

CANADA / JUDGMENT

Floris v. Castillo

2020 BCSC 1447

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1447 Floris v. Castillo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Floris v. Castillo,

2020 BCSC 1447

Date: 20200930

Docket: M190231

Registry: New Westminster

Between:

Ashley Breanne Floris

Plaintiff

And

Montano Manuel Michael Castillo

Defendant

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for the Plaintiff:

P. Unruh

J. Dunning

Counsel for the Defendant:

C. Ross

Place and Date of Trial:

New Westminster, B.C.

February 10-14, 2020

Place and Date of Judgment:

New Westminster, B.C.

September 30, 2020

I. Introduction

- [1] Ashley Floris was injured in a car accident that occurred on May 14, 2015 in Abbotsford, British Columbia. The defendant has admitted liability and so these reasons for judgment address damages only.

II. The Accident

- [2] The accident occurred at the intersection of Marshall Road and McKenzie Road. Ms. Floris was driving a 2005 Honda Civic and she was accompanied by a passenger, Megan Walker. She had been proceeding eastbound on Marshall Road and was stopped at a red light at the McKenzie Road intersection when her vehicle was rear-ended by a 2000 Chevrolet Cavalier driven by the defendant. Ms. Floris was wearing a lap and shoulder seatbelt at the time.
- [3] The force of the impact was such that Ms. Floris' vehicle was propelled forward and struck a moped that was ahead of her, also waiting for the light to change. The operator of the moped was thrown forward onto the pavement as a result of that secondary impact.
- [4] Ms. Floris' car suffered damage that cost about \$3,700 to repair. Most of the damage was to the rear of her vehicle, including the bumper, but there was some damage to the front of her car as well.
- [5] Ms. Walker, the passenger, was upset and crying, and she insisted they go to a chiropractor, which they did. Ms. Floris said she had never been to a chiropractor before. By the time they arrived at the chiropractor's office she had a bad headache. She received chiropractic treatment to her neck and back. She was sore the next day and again had a bad headache.
- [6] In the weeks that followed, Ms. Floris still felt tense in her neck, upper back and lower back. She attended on a chiropractor for treatments twice a week. I will return to the post-accident period later in these reasons, but I will now digress to describe the plaintiff's background.

III. The Plaintiff

- [7] Ms. Floris was 21 years old at the time of the accident and was 26 by the time of trial. She was born and raised in Abbotsford and graduated from high school in 2012.
- [8] She has worked at various jobs over the years, primarily in the restaurant industry. She described herself as "a big worker", which I took to mean someone who is keen to work. She was in fact working at two jobs at the time of the accident: (1) as a server at a restaurant called Abbey Road in Abbotsford; and (2) as a full-time receptionist at a music studio called Drumeo. At Drumeo she worked 8:00 a.m. to 4:00 p.m. Monday to Friday, with some overtime on weekends which she spent answering emails or other inquiries. Her rate of pay was \$12 per hour. At Abbey Road she was paid \$10.25 per hour, plus tips.
- [9] After the accident, Ms. Floris moved to Kelowna, where she worked and lived in two different stints, the first from May to September 2016, and the second from September to December 2017. I will describe these events in more detail later.
- [10] In September 2019, Ms. Floris started a training program for qualification as a care aide. She expects to graduate from that program in mid-March 2020.

IV. Pre-Accident Activities

- [11] Prior to the accident Ms. Floris was an active person. She skied a fair bit in winter and she hiked regularly in summer. The hikes she enjoyed included such difficult hikes as Sumas Mountain. She enjoyed boating and tubing with her family, as well as camping with friends.
- [12] Pre-accident, Ms. Floris was a yoga enthusiast and she attended classes four to five times a week, sometimes even twice a day. She often went to advanced classes and engaged in advanced poses. Ms. Floris was also a runner, whether on a track or on a treadmill, and she regularly attended at fitness centres or gyms.
- [13] Ms. Floris said that prior to the accident she was a healthy individual and she had no physical restrictions or issues.

V. Post-Accident

- [14] Ms. Floris said she missed a work shift at Abbey Road the day after the accident, but she still went to work at Drumeo because "I had to pay rent and had no choice". In order to get through her workdays she took breaks every hour, going for quick walks, and she saw the chiropractor regularly. At the restaurant, she experienced a lot of back pain when carrying dishes. She "pushed through" in order to get the work done but she said "my body was sore".
- [15] In December 2015, Ms. Floris' chiropractor referred her to a kinesiologist so that she could "strengthen her body muscles". She started at the kinesiology facility in February 2016.

