has the handling and sitting ability to do reflexology."

- [33] In my view, this undermines to a certain extent Mr. Armstrong's conclusion at page 11 of his 2017 report that "until she is better able to manage her symptoms, she would not be able to work in similar occupations (i.e. massage therapy)". I note again however, that this opinion begs the question of whether it is focused primarily on Shiatsu massage.
- [34] Both Mr. Armstrong and Ms. Phillips concluded that "fear avoidance" was a significant issue for Ms. Doberstein and she was afraid to push herself for fear of aggravating her symptoms. As a result, I disagree with Ms. Doberstein's counsel when he submits Ms. Phillips' evidence should be given no weight.
- [35] Ms. Phillips commented on the fear avoidance issue in her July 29, 2020 report, stating that "fear avoidance is important because if a person does not provide high effort during testing, then we must assume that the results of testing do not reflect their best abilities." Similarly, Ms. Phillips states that "Ms. Doberstein's maximum functional abilities were not observed during grip testing, walking, stairs, ladder climbing or strength testing", and therefore, "we must assume that her demonstrated abilities under these tests represent her minimum abilities rather than her maximum functional abilities." Ms. Phillips concluded that the "data" provided in Mr. Armstrong's report "does not support the conclusion that Ms. Doberstein provided 'good effort' throughout the testing day."
- [36] Mr. Armstrong confirmed that Ms. Doberstein is not limited with respect to strength issues and lifting to a certain extent, and that her hands present her no problem, such that something like reflexology, where she sits on a chair and puts pressure on the patient's foot, would be something, in his opinion, she could tolerate. Mr. Armstrong says it is the bending and stooping over to apply body pressure that is required in Shiatsu massage that is Ms. Doberstein's biggest problem. Mr. Armstrong agreed that based on his testing and assessment, Ms. Doberstein is capable of working in "sedentary and light" occupations.
- [37] Ms. Phillips' observations are consistent with Mr. Armstrong's opinion. For example, Ms. Phillips noted at p. 8 of her report: "her (Ms. Doberstein's) subjective reports during the interviews suggested very limited abilities (i.e. lifting up to 10 pounds, not able to push/pull a vacuum); these did not match with her demonstrated ability to manage 25 to 40 pounds occasionally and 15 pounds frequently. She reported 'difficulty doing all the chopping' for cooking ... but demonstrated functional abilities (no limitations) with standing ... and reaching below chest level and handling/manipulation/dexterity. She reported 'I do find my grip strength is weak and pain limits my ability to sustain a grip' but she was found to be within normal limits for grip strength bilaterally."
- [38] Ms. Phillips also observed that Ms. Doberstein presents with "a self-perception of a severe level of disability related to her neck pain," but that her "demonstrated abilities exceed those that would be expected of a severe disability. This suggests an elevated perception of her disability, which is a poor indicator for reliability."

- [39] Given his observations of Ms. Doberstein, Mr. Armstrong testified that he believed she was reliable - that is, she was not misleading him and what she demonstrated was consistent with what she described were her symptoms. Nevertheless, it is clear Ms. Doberstein has a fear of hurting herself if she pushes herself too far.
- [40] With respect to treatment, Mr. Armstrong suggested cognitive behavioural therapy to assist Ms. Doberstein in dealing with her chronic pain symptoms, and then "a more active, graduated exercise/activity program Starting in a pool and hydrotherapy program may be a good starting point." Mr. Armstrong wrote, "she (Ms. Doberstein) has continued to attend both chiropractic and physiotherapy. However, from her own account, as a result has noted little in the way of symptom or functional improvements." Mr. Armstrong did not recommend any passive treatment in the future.
- [41] Based on the totality of Mr. Armstrong's report and evidence, coupled with Ms. Phillips' observations, I am unable to accept that Ms. Doberstein is incapable of working in some other massage-related capacity, such as reflexology, or some other "light" endeavour, given Mr. Armstrong's finding that she is able to sit and stand for periods of time without undue pain and discomfort.
- [42] Given the totality of the evidence, I am not persuaded Ms. Doberstein is as incapacitated and limited in her functional capacity as she suggests or is incapable of participating in any gainful employment in the future.

MEDICAL EVIDENCE

Dr. Lynne MacKean

- [43] Dr. MacKean was declared an expert in physical medicine and rehabilitation. She assessed Ms. Doberstein on March 23, 2017, and wrote a report later that day.
- [44] Dr. MacKean confirmed that Ms. Doberstein reported she had headaches, nausea and dizziness, and pain from "head to toe" after the first accident, and "following the second motor vehicle accident she had increased pain symptoms in her neck, back and also the right and left side of her body... and headaches." Dr. MacKean agreed with the other medical personnel that Ms. Doberstein's soft tissue injuries and "diffuse pain symptoms" were as a result of the accidents.
- [45] Dr. MacKean confirmed Ms. Doberstein complained she did not "sleep very well" and needed to nap in the afternoon. She confirmed that Ms. Doberstein was "cautious in her movements" and demonstrated "decreased active range of motion of the thoracolumbar spine" and complained of increased lower back pains "bilaterally with flexion and extension as well as right greater than left side flexion of the lumbar spine."

- [46] Dr. MacKean did however note that Ms. Doberstein was "able to squat with no difficulty and no complaints of increased pain," at the same noting that she demonstrated "very limited active range of motion of the cervical spine...she complained of increased neck pain with all movements felt on both sides of the neck."
- [47] Dr. MacKean concluded on March 23, 2017, that "she is not yet at the point of maximum medical improvement," and felt at that point in time that with further treatment she would improve and her pain would decrease.
- [48] As far as Ms. Doberstein's mental health is concerned, Dr. MacKean noted at page 6 of her report, "it is clear from the clinical records that she had significant psychological and psychosocial issues occurring even before the motor vehicle accidents occurred. It is important that she sees a psychiatrist and has a formal assessment of her psychological state and follow through on any recommendations that are made by the psychiatrist."
- [49] In conclusion, Dr. MacKean was of the view that Ms. Doberstein was not able to return to work doing massage therapy primarily, in my view, because of Ms. Doberstein's own estimation of her physical limitations. At the same time, Dr. MacKean recommended that Ms. Doberstein participate in some "pool therapy" in addition to the passive therapies she had been taking since the accident, such as physiotherapy and acupuncture. In cross-examination, Dr. MacKean confirmed that "passive, non-active" therapy is usually not beneficial or helpful in reducing chronic pain after two years of treatment, let alone four or five years later, even though she specifically recommended physiotherapy, acupuncture and chiropractic treatments in the future.

Dr. Ann Grobler

- [50] Dr. Grobler is Ms. Doberstein's family doctor. She was not presented as an expert but rather to confirm Ms. Doberstein's attendance on November 25, 2016, a couple of weeks before the second accident, when Ms. Doberstein complained of pain from "head to toe." Dr. Grobler recorded Ms. Doberstein's complaints of pain during several appointments, all of which were basically consistent with Ms. Doberstein's testimony and the observations of other practitioners.

Dr. Laidlow

- [51] Dr. Laidlow is an experienced physical medicine and rehabilitation specialist. He assessed Ms. Doberstein on July 16, 2019, and prepared a report on July 25, 2019. He testified during the trial at the request of Ms. Doberstein's counsel.
- [52] In considering Ms. Doberstein's complaints of neck and shoulder pain, Dr. Laidlow attributed her neck and shoulder pain "primarily to the 2015 accident with aggravation by the 2016 accident." He noted that she "has had an extraordinarily passive approach to treatment, which encouraged muscular tightening and deconditioning" and that her pain "has been further aggravated by muscular tension and her emotional state." In terms of Ms.

Doberstein's headaches, Dr. Laidlow concluded that "the headaches represent a combination of posttraumatic headaches related to the musculoligamentous strains of the neck and muscle tension related to her mental and emotional state," and that family-related stress is "at least aggravating her symptoms."