- [16] There is some controversy over these treatments and the expense of those treatments as Ms. Floris attended there on a good number of occasions. She recalled attending twice a week for year. She said she was given recommended exercises to deal with her injuries, specifically for her neck, upper back and lower back, and she did exercises and stretches there.
- [17] She continued to see her chiropractor once a week.
- [18] In September 2015, Ms. Floris ended her employment at Abbey Road. She said "it was getting too much with two jobs. Drumeo was far more stable and the restaurant work was too physically demanding". She said the Abbey Road employer knew she had been in an accident but did nothing to accommodate her.
- [19] She continued to work at Drumeo until she left in late April 2016 to go to Kelowna, where she lived with her friend, Jennifer Thomson.
- [20] During that time, Ms. Floris continued to have neck and back pain, and headaches. She described the pain as follows:
- a) Neck and Upper Back: her neck was very tense and had an aching pain. When it got really bad it triggered headaches. She experienced those symptoms every day. Her neck pain is aggravated by turning, reading or being in an awkward position;
 - b) Low Back: she felt like her back was on fire, particularly at work when she was carrying things or bending to serve drinks.
- [21] In Kelowna, Ms. Floris obtained work at a restaurant called Sammy J. Peppers. One of the job requirements there was for female servers to wear high heels, which aggravated Ms. Floris' lower back, upper back and neck. She worked approximately 30 hours per week at that restaurant. After her work shifts, all she could manage was to shower, lay down and put ice packs on her sore areas.
- [22] Ms. Floris' activity level in Kelowna was limited. She and her friends went to the beach, walked around and "relaxed". She attempted one modest hike (Knox Mountain) but she could not complete it and only made it halfway. Knox Mountain is not nearly as arduous a hike as is Sumas Mountain.
- [23] Ms. Floris did not have regular chiropractic treatment in Kelowna because she could not afford it. She had occasional treatments with her Abbotsford chiropractor when she went home for visits.

- [24] Ms. Floris moved back to the Abbotsford area in September 2016. She resumed work at the Abbey Road restaurant for a short time, but she was then hired at a new restaurant called S+L Kitchen & Bar ("S+L"). She trained at the S+L location in Langley and began work at the Abbotsford S+L location when it opened in December 2016. Ms. Floris said she experienced the same symptoms as before and so she resumed her regular chiropractic treatments and resumed the sessions at the kinesiology facility.
- [25] At S+L, the servers had a lot more in the way of side duties, which included stocking the bar and carrying wine boxes, linen bags, water jugs and other heavy items. At some point, Ms. Floris spoke to the restaurant manager and the manager gradually relieved her of the heavier side duties. She also accommodated Ms. Floris by giving her "swing shifts".
- [26] A swing shift is a shift that starts earlier in the day and then breaks before resuming for further hours in the evening. However, swing shifts are less lucrative than closing shifts because evening sales are generally greater.
- [27] Ms. Floris said she had to do closing shifts at S+L at the beginning of her time there, and after those shifts she would be sore in her upper neck and back. She was then assigned swing shifts for much of the next year.
- [28] Ms. Floris added that she resumed kinesiology treatments in the fall of 2016 because she had experienced a great deal of stiffness while in Kelowna. The kinesiology treatments gradually made her feel better.
- [29] In September 2017 Ms. Floris returned to Kelowna where again she lived with a friend. She found work at a local restaurant, workings three or four shifts a week. She was also coming back to Abbotsford once a week to see her boyfriend.
- [30] At this particular Kelowna restaurant she was given "almost all" closing shifts. She said, "I did not do very well. Almost every shift I went to the bathroom and sat down to relieve the pain".
- [31] Ms. Floris went to a chiropractor once a week or so during this stint in Kelowna. The treatments helped a lot. She also went to the gym a few times and did exercises and stretches, which helped somewhat. She tried going on walks and she again attempted to hike Knox Mountain but, as before, she had to quit before the halfway point.
- [32] Ms. Floris returned to Abbotsford in December 2017 and resumed work at S+L in early January. She was assigned either swing shifts or early start shifts, four or five times a week, and she was given the same accommodations as before. The shifts were four to seven hours in length.