[53] At page 21 of his report, Dr. Laidlow, concludes:

It is quite clear that she has had many sources of stress going on in her life. She had great difficulty in coping with what was happening to her before this accident and several additional events have occurred to make things even worse for her since the 2015 accident. She requires a psychiatric evaluation in order to evaluate her mental health thoroughly and to optimize its treatment.

[54] In terms of suggested treatment, Dr. Laidlow strongly recommended that Ms. Doberstein discontinue further treatment with her chiropractor, given that his treatments are "extremely limited in nature and it would be unlikely that they would have any significant positive effect on her." He notes that it "has been extremely unfortunate" that her chiropractor advised Ms. Doberstein "not to do anything active and to not be involved in any other forms of treatment than his own since the time of the accident;" and that this advice has "only encouraged her to become progressively deconditioned and more disabled."

[55] Like Dr. O'Breasail (a psychiatrist) who recommended "physical rehabilitation treatment," and Dr. MacKean who said she "would strongly recommend pool therapy," Dr. Laidlow emphasizes that Ms. Doberstein "needs to be involved in an active program of exercise." He recommended that she see a kinesiologist who would "assist her in initiating a program that would have a chance of restoring her muscle flexibility and strength." He added that "she should not receive passive treatment such as physiotherapy, massage therapy, acupuncture or chiropractic treatment" because it would not be "expected to result in any gains in her function and they would only serve to encourage further deconditioning in dependency."

[56] Finally, under "Prognosis," Dr. Laidlow writes that Ms. Doberstein's treatment "has been suboptimal and as such, she has not reached her maximum point of improvement." He is of the view that with "optimal treatment of her underlying mental health issues" and with "active exercise and appropriate medical support," her symptoms would likely improve with time.

[57] I accept Dr. Laidlow's observations and conclusions without hesitation.

Dr. O'Breasail

[58] Dr. O'Breasail assessed Ms. Doberstein on January 24, 2017, and wrote a report on May 19, 2017, focusing on whether her psychiatric or psychological issues were the result of the two motor vehicle accidents. He provided a follow-up report on August 8, 2019, after re-assessing Ms. Doberstein on July 17, 2019.

[59] Dr. O'Breasail stated that prior to the first accident, Ms. Doberstein had been functioning "reasonably well." However, following the accidents, Dr. O'Breasail concluded that, based on Ms. Doberstein's description of her various symptoms, Ms. Doberstein is "currently totally disabled" and incapable of working as a result of the injuries she suffered in the motor vehicle accidents." He confirmed in his first report that "the symptoms that give rise to her disability are her low energy, fatigue, cognitive difficulties, as well as the physical limitation associated with her chronic pain amongst other symptoms."

[60] On page 7 of his first report, Dr. O'Breasail wrote:

In my opinion, this woman went on to suffer a Major Depressive Disorder with prominent symptoms of anxiety following the first motor vehicle accident and, again, aggravated by the second accident. She suffered symptoms of depression, anxiety, and sleep disturbance, although this largely was secondary to the pain. She experienced decreased drive and motivation and feelings of fatigue. She experienced changes in her appetite and weight. She experienced cognitive difficulties with impairment in concentration and memory. She has decreased enjoyment from life. There is less physical intimacy in her relationship with her husband.

[61] Dr. O'Breasail documented Ms. Doberstein's difficult childhood and family traumas and testified that those factors contributed to her present stress. He noted that Ms. Doberstein had psychiatric issues "over many years before hand" and a "real likelihood of depression" that, in Dr. O'Breasail's opinion, added to the development of a "major depressive disorder" after the first accident which was "aggravated" by the second. Whilst he acknowledged Ms. Doberstein has had "chronic stress for years," he opined the "full major psychiatric disorder" diagnosis was after the first accident.

[62] As a result, Dr. O'Breasail recommended that Ms. Doberstein see a psychologist, and that her therapy include cognitive/behavioural techniques to help her come to terms with the major challenges that have occurred in her life before and after the September 2015 accident. He also recommended that she go back to using an antidepressant, not just herbal or "natural" remedies. Dr. O'Breasail was of the view that Ms. Doberstein should undertake an active physical rehabilitation programme, in conjunction with psychiatric counselling.

[63] In his second report, Dr. O'Breasail noted that while Ms. Doberstein's headaches were less frequent, she continued to report significant pain in various areas, and that psychological factors still played a role in the intensity and perpetuation of her pain. Dr. O'Breasail noted that Ms. Doberstein said she continued to experience symptoms of depression, and her generalized anxiety and situational anxiety when in a vehicle or using a crosswalk had become more of a problem.

[64] Dr. O'Breasail's recommendations are also similar to those in his first report; namely, that Ms. Doberstein receive cognitive/behavioural treatment and that she use an antidepressant. Dr. O'Breasail again was of the opinion that, given the passage of time since the accidents and the "chronic course" of her symptoms despite various treatments, Ms. Doberstein remains "totally disabled and incapable of working" as a result of her injuries from the

accidents. In reaching this opinion, Dr. O'Breasail relies on Ms. Doberstein's reporting of her pain tolerance, and writes "she is physically limited by her pain and, in my opinion, would not be capable of working as a Shiatsu massage practitioner. Her Major Depressive Disorder with prominent symptoms of anxiety is also a contributing factor to her disability and likely affects her pain tolerance. Other factors that contribute to her disability include the family stresses outlined above."

Dr. Robertson

- [65] Dr. Robertson is a psychiatrist who was retained by the defendants to examine Ms. Doberstein and provide an expert report. He testified at the request of Ms. Doberstein. His report and testimony was generally consistent with the other expert evidence, noting that while Ms. Doberstein had depression and anxiety symptoms before the first accident, it was afterwards that Ms. Doberstein developed a PTSD and a Major Depressive Order, in addition to chronic pain, as a result of the injuries she received in the first accident.

SUPPORTING WITNESSES

- [66] Ms. Doberstein called three past clients to confirm the capabilities she displayed as a massage therapist and the esteem her clientele held for her as a practitioner. I assume they also testified to support Ms. Doberstein's claim that her clients paid primarily in cash and were given no receipts. Her husband and eldest daughter also testified as to their observations on how Ms. Doberstein's enjoyment of life has been affected by the motor vehicle accidents.

Ken Williams

- [67] Mr. Ken Williams is a 72 year-old builder who some years ago suffered significant injuries in a fall at work. He first went to Ms. Doberstein for massages in 2007. He continued until Ms. Doberstein was no longer able to work after the first motor vehicle accident. He testified he would see her "regularly" for two hours on Friday afternoons. He testified he thought he saw her between 30 to 40 times per year and felt she was "very thorough and understood" his injuries. On this point, the client calendar entered into evidence to support Ms. Doberstein's calculation of her total income is somewhat inconsistent with Mr. Williams' estimate of the number of times he would have seen Ms. Doberstein for massages. For instance, in 2013, according to the calendar, it appears he saw Ms. Doberstein approximately 16 times, as opposed to 30 or 40 times. Nevertheless, I accept Mr. Williams was a credible witness, if not a reliable one, on this discrete issue. Mr. Williams added there always seemed to be a client coming out of the house while he was waiting for his session to commence, and when his session was over there usually was a client waiting to come in for treatment. All in all, Mr. Williams stated, "I think she had a pretty good little business going there." He summed up his experience with Ms. Doberstein as being "awesome."

[68] Mr. Williams testified that he would get "regular massage," that is deep tissue massage, as well as some acupressure. Mr. Williams testified that he presently sees another therapist and is familiar with Shiatsu massage, but he did not receive Shiatsu massage from Ms. Doberstein, even though that was the primary focus of counsel's instructions to Mr. Armstrong, the functional capacity evaluator, and was specifically referred to by Dr. O'Breasail.

Tom Kirwan

[69] Tom Kirwan saw Ms. Doberstein from 2008 to 2014 for deep tissue massage. He received no other treatment. He testified that Ms. Doberstein was always professional and friendly. He thought her practice seemed "quite busy." Mr. Kirwan confirmed that 90 percent of the time he paid in cash, occasionally by cheque. Like Mr. Williams, he confirmed that at \$40 or \$50 an hour, Ms. Doberstein's tariff was half of what a registered massage therapist was generally charging at that time.

Connie Strain

[70] Ms. Connie Strain received massages from Ms. Doberstein over about a three year period, generally May through September, or early October, before she went south for the winter. She last saw Ms. Doberstein in August 2015.

[71] Like the other past clients, Ms. Strain testified that Ms. Doberstein was "great," very professional and organized. Ms. Strain said she appreciated the effort that Ms. Doberstein put in in trying to specify what might be the best therapy for Ms. Strain's sore feet and legs, her primary areas of complaint. She saw Ms. Doberstein for regular massage and, on some occasions, reflexology treatments, which she described as a "special foot massage."

[72] Ms. Strain testified that she usually paid by cheque, once in a while she paid by cash, and that she would get a receipt from Ms. Doberstein for these sessions. She confirmed that during her reflexology treatments she would sit in a chair, soak her feet and have Ms. Doberstein massage her feet.

Rick Doberstein

[73] Ms. Doberstein's husband, Rick, acknowledged he is extremely busy working with his brothers on his parent's farm. He confirmed that Max's medical condition is extremely complicated and described Max as being "the most complicated medical kid in British Columbia." He noted their daughter, Hailey, was in a coma for a month after her car accident and suffered severe emotional damage. When she came home, she was violent and vulgar and a "very different person." He described it as almost "unbearable."

- [74] Mr. Doberstein testified Ms. Doberstein was popular with her clientele, she had a "healing touch," and business was "good." He confirmed that Ms. Doberstein was paid mostly in cash. Mr. Doberstein confirmed his wife's business allowed her to buy expensive gifts and contribute to, if not pay for, family vacations.
- [75] Mr. Doberstein testified the biggest change in his wife's demeanor and lifestyle since the two accidents has been her inability to get through the day without an afternoon nap due to lack of sleep because of her pain and discomfort. He testified she is more irritable and often gets up during the night to sleep on the couch so he can get some sleep. He testified that it has had a "pretty huge effect on our relationship" given her lack of energy and reluctance to do anything on the weekends when he is not working on the farm. He testified she used to be "really positive" before, but now is "negative."
- [76] As far as the September 2013 incident was concerned, where Ms. Doberstein ingested Max's medication, he characterized it as a "stupid move" precipitated, in his view, by Hailey acting very bizarre at that time. However, much like his wife, Mr. Doberstein minimized the seriousness of the incident, stating it has not happened since, and there were no significant repercussions. He says Ms. Doberstein carried on "as if nothing had happened." However, he testified that even though he and his wife thought it was merely an "embarrassment," he did admit that "it scared all of us." The reasonable inference being that it was a serious attempt to commit suicide. Mr. Doberstein ended his cross-examination by stating perhaps the obvious, that is, "the stressors we have in our family are unbearable."

Sasha Nygren

- [77] Sasha Nygren is Ms. Doberstein's eldest daughter. She acknowledged she and her mother "definitely had ups and downs," prompting her to move out of the house when she was 16, but over the years they have grown "somewhat closer."
- [78] She testified that prior to the motor vehicle accident, Ms. Doberstein was "a busy body," always baking, cleaning, gardening, caring for her children, especially Max, and that she would bicycle occasionally. She said her parents liked to travel when they could afford it; that is, after Ms. Doberstein started earning income from her massage practice. She confirmed that Ms. Doberstein was Max's main caregiver and was very hands-on in maintaining a proper household. She testified her mother had not planned to retire anytime soon, as she thoroughly enjoyed her massage practice. She confirmed that based on her observations of comings and goings at the family home, her mother's massage practice seemed "pretty busy."
- [79] Ms. Nygren added she presently sees her mother from "time to time," saying Ms. Doberstein is more negative, "down," and more emotional. She appeared to have some difficulty doing some of the daily chores she had when caring for Max, such as lifting him out of bed. Nevertheless, she testified Ms. Doberstein was still able to care for Max much as she did before the accident, a point emphasized by the defendants. In fact, Ms. Doberstein was able

to take care of Max, as difficult as that was, until the decision was made in June 2020 that it would be best if Max resided in the Maple Ridge facility. Ms. Nygren added that while her mother still does most of the household chores, her housework is not up to the same "high standard" she observed her mother trying to attain prior to the first accident.

CREDIBILITY

[80] Credibility is often an issue in personal injury cases. As Justice Marzari states in *Gee v. Bock*, 2019 BCSC 1348 at para. 36:

[36]...This is not unusual in cases of chronic pain, where the court must always be concerned with the reality of the plaintiff's complaints of ongoing pain in order to determine the existence and extent of the injuries and properly assess damages based on such complaints.

[81] In *Buttar v. Brennan*, 2012 BCSC 531, at para. 24, Abrioux J. (while in this court) noted the difficulty in assessing damages where there is moderate or moderately severe soft tissue injuries, noting at the same time that "the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery."

[82] In the present case, I find Ms. Doberstein an accurate and reliable historian as to the circumstances surrounding both accidents and her subsequent injuries. Her evidence has been consistent throughout her dealings with several practitioners. There is corroborating evidence from the lay and medical witnesses regarding the nature and extent of her injuries. As a result, the defendants acknowledge Ms. Doberstein is entitled to be fairly compensated for the injuries she received in these two accidents. At the same time, as I have stated, based on the same expert evidence, I find her present physical incapacity and future functionality is not as dire as she suggests.

[83] Nevertheless, even though I find Ms. Doberstein credible in general, what is troubling is the fact that Ms. Doberstein has acknowledged she has defrauded the federal government by not filing tax returns in the first three years of her practice and not reporting approximately 80% of what she says she earned in the years 2010 to 2014. She has been deceitful when dealing with the provincial government by under-reporting her income in order to obtain government funding to assist in the care of Max. Ms. Doberstein has obviously been engaged in a persistent pattern of dishonesty by misrepresenting her income for significant financial gain. The question is, does the goal of achieving a fair and reasonable assessment for loss of earning capacity demand an adverse finding as to Ms. Doberstein's credibility, as the defendants submit?

[84] In this regard, Ms. Doberstein testified that because she is not a registered massage therapist, clients cannot "write-off" her treatments, so the vast majority of her clients paid in cash and did not ask for receipts, such that Ms. Doberstein says she did not declare approximately 80% of her income. Be that as it may, Ms. Doberstein submits her claim for loss of earning capacity, both past and future, should be based on her total income,

including what she says is her non-declared income. The defendants disagree. They say Ms. Doberstein's credibility and reliability should be of concern on this discrete issue and any loss of earning capacity should be based solely on the income she declared on her tax returns.

- [85] This concern has been front and center in several cases. These decisions make it clear that even where a plaintiff does not properly declare income to the Canada Revenue Agency, this is not, in and of itself, the determining factor when assessing loss of earning capacity.
- [86] Some years ago, in *Iannone v. Hoogenraad*, [1992] B.C.J. No. 682 (B.C.C.A.), our Court of Appeal concluded there was no public policy reason not to include unreported income in assessing loss of earning capacity. The court did emphasize however, that a plaintiff has the burden of leading evidence of wage loss, and "that will be a difficult burden to discharge where there is no corroborating evidence such as income tax returns, but it is not an impossible burden to discharge."
- [87] In *Scott v. Cheng*, 2019 BCSC 697, the court confirmed at para. 89, that "[w]ith respect to unreported income from cash jobs, there is authority for including it in the calculation of income", citing *Isbister v. Delong*, 2014 BCSC 1395, *aff'd* 2017 BCCA 340. Even though the trial judge stated "more concerning is ... that the only evidence about cash jobs is from the plaintiff," the court did make a modest adjustment when adding income for undeclared cash jobs.
- [88] Similarly, in *Tougas v. Mostat*, 2020 BCSC 1281, a case involving the non-reporting of tips in the food service industry, the court concluded that "as long as the plaintiff does not have significant credibility problems," a claim can be made based on a plaintiff's own evidence of total income, both reported and unreported.
- [89] Perhaps Fitch J. (while in this court), put it best in *Wong v. Hemmings*, 2012 BSCS 907. While noting at para. 84 that the defendants argued that the plaintiff had "demonstrated a pattern of deception and is prepared to mislead if it is in her economic interest to do," he concluded there was sufficient independent and objective evidence to confirm the plaintiff's evidence as to the injuries she says she received in the accident. I find the same holds true here with respect to the injuries and ongoing chronic pain Ms. Doberstein has described. Indeed, the defendants clearly recognize the legitimacy of the physical symptoms Ms. Doberstein has described, as they accept a relatively significant award for non-pecuniary damages is appropriate.
- [90] Fitch J. went on to state that the impact a failure to report income has on the credibility of a plaintiff "is a case specific inquiry," which "must take account of factors that are more encompassing and more subtle than the failure to report income in isolation." He added:

- [105] In the case at bar, I am unable to find that the plaintiff's admittedly dishonest conduct in the preparation of her tax returns adversely affects on her credibility on the central issues before me. I would note, in this regard, that virtually all of the plaintiff's evidence relevant to the heads of damage that are at issue in this case is independently and objectively supported by other evidence which I accept
- [106] To discount the plaintiff's evidence in these circumstances would be to punish her for misconduct that is not directly before me. It forms no part of my role to do so. In all the circumstances of this case, it would be unfair to the plaintiff, and would lead to an unjust result, to make an adverse credibility finding in relation to her as a consequence of her dishonesty in the preparation of her tax returns.
- [91] I agree with these conclusions. I will deal with the credibility and reliability of Ms. Doberstein's evidence as to her past earnings when I consider her claim for loss of earning capacity.

DAMAGES

Non-Pecuniary Damages

- [92] The purpose of non-pecuniary damages is to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and amenities: *Trites v. Penner*, 2010 BCSC 882 [Trites] at para. 188; and provide "reasonable solace for [the plaintiff's] misfortune": *Lindal v. Lindal*, [1981] 2 S.C.R. 629 [Lindal] at 636.
- [93] The Court of Appeal outlined the proper approach to the assessment of non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, leave to appeal ref'd [2006] S.C.C.A. No. 100. The factors to be considered include the plaintiff's age; the nature of the injuries; the severity and duration of pain; disability; emotional suffering; loss of enjoyment of life; the impairment of family, marital and social relationships; the impairment of physical and mental abilities; and loss of lifestyle. A stoic nature is also to be considered. A plaintiff's stoicism should not penalize her. While Ms. Doberstein is clearly fearful of injuring herself, she has testified that she does the best she can and still does all of her house work, albeit perhaps somewhat slower. I find her relatively stoic.
- [94] When it comes to awards for non-pecuniary damages in motor vehicle cases, there is no "tariff." An award must reflect the specific circumstances of each individual case: *Lindal* at 637. Counsel have presented several authorities which they argue support their respective positions on what would be a fair assessment for non-pecuniary damages. While an assessment is an individual process, awards made in somewhat similar cases can be of assistance in arriving at a fair award for non-pecuniary damages. They do however serve only as a guide to what is appropriate compensation. In this analysis I must consider the pain, suffering and loss of enjoyment experienced by this particular plaintiff. At the same time, it is important to remember that the award must be fair and reasonable to all parties: *Trites* at para. 188.

- [95] The onus is on Ms. Doberstein to prove on a balance of probabilities that there is a substantial connection between the defendants' tortious conduct and her injuries. There is no issue on this point, at least as it pertains to Ms. Doberstein's physical injuries and symptoms. The defendant's own expert witness, Dr. Laidlow, confirmed in cross-examination that Ms. Doberstein's physical symptoms were indeed caused by the first accident and aggravated in the second accident.
- [96] Ms. Doberstein's counsel says the accidents have "caused a significant impact to all aspects of her life" and submits that an award in the range of \$150,000 to \$200,000 would be reasonable for non-pecuniary damages.
- [97] Ms. Doberstein provided three cases in support of this submission:
1. *Gulati v. Chan*, 2015 BCSC 431 (Gulati) - The 53 year-old plaintiff was struck while crossing the street, receiving soft tissue injuries, a broken arm, PTSD, memory difficulties and a personality change, plus other injuries. The award was \$150,000 less 20% for "crumbling skull."
 2. *Gill v. Apeldoorn*, 2019 BCSC 798 - The 60 year-old plaintiff could not return to work as a longshoreman. He was diagnosed with PTSD and a somatic symptoms disorder. The injuries had a "profound" effect on his day to day functioning. He was a "shadow of his former self." The award was \$200,000.
 3. *Xu v. Balaski*, 2020 BCSC 940 (Xu) - A 42 year-old plaintiff suffered soft tissue injuries, depression and PTSD as a result of several motor vehicle accidents that significantly reduced her ability to work as a licensed practical nurse. Ms. Doberstein points out that the court found her inability to care for a disabled child was a factor in awarding \$145,000 in non-pecuniary damages.
- [98] The defendants accept Ms. Doberstein suffered injuries in the accidents and "are willing to acknowledge those psychological symptoms that relate directly to the accidents," but submit "the plaintiff continued to experience psychological symptoms (unrelated) at the time of the first accident." The defendants therefore say an appropriate award for non-pecuniary damages should be somewhat less than Ms. Doberstein's suggested range, something in the range of \$110,000 to \$125,000, taking into consideration what the defendants say is Ms. Doberstein's pre-existing psychological or mental health issues, which they say would have persisted even without the accidents. In addition, the defendants submit this is an appropriate range of damages that includes a reduction for failure to mitigate.
- [99] In this regard, the defendants say it is clear from the evidence that Ms. Doberstein's mental health issues were not resolved prior to the first accident, as illustrated by the 2013 "overdose," even though she "may have been functioning" and running her business and taking care of her domestic responsibilities, including caring for Max .

- [100] The defendants also say there were unrelated post-accident intervening "stressors" that would have adversely affected Ms. Doberstein's original position even without the accident, such as Max's hospitalization for two months in November 2015 with a serious infection, the December 2015 "overdose" and Chad's serious fall and brain injury in September 2016. As a consequence, the defendants submit they are only liable "for a certain extent of the plaintiff's damages."
- [101] While there is little doubt that Ms. Doberstein has had to deal with several traumatic family events that have understandably affected her emotional wellbeing, especially pre-accident and going back to Max's traumatic diagnosis when he was two, I agree with Ms. Doberstein when she says she was able to deal with these events in general, especially after the September 2013 suicide attempt. I also agree that the accidents have materially contributed to not only her chronic pain but also to her ongoing psychological distress, as noted by Dr. Robertson, who agreed that Ms. Doberstein had PTSD symptoms after the first accident, and Dr. Laidlow, who agreed that Ms. Doberstein's injuries and subsequent pain caused by the first accident developed into "somatic pain disorder." Likewise, as I have noted, Dr. O'Breasail has opined that even though Ms. Doberstein was exhibiting symptoms of depression before the first accident, it was the accidents that resulted in a "major depressive disorder," with symptoms of anxiety.
- [102] Given all of the evidence, I am unable to agree with the defendants that an otherwise reasonable assessment of non-pecuniary damages should be reduced because of Ms. Doberstein's pre-existing emotional issues.
- [103] In support of their position the defendants have provided a number of authorities as well. I have considered them all. The cases I find most relevant and similar to the present circumstances are:
1. Gill v. Huber, 2020 BCSC 519 - \$145,000
 2. Parhar v. Clarke, 2017 BCSC 550 - \$104,500
 3. Nadeau v. Toulmin, 2020 BCSC 866 - \$110,000
 4. Zhang v. Law, 2009 BCSC 991 (Zhang): Even with non-tortious causes for depression, these were aggravated by the accident - \$146,776 in 2020 dollars
 5. Kim v. Sodhi, 2019 BCSC 1823 - \$120,000
 6. Hollyer v. Gastoon, 2016 BCSC 1401- \$135,000 in 2020 dollars
 7. Wagner v. Newbery, 2015 BCSC 894 - \$122,000 in 2020 dollars
- [104] At this point, it is appropriate to consider whether Ms. Doberstein's claim for loss of housekeeping capacity should form part of the assessment of non-pecuniary damages or be a separate discrete pecuniary head of damages.