- [33] Ms. Floris started training as a care aide at the University of the Fraser Valley in September 2019. She hopes to become a licensed practical nurse or even a registered nurse some day. She is familiar with the duties of a care aide because she has completed a care home practicum, and she described those duties in her testimony. She noted that there are some substantial physical demands with the work, at least at times. She is aware that the current hourly rate for care aides ranges between \$23 and \$24.85 per hour.
- [34] During her practicum, she found that she often had a headache and back pain at the end of the day. The most difficult aspects of her practicum involved turning patients while they are in bed. By lunchtime she would feel her back pain come on. Her neck pain would come on as well but she said it was definitely more pronounced in her back.
- [35] The classwork portion of her training involves sitting for long periods, which causes pain in her upper and lower back. The same happens when she does her homework because it too involves sitting for longer periods. She handles it by taking stretching breaks.
- [36] Ms. Floris tried to work both Saturdays and Sundays at S+L while she was going to school, but found it too physically and mentally demanding. She said that she had a lot of homework and working that much did not leave her enough time to complete it. Currently, she works at S+L one day a week, either a swing shift or an early start shift, which typically gives her between four to seven hours of work.
- [37] Ms. Floris was asked to describe her treatments over the last few years. She said she tried massage and it was "nice but not super effective". She felt that chiropractic treatments were more effective. She still takes chiropractic treatment. In the period from 2018 to 2020 she had chiropractic treatments once a week for a time, and then she changed it to once every two weeks. Currently, it is less frequent than that and is "just when I can". She estimated that she now has chiropractic treatments once every three weeks.
- [38] Her chiropractic treatments give her the feeling that "a lot of tension has been relieved". Prior to these sessions she feels tense and sore in the three main areas and the treatments give her some relief. If she has had no chiropractic treatment for a couple of weeks, her neck pain gets very intense and this triggers her headaches.
- [39] Ms. Floris has never had a family doctor and so she has not sought medical help. She also feels the treatment she was getting was reasonably effective.
- [40] Ms. Floris described her present problems as follows:
- a) Headaches: she gets severe headaches once or twice a week. She feels they come from "behind my neck", and the neck pain brings them on. The headaches last until she goes to the chiropractor. She takes Advil or Tylenol one or two times a week for her headaches;
 - b) Neck Pain: Ms. Floris said that she feels she has neck pain every day, with some days worse than others. It fluctuates depending on her activities. She described it as being "very tense, like a dull aching pain";

- c) Back Pain: pain in her upper and mid back comes on in the same way that her neck pain does, and occurs if she is carrying things, reaching or standing too long. If she sits or stands too long - for example, sitting for eight hours of classroom work - her back will be "on fire";
 - d) Sleep: if she has a severe headache then she has trouble sleeping, both in terms of being able to fall asleep and in being able to stay asleep as she will wake up a couple of times during the night; and
 - e) Driving Anxiety: she is anxious while driving. Although she has to drive to some extent, she prefers not to drive and she avoids driving long distances.
- [41] When asked if she feels her symptoms have improved at all, she said it is hard to say because she is constantly in pain. She does stretches and some workouts at home to some extent, but she no longer goes to the kinesiologist because it is too expensive.
- [42] Ms. Floris said her activities are much curtailed from what they used to be. She has tried skiing couple of times but has had to quit after just a couple of runs. She said the back pain made her stop because it felt like her back was "on fire". She has not done any hiking because going uphill or downhill aggravates her back after only 10 minutes. She does not run anymore. She has tried yoga "here and there", although it is at a different level now, with beginner classes instead of advanced classes. She also has to modify yoga poses to accommodate her limitations.
- [43] Her social life has changed because her friends no longer ask her to participate in any active events or physical activities. Her socializing now is restricted to "hanging out", going for coffee, and similar sedentary events.
- [44] Ms. Floris acknowledged that she has travelled for vacation purposes on several occasions since the accident, but the warm vacations involved merely hanging out at a pool or beach. Although a 2017 holiday to Disney World was more active in nature because she went on rides with her friend, she was in a lot of pain the next day.
- [45] Ms. Floris also acknowledged that she went to a music festival (the Shambhala festival near Creston) where she and her friends camped, but she found that sleeping in her tent aggravated her back.
- [46] Ms. Floris has lived with her boyfriend, Dawson Bremner, for about two years. They live in a townhouse in Chilliwack. She and Mr. Bremner have divided the household duties in a way that avoids Ms. Floris having to do any of the heavier cleaning or other household tasks. Mr. Bremner has a seven-year-old daughter from a prior relationship, who is with them every second weekend. She enjoys her time with Mr. Bremner's daughter, but she is limited in what she can do with her, for example, at the playground, where Ms. Floris will merely sit on the bench. She assists with the child's bathing, but finds the associated bending or reaching to be hard on her lower back.