- [105] Ms. Doberstein submits that the totality of the evidence establishes that she has suffered a loss of housekeeping capacity, both in the period up to trial and in the future, and says a "global assessment" under the general heading of future cost of care is appropriate. In my view, the proper approach when considering whether there should be an award due to what Ms. Doberstein says is her difficulty in performing some of her usual household and gardening tasks, is to consider this aspect of the claim under claim of a loss of housekeeping capacity, not as part of a cost of future care award. In *Kim v. Lin*, 2018 BCCA 77 [Kim] at para. 33, the court said:
- [33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu* [*Liu v. Bains*, 2016 BCCA 374], "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.
- [106] Justice Adair said in *Amaral v. Glasser*, 2020 BCSC 639 [Amaral] at para. 266: "[w]here homemaking can be done, although with pain, it may be more appropriate to reflect that in the award for non-pecuniary damages, rather than make a separate award for loss of housekeeping capacity."
- [107] In this particular case, Ms. Doberstein has testified, as confirmed by Mr. Armstrong, that she is able to do most of her every day, normal household duties such as cooking, laundry, bed-making, preparing lunches and dinner, vacuuming with her new vacuum, and the like. Ms. Doberstein testified "I try to do everything," but has "difficulty scrubbing the bathroom and mopping the floor." Ms. Doberstein points out that Dr. Laidlow agreed that it "would be better" if heavier household or gardening tasks were "referred out," at the same time noting that her ability to accomplish such tasks would be dependent on Ms. Doberstein being able to "pace herself." I also appreciate that Mr. Armstrong stated that he "would expect that Ms. Doberstein will continue to either not contribute to the heavier farm work or that she will need to pace herself or get assistance in these tasks." A similar sentiment was expressed by Dr. MacKean when she recommended Ms. Doberstein obtain help for heavier house cleaning tasks.
- [108] One of the heavier garden tasks Ms. Doberstein said she used to do was distributing large amounts of bark mulch throughout the garden, an activity which she says is now too painful to perform. I do note however, that Ms. Doberstein testified she got a large load of mulch in 2007 and again in 2012, such that she would be spreading mulch over several years, clearly not a regular everyday undertaking. At the same time, Ms. Doberstein testified "I try and care for the yard as best I can," but adds her gardening at present, is "not up to my standards." Ms. Doberstein testified that "it would help me immensely if every

three months I could get help in the garden." At the same time, Ms. Doberstein agreed in cross-examination that at present she is more functional and can do some tasks better, as long as "I don't do anything too crazy."

- [109] It is well-settled that any interference with or impairment of housekeeping duties or activities can be treated as an aspect of pain and suffering and loss of enjoyment of life under non-pecuniary damages, or it can be assessed separately. To reiterate, in *Kim*, the Court of Appeal explained that a pecuniary award is appropriate where the plaintiff has suffered a true loss of capacity. Where the loss is "more in keeping with loss of amenities or increased pain and suffering," the award should be an aspect of non-pecuniary damages.
- [110] In *Travis v. Quan*, 2009 BCSC 63, Mr. Justice Johnston rejected a claim similar to that of Ms. Doberstein. In doing so Justice Johnston explained:
- [114] Part of the housekeeping portion of these claims arises out of the fact that the plaintiff's husband is not terribly helpful in that regard. While the defendants cannot expect a family member to take on an unreasonable burden created by injuries to another member of the family, it is not reasonable to expect defendants to pay to have someone perform services that can and should reasonably be taken on by members of the family.
- [126] The plaintiff is capable of doing her own housework. She cannot do it all at once as she formerly did, nor can she do it as well as a result of her injuries.
- [128] In my view, the claims advanced for housekeeping in this case are better dealt with under non-pecuniary damages and an allowance will be made there.
- [111] Similarly, as I said in *Flores v. Joynson*, 2020 BCSC 655, it is not unreasonable to expect a spouse or adult children to provide some assistance in doing various chores in and around the house without triggering an in-trust claim. For example, Ms. Doberstein testified that before the first accident, Mr. Doberstein "helped out" with the cooking if Ms. Doberstein had a client until 5:00 p.m. This is a fair and reasonable allocation of family resources.
- [112] I am also satisfied that it is not unreasonable to look not only to Mr. Doberstein but also to Chad and Drew to provide some assistance surrounding the heavier seasonal outdoor chores, especially when Drew now has his own garden. Ms. Doberstein acknowledged that Drew "helps" in her garden, adding that Chad is "reluctant," but will help.
- [113] In reply, the defendants resist any monetary acknowledgment for a reduced capacity to perform "homemaking services," whether under this head of damages or cost of future care. While I do not agree with the defendants that there should be no acknowledgment as to the difficulty Ms. Doberstein has in performing some household and gardening tasks due to her neck and back pain, I find it more appropriate to factor her discomfort when doing these activities in the assessment of her non-pecuniary award: see *Eaton v. Regan*, 2005 BCSC 3, and *Bains v. Park*, 2014 BCSC 1818 at para. 57. As a result, there will be no separate pecuniary award for loss of housekeeping capacity, be it for household tasks or gardening and yard work.

[114] I will state that I am specifically taking into consideration the discomfort Ms. Doberstein says she has when performing some household and garden tasks when assessing non-pecuniary damages. In addition, I find the circumstances in Zhang, and Ms. Doberstein's authorities, Gulati and Xu, most resembling the present case. Applying the Stapley factors to the totality of the evidence, I find an award of \$150,000 for non-pecuniary damages is fair and reasonable to all parties. Counsel have agreed there is no need to apportion damages. A global assessment is appropriate.

Mitigation

[115] I now turn to the defendants' submission that Ms. Doberstein's non-pecuniary damages should be reduced because she has failed to mitigate her damages. On this point, the defendants say that Ms. Doberstein could have done more to try and ameliorate both her physical and psychological injuries. For example, she was referred to a psychiatrist on more than one occasion and she did not follow up. Dr. MacKean suggested pool therapy. This was not undertaken by Ms. Doberstein. The defendants also say Ms. Doberstein should have taken more massage and physiotherapy than she did. As an aside, I find this submission somewhat perplexing as it appears the preponderance of the evidence supports the conclusion that these treatments have done little to advance Ms. Doberstein's rehabilitation.

[116] In response, Ms. Doberstein testified she attended many counselling sessions given her stress and anxiety. She did go to physiotherapy and massage. It would appear however, that her primary treatment was from a chiropractor who simply provided what Ms. Doberstein described as a "light touch" and who told her to forego any exercise or other active rehabilitation programmes; advice which she has taken to heart. In Dr. Laidlow's opinion this was simply bad advice. It is hard to disagree. In fact, I accept Dr. Laidlow's opinion without reservation. As a result, Ms. Doberstein has not yet received the treatment she requires in order to alleviate some of her chronic pain and increase her functionality. However, Dr. Laidlow summed up the situation properly, in my view, by testifying "it's not her fault" that she has received "less than optimal" advice and treatment over the last four or five years.

[117] The onus is on the defendants to establish Ms. Doberstein has failed to mitigate her damages.

[118] Mitigation goes to limit recovery based on an unreasonable failure of an injured party to take reasonable steps to limit their loss. As such, a plaintiff in a personal injury action has a positive duty to mitigate. However, the defendants bears the onus of proving a plaintiff has failed to mitigate: see *Graham v. Rogers*, 2001 BCCA 432 at para. 35.

[119] Justice Adair summarized the test the defendants must meet in *Flore v. Jongkind*, 2018 BCSC 721:

- [1233] In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, and the defendant seeks to have damages reduced on the basis that the plaintiff has failed to take reasonable steps in mitigation, the defendant must prove two things: (1) that the plaintiff acted unreasonably in not following the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. The mitigation test is a subjective/objective test, that is, whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment. The second aspect of the test is the extent, if any, to which the plaintiff's damages would have been reduced by that treatment. See *Chiu v. Chiu*, 2002 BCCA 618, at para. 57 and *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, at paras. 53 and 56.
- [120] Being instructed by these principles and given the totality of the circumstances, I am not persuaded the defendants have established Ms. Doberstein has failed to mitigate her damages.

Loss of Earning Capacity

- [121] Ms. Doberstein seeks damages for loss of earning capacity as a result of the injuries she received in the accidents.
- [122] Claims for both past and future loss of earning capacity are subsumed under an award of damages for loss of earning capacity, and are to be assessed in the same manner: *Falati v. Smith*, 2010 BCSC 465 at para. 39, aff'd 2011 BCCA 45. However, past income losses are net of income tax and any amounts actually earned during the relevant period: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98; *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 27.
- [123] A plaintiff must initially demonstrate both impairment to earning capacity, and a "real and substantial possibility" that the impairment has resulted, or will result, in pecuniary loss: see *Donovan v. Parker*, 2014 BCSC 668 [Donovan] at para. 44; *Perren v. Lalari*, 2010 BCCA 140 [Perren] at para. 32; *Grewal v. Naumann*, 2017 BCCA 158 [Grewal] at paras. 42, 48.
- [124] The purpose of an award for loss of earning capacity is to "provide the plaintiff with full compensation for all pecuniary losses ... to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred": *Grewal* at para. 42, quoting the remarks of the trial judge. See also *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, appeal ref'd [2009] S.C.C.A. No. 197 [Lines]; *Sandher v. Hogg*, 2010 BCSC 1152 at para. 87.
- [125] Such loss is to be quantified using either an "earnings approach" or a "capital asset" approach, depending on the facts of any given case: *Perren* at para. 32. The earnings approach is generally used in cases where the evidence allows for easy measurement, such as where the plaintiff had already embarked on a career path or had steady employment and a known rate of pay prior to the accident.

- [126] In the present case I agree with Ms. Doberstein and the defendants when they say the earnings approach is the proper methodology when assessing loss of earning capacity.
- [127] At the same time, any assessment must take into account both negative and positive contingencies to recognize the possibility that the assumptions on which the award is based may prove to be inaccurate: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [128] As the Court of Appeal said in *Grewal* at para. 49:
- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [129] Ultimately, the court must assess these damages based on what is fair and reasonable in all of the circumstances: *Parypa v. Wickware*, 1999 BCCA 88 at para. 70; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.

Past Loss of Earning Capacity

- [130] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 [Rowe] at para. 30, the Court of Appeal explained that a claim for "past loss of income" is actually a claim for past loss of earning capacity, that is, "a 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." The value of the loss may be measured in different ways: for example, by actual earnings the plaintiff would have received, or by a replacement cost evaluation of tasks that the plaintiff is now unable to do: *Rowe* at para. 31. The test to be applied to hypothetical events, whether past or future, is whether there is a real and substantial possibility that the events would or will occur and that the event occurring is not based upon mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 [Athey] at para. 27; *Smith v. Knudsen*, 2004 BCCA 613 [Smith] at para. 29; *Grewal* at paras. 43-46; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14. Such events are to be given weight according to the relative likelihood that they would have occurred or will occur: *Athey* at para. 27; *Smith* at paras. 29, 31.
- [131] On this issue, Ms. Doberstein testified that she has been unable to work as a massage therapist since the first accident on September 3, 2015. As a result, according to an expert report from Mr. Sheldon, an economist retained by Ms. Doberstein to assist the court in this analysis, Ms. Doberstein says a proper award for past loss of earning capacity would be approximately \$94,000, based on the original trial date of June 2019.

- [132] On this point counsel for Ms. Doberstein says Mr. Sheldon's economic report, and a reply report from an economist retained by the defendants, Mr. Hildebrand, is of limited value because the appropriate assessment in the present case is a "straight forward" mathematical calculation. The defendants agree. Even though loss of earning capacity is an "assessment," I accept that a mathematical calculation based on a past stream of income is appropriate in these circumstances.
- [133] The methodology for Mr. Sheldon's calculation is indeed quite straightforward. He took Ms. Doberstein's average net declared income of \$5,700 (rounded in 2019 dollars) from 2010 to the full year of 2015, as reported on her income tax returns, and added her "average undeclared cash" income of \$24,800, for a total of \$30,500 in annual income. Taking into consideration the effect of federal and provincial income taxes, Mr. Sheldon estimates that Ms. Doberstein's "past earnings loss" is \$129,000, net of deductions, up to the new trial date of September 14, 2020.
- [134] In reply, while the defendants acknowledge Ms. Doberstein has established a real and substantial loss of past earning capacity, they say Ms. Doberstein is not credible when she calculates her undeclared income, as she relies solely on looking at three booking calendars and suggesting that every appointment noted was for one hour, unless otherwise stated, but without being able to specify what type of treatment was provided. The defendants say given the lack of any other corroborating documentation, I should base my assessment for past loss of earnings solely on her net income as declared in her tax returns, which according to Mr. Sheldon is \$5,700 net per year, for a total net loss up to the trial date of \$25,800, (\$5,700 x five years, or 20% of \$129,000, as Mr. Sheldon agreed that Ms. Doberstein reported only 20% of what she says was her total income.)
- [135] In the alternative, the defendants' say that if I conclude there is "sufficient evidence to support some of the plaintiff's claim for undeclared income," this should be no more than twice her declared net income of \$5,700, or \$11,400 per annum, multiplied by 5 years, for a total of \$57,000 for past income loss.
- [136] One of the difficulties I have in attempting to calculate a fair assessment for loss of earning capacity is there is no evidence to support what Ms. Doberstein says was her total income prior to 2013, save for her T4's, as she did not introduce any client calendars for 2010, 2011 or 2012.
- [137] As a result, given the absence of any corroborating records of any kind, I have to rely solely on Ms. Doberstein's assertion as to what she says her total income was in those years. Mr. Sheldon was in the same predicament. His report is based solely on a memo from Ms. Doberstein's solicitor dated October 29, 2018, stating that Ms. Doberstein "provided ... via telephone, the amounts of undeclared cash income in the five years prior to the MVA." Why Ms. Doberstein was unable to produce documentary evidence to support the assertion she made in this 2018 telephone call that she earned undeclared cash income in 2011 of \$24,015 and \$25,174 in 2012, I do not know. As the defendants emphasize, Mr. Sheldon was not

provided with any financial documentation, not even bank statements. As a result I am driven to view her evidence about her past income with some skepticism and caution, given Ms. Doberstein's failure to maintain proper records, or produce them in this litigation.

[138] At the same time, the evidence of her three past clients support Ms. Doberstein's contention that she did in fact have undeclared cash income. How much is the question. As the defendants point out, the calendars that were produced were not kept to track her earnings, but simply to keep her appointments, both personal and business, in order. It was only when counsel requested information about her total income that Ms. Doberstein utilized the appointment calendars in an attempt to calculate her overall earnings. In this regard, Ms. Doberstein acknowledges that the monthly figures produced on the bottom right corner of the calendar were based "on her own computation of her rate times the number of appointments in a particular month." Similarly, the defendants question Ms. Doberstein's reliability by noting her May 22, 2018, examination for discovery testimony where she stated only "some" of her earnings were in cash, "most were receipts." Finally, Ms. Doberstein acknowledged that when she totalled her monthly income from the calendars, she had to "figure" what the treatments were and for how long, although often the actual time was noted. As a result, Ms. Doberstein says "to be honest, I feel it's pretty accurate."

[139] In the end, given the lack of any corroborating evidence by way of appointment calendars for the years 2010, 2011 and 2012, and my reservations as to the reliability of Ms. Doberstein's evidence concerning her actual total earnings, balanced by the fact there is no doubt she did take in cash payments, whether only for "some" appointments or for 80% of her appointments, I find that a fair and reasonable assessment for net past loss of earning capacity is \$80,000. In this assessment I have also taken into consideration the fact that Ms. Doberstein would have been unable to earn any income from March 2020 to June 2020 due to COVID-19 mandatory restrictions and the fact that past income loss is net of income tax as noted by Mr. Sheldon in his report.

Loss of Future Earning Capacity

[140] In addition to the general principles that are applicable to both past and future loss of earning capacity, a claim for loss of future earning capacity involves two fundamental questions. First, has the plaintiff's future earning capacity been impaired by their injuries and, if so, what compensation should be awarded for the resulting financial harm that will accrue over time: *Hoy v. Williams*, 2014 BCSC 234 [Hoy] at para. 153. Once again, this is an assessment of loss based on the evidence, and generally is not the application of a purely mathematical calculation: *Hoy* at para. 153.

[141] In discussing the question of loss of future earning capacity, Garson J.A. said in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144:

- [32] It is well settled that an individual's earning capacity is a capital asset: *Parypa v. Wickware*, 1999 BCCA 88 at para. 63. An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. The degree of impairment to the plaintiff's earning capacity depends upon the type and severity of the plaintiff's injuries and the nature of the anticipated employment at issue.
- [33] In valuing the award, the judge must consider the likely duration of the plaintiff's prospective working life and must account for negative and positive contingencies which are unique to each case. The final award must be fair and reasonable in all the circumstances. This assessment requires a very fact-intensive, case-specific inquiry
- [142] The fact that the assessment of damages is a matter of judgment, not a strict mathematical calculation, was highlighted by McLachlin J., as she then was, in *Milina* at 93:

A final question of principle concerns the use of actuarial evidence in assessing lost future earnings. Where the assumptions upon which the calculations are made are relatively certain, precise mathematical calculation of lost earnings may be possible. Where, however, they cannot be ascertained with some degree of precision, the court must take a more general approach and "assess such sum for loss of future income as may be determined from a reasonable appraisal of the evidence. "

- [143] As mentioned, the two possible approaches to assessment of loss of future earning capacity are the earnings approach and the capital asset approach: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Perren* at paras. 11-12. Again, the earnings approach will generally be more useful when the loss is easily measurable in a pecuniary way, for instance where a mathematical calculation can be used to demonstrate the future loss: *Perren* at paras. 12, 32. Ms. Doberstein submits the earnings approach is appropriate, given her particular circumstances and the steady stream of earnings she earned from her practice. The defendants again agree that the earnings approach is appropriate, complicated as it is by Ms. Doberstein's failure to declare much of her income.
- [144] Nevertheless, mere speculation as to future loss of earning capacity is not sufficient to justify an award under this head of damages. The possibility of future loss of earning capacity must be real and substantial. In this regard, I am satisfied Ms. Doberstein has established there is a real and substantial possibility of a loss of future earning capacity.

- [145] As to what would be a reasonable assessment, Ms. Doberstein submits an appropriate award under this heading of damages would be \$435,000, "before contingencies" based on an average total income of \$30,500 as calculated by Mr. Sheldon, including the non-reported income Ms. Doberstein says she earned from 2011 to 2015, and a retirement date of age 67. In addition, Mr. Sheldon noted that his report and calculations are based on the premise that Ms. Doberstein "remains totally vocationally disabled."
- [146] Mr. Hildebrand was alive to these assumptions, noting that Mr. Sheldon was instructed to assume that Ms. Doberstein would have continued to operate her own massage business providing "Shiatsu massage and reflexology" until the age of 67, but for the accident, and that because of the accident she "will be totally vocationally disabled." Mr. Hildebrand further noted that Mr. Sheldon "does not consider the plaintiff's residual earnings capacity," or the fact that "Mr. Armstrong (April 8, 2019) opines that the plaintiff is capable of working at positions requiring light or limited strength."
- [147] In this analysis, the court is to consider the positive and negative "vagaries of life": Lines at para. 57. Relevant contingencies can include such things as the potential for improvement in health or an expanding economy, or, on the other hand, a declining economy such that services such as massage or reflexology might not be in demand, or as the last year has demonstrated, a widespread pandemic and the shutting down of non-essential services, in addition to the usual changes and hazards of life: Trites at para. 228.
- [148] On this point, Ms. Doberstein's counsel submits that negative contingencies have already been accounted for given her self employment status and how her unique family situation and issues have precluded her from working more hours than she could prior to the first accident. I do not disagree with that submission.
- [149] Conversely, the defendants say there is a real possibility that if Ms. Doberstein was to participate in an active rehabilitation programme, as suggested by most if not all of the medical witnesses along with Mr. Armstrong, Ms. Doberstein's physical and mental health and functional capacity will improve. I cannot disagree with this submission either.
- [150] Similar to their submissions on past loss of earning capacity, while the defendants agree Ms. Doberstein has established a real and substantial possibility of a loss of future earning capacity, they again say any assessment should be based solely on the average annual declared net income of \$5,700. Applying the present value to age 67 multiplier of 14.261, which both Mr. Sheldon and Mr. Hildebrand agree is appropriate, results in an assessment of approximately \$82,000.

- [151] In the alternative, if I find there is sufficient evidence to include some undeclared income, the defendants say this again should be no more than an amount "equal to the plaintiff's declared income" of \$5,700 (net) a year, or \$11,400, which, depending on which contingency column in Mr. Sheldon's Table 4 one uses, results in a range of approximately \$103,000 to \$164,000. Nevertheless, as Mr. Sheldon testified, his calculations are only guidelines meant to assist the court in making a reasonable assessment.
- [152] At the same time, if I accept the defendants' position that only declared income should be considered, but include the gross income Ms. Doberstein reported (as opposed to net income), noted by Mr. Sheldon in his report to be approximately \$12,000 a year, and apply the present value multiplier of 14.261, the projected loss of future earning capacity is \$175,320. This calculation is however again based on the premise Ms. Doberstein will remain totally vocationally disabled and unable to work at all in the future.
- [153] During submissions, Ms. Doberstein advanced an alternative scenario using somewhat similar methodology to assess loss of future earning capacity, but based on a reduced annual income of \$25,000 as opposed to an annual income of \$30,500, to reflect the uncertainty surrounding Ms. Doberstein's assertion as to her total income. Using the present value multiplier results in a calculation of $\$25,000 \times 14.261$, for a loss of future earning capacity of approximately \$350,000. This calculation again presumes Ms. Doberstein will be unable to earn any income in the future, as she claims even reflexology "is beyond my capability."
- [154] As I say, these projections are based on Ms. Doberstein being unable to work in any capacity in the future. As I have already concluded, given the totality of the evidence, especially the evidence of Mr. Armstrong and Dr. Laidlow, I am unable to accept this proposition. I am not satisfied the evidence is sufficient to enable me to conclude that Ms. Doberstein's earning capacity has been diminished to the extent that she claims, even though Ms. Doberstein says she is restricted to working from home as her "day is still filled" being with her adult sons, stating "I get Chad off to work" and "I keep Drew company."
- [155] Be that as it may, in my view, it is appropriate to assess loss of future earning capacity by calculating the difference between whatever Ms. Doberstein's annual income might have been from 2010 to 2015, and what I find to be a reasonable amount of income Ms. Doberstein will be able to earn in the future, given my conclusion she is capable of earning some income by engaging in some form of passive treatment, such as reflexology, given Mr. Armstrong's functional capacity report. Again, I cannot accept the dire conclusion that Ms. Doberstein is "totally vocationally disabled." In my view, the totality of the evidence does not support such a devastatingly bleak future given Mr. Armstrong's evidence. I am satisfied that, even if Ms. Doberstein elects not to engage in an active rehabilitation programme, she will be able to utilize her healing skills to at least a limited degree, as opposed to being "totally vocationally disabled" for the rest of her life.

- [156] In this analysis, I am reminded of the high esteem Ms. Doberstein's past clients have for her "healing" skills. As a result, I have little doubt she will be able to attract future clients, even if she only provided reflexology treatments in the near term. Moreover, as difficult as it was for Ms. Doberstein to have Max move to the Maple Ridge facility, as she cared for him all his life, she now has considerably more time to pace herself with not only some work, but also her household tasks.
- [157] Because of the concern I have with respect to how reliable Ms. Doberstein's evidence is with respect to her pre-accident earnings, due to the absence of any client calendars prior to 2013, combined with the absence of any proper financial documentation apart from the misleading tax returns, and the meager income reported on her returns, I am satisfied it is reasonable to calculate Ms. Doberstein's future loss of earning capacity utilizing a pre-accident total annual income of \$25,000. Given the totality of the circumstances and the lack of corroborating documentation for 2010, 2011 and 2012, I find this is a fair base figure to employ for any mathematical calculation when assessing loss of future earning capacity.
- [158] In conclusion, I am satisfied Ms. Doberstein is capable of earning income in some massage-related capacity, such as reflexology, even if she were to only charge the same rate as she did five years ago. Based on a projected annual base income of \$25,000, if Ms. Doberstein were to see two clients a day at \$50 an hour, for only four days a week with a day off mid week to rest or do other tasks, and giving her 12 weeks to recuperate, or for rehabilitation, she would earn \$100 a day or \$400 a week. Over 40 weeks this would amount to \$16,000 a year, a loss of approximately \$9,000 a year. Multiplying this annual \$9,000 loss by the present value multiplier 14.261 results in a total loss of \$128,349. Given the totality of the evidence, I find \$129,000 (rounded) to be a fair and reasonable assessment of Ms. Doberstein's loss of future earning capacity.

Future Cost of Care

- [159] Damages for cost of future care compensate for expenses to be incurred to sustain or promote a plaintiff's mental or physical health: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews] at 241-242. The services and items provided for within this head of damages must be reasonable, both in the sense of being medically required or justified, and in the sense that the plaintiff will be likely to incur them. See: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 [Penner]; *Milina* at 84; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at paras. 21-22; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 28-30; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55-56. There must be some evidentiary link between the physician's assessment of pain, disability, recommended treatment, and the future care item or service recommended by a qualified health care professional, such as a "rehabilitation expert" or occupational therapist: *Gregory* at para. 39; *Gao v. Dietrich*, 2018 BCCA 372 at paras. 68-70.

- [160] As with other heads of damages, quantification for the cost of future care is an assessment and not a precise accounting exercise: *Smith v. Moshrefzadeh*, 2012 BCSC 1458 at para. 123.
- [161] At the same time, in non-catastrophic cases, "a little common sense should inform claims under this head, however much they may be recommended by experts in the field": *Penner* at para. 13. In addition, in *Andrews, Dickson J.* (as he then was) stated at 242 that damages for future care must "be moderate and fair to both parties." In other words, "a degree of restraint has characterized awards under this head of damages": *Hastings v. Mathew*, 2020 BCSC 1418 at para. 54.
- [162] In the present case, contrary to the opinions of the medical experts, Ms. Doberstein does not seek damages for any psychological or psychiatric counselling or cognitive behaviour therapy, presumably because as she emphasized throughout her testimony, even with the many traumatic family "stressors" she has had to endure for years, she is able to cope and function on her own without any professional assistance. She does submit she "requires further manual therapy to assist with her symptoms" in order to promote and maintain her health and function, and thus, her quality of life.
- [163] With respect to further massage, physiotherapy and acupuncture, Ms. Doberstein says "I'm sure all of these would help," and added, "I think I need massage once or twice a month," even though the agreed statement of facts notes she has had only three massage sessions since the start of 2017.
- [164] While there is no question Ms. Doberstein has received these various treatments in the past, the evidence of Dr. Laidlow seriously undermines the necessity of bi-weekly treatment from her chiropractor, who apparently restricts his treatment on Ms. Doberstein to a "light manipulation" on her neck, a technique which has prompted Ms. Doberstein herself to think "is that it?" Nevertheless, Ms. Doberstein said this "treatment" is "helpful," contrary to the skepticism of Dr. Laidlow and the opinion of Dr. MacKean. At the same time, I do note that Dr. MacKean recommended pool therapy "in conjunction with her other therapies," which she states are chiropractic, massage and physiotherapy. Dr. MacKean then simply adds she should "try some acupuncture to see if this could give her some relief."
- [165] Ms. Doberstein also seeks transportation costs given her "remote" location. On this latter point there is little evidence which would allow me to assess what a reasonable assessment for transportation costs may be, nor has there been any suggestion from Ms. Doberstein as to an amount that would be reasonable. I decline to accede to this suggestion.
- [166] As I have mentioned, Ms. Doberstein seeks a "global assessment" for these treatments under cost of future care and loss of housekeeping capacity. She submits a "total assessment" of \$100,000, incorporating both heads of damages is reasonable. However, I have already considered Ms. Doberstein's difficulties in doing some domestic chores in my assessment of non-pecuniary damages. In addition, there is no evidence from a cost of future care expert as to what would be an appropriate present value for the cost of these

future services nor any evidence from a "rehabilitation expert" (as noted in Milina) as to how often such treatments should occur. As the defendants submit, Ms. Doberstein relies primarily on her "subjective plans" and "estimates" when suggesting an appropriate assessment under this head of damages.

[167] Be that as it may, the defendants appear to acknowledge Ms. Doberstein is entitled to some damages for cost of future care, stating that if I am "considering an award under this head of damage to provide a breakdown of the award respecting each treatment respectively," as opposed to a global assessment for these various treatments. The defendants also refer to Dr. Laidlow's opinion that Ms. Doberstein should not receive passive treatment, stating "she needs to be involved in an active program of exercise." Once again though, Ms. Doberstein has made no claim for the cost of seeing a kinesiologist to assist her in an appropriate exercise programme, or the cost of a gym membership or pool membership in order to participate in pool therapy or an active exercise programme, contrary to the views expressed by Dr. MacKean, Mr. Armstrong and Dr. Laidlow.

[168] In this analysis, counsel for Ms. Doberstein acknowledges the passive treatments Ms. Doberstein has received since the first accident have not had any "longstanding beneficial impact." Nevertheless, Ms. Doberstein says she still sees her chiropractor and testified that whatever he does, "it helps." She also "believes" she would benefit from physiotherapy and acupuncture and says "I think" massage would "help" as well. I note however, that Ms. Doberstein testified she stopped going to physiotherapy because her chiropractor instructed her not to have physiotherapy, thereby calling into question whether she would attend physiotherapy if she was still attending chiropractic treatments. On the question of costs, Ms. Doberstein says these treatments "currently" cost her approximately \$5,000 a year, even though I have little evidence in support of that assertion and little evidence as to the frequency of such sessions at the present time.

[169] Notwithstanding the paucity of evidence on this particular issue, and even though I find Dr. Laidlow's opinion and recommendations to be the most practical and illuminating, given the position taken by Dr. MacKean in her brief report, I am prepared to accept that some compensation for the cost of these therapies for two or three years is justified. Assuming one monthly chiropractic treatment at a cost of \$60, one massage a month at \$90, and \$90 per session of physiotherapy, "but that's a guess" says Ms. Doberstein, and something for acupuncture, I find a fair reasonable assessment under this head of damages to be as follows:

Chiropractor

\$ 2,000

Massage

3,500

Physiotherapy

3,500

Acupuncture

1,000

Total:

\$ 10,000

Special Damages

[170] The parties agree outstanding special damages are \$7,831.64.

CONCLUSION

[171] For these reasons, I find the following assessment of damages fair and reasonable to Ms. Doberstein and the defendants:

a) Non-pecuniary damages

\$150,000.00

b) Past loss of earning capacity

80,000.00

c) Loss of future earning capacity

129,000.00

d) Future cost of care

10,000.00

e) Special damages

7,831.64

TOTAL:

\$376,831.64

COSTS

[172] Ms. Doberstein is entitled to costs on Scale B and interest where appropriate.

"The Honourable Mr. Justice B.D. MacKenzie"

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