- [47] As for the future, Ms. Floris said her main concern is what her pain level will be in the years to come. She is worried that it may be worse.
- [48] When asked what the main differences are between her pre-accident and post-accident life, she referred to the lack of any social functions involving any physical activity, the amount of time she has spent getting chiropractic treatments, and the lack of energy at the end of a day. She said that when she comes home all she can do is sit whereas formerly she had the energy to do other things.
- [49] When asked to describe a "good day", she said it would be a day that she wakes up with no pain, which happens sometimes. Although her back hurts "all the time", on "good days" she is able to do errands and go to work and not have that pain aggravated by anything during the day. A "bad day" is one where she wakes up with a raging headache or where she ends the day in a lot of pain.
- [50] In cross-examination, Ms. Floris said:
- a) sometimes she has felt "completely better" after a chiropractic treatment;
 - b) in the first six months post-accident there were some days where she noticed improvement in her pain. When pressed that there was also a general improvement in that time period, she said "oftentimes, yes";
 - c) her pain levels fluctuate depending on what she is doing;
 - d) she experiences neck pain every day "to a degree" but does not have headaches every day;
 - e) she does not have low back pain every day, but it depends on what she is doing. Sitting for long periods, for example, will bring on low back pain;
 - f) she has sleep problems a couple of times a week;
 - g) she will drive long distances if she needs to, but she avoids it. When she was travelling back and forth from Kelowna to Abbotsford she took the bus a lot;
 - h) she is able to do heavier household chores or tasks, but if she does them it will aggravate her neck and back;
 - i) after the accident she avoided yoga altogether for a time. She has gone to yoga 10 or 15 times in the past five years. She agreed that lack of free time is part of the reason for that;
 - j) at the kinesiology facility she did exercises that involved cardio fitness as well as exercises that did not involve injured areas of her body;
 - k) she agreed that 69 sessions seemed to be "about right" for the number of kinesiology sessions she had. She also agreed she would have been able to do these exercises on her own in a gym;

- l) when she worked at Drumeo she worked at Abbey Road on weekends, either one or two shifts, which meant between 4 and 16 hours in total;
- m) if she had not been accommodated at S+L she could still have done the work but she would have been sore; and
- n) she has rarely worked a closing shift at S+L.

VI. Other Witnesses

A. Jennifer Thomson

- [51] Ms. Thomson is a friend of the plaintiff. She has known Ms. Floris for 11 years. They met when they were 14. She is a licensed practical nurse (LPN) and is currently attending UBC nursing school. She expects to graduate with a nursing degree in April 2020. She has worked as both a care aide and an LPN.
- [52] Prior to May 2015, Ms. Thomson and Ms. Floris were "very active" and together engaged in activities such as hiking Sumas Mountain, which is a very hard hike, and working out in gyms. Their relationship involved spontaneity and so they would do things on the spur of the moment. She said "everything we did was outdoors".
- [53] Ms. Thomson moved to Kelowna in 2015 and encouraged Ms. Floris to join her there. She also encouraged Ms. Floris to go into health care as a career. Ms. Thomson was attending LPN school and working at Sammy J. Peppers. Ms. Floris moved to Kelowna in May 2016 and the two became roommates.
- [54] Ms. Thomson was "quite surprised" by the change in Ms. Floris' demeanour. She was now quiet, more reserved, and she did not want to do things.
- [55] Sammy J. Peppers had three types of shifts: first cut, second cut and closer. "First cut" meant that the employee would be the first one sent home on any particular day. It was the least desirable shift. Servers usually want the closing shifts because these are more lucrative.
- [56] Ms. Thomson said that even though Ms. Floris wanted to make money she usually asked to be "first cut". Ms. Thomson noted Ms. Floris struggled with wearing high heels and performing the heavier duties, such as carrying dish racks. She could see her wincing or grunting, or otherwise struggling with the heavier tasks. She was also very pale.
- [57] Ms. Thomson saw that Ms. Floris tired easily and was exhausted at home. Ms. Thomson found this "a bit shocking" because it was a striking contrast to Ms. Floris' former self. If Ms. Floris did a closing shift, she would go home, shower and go to bed, with no conversation. She would then stay in bed much of the next day.

- [58] Their activities together were not what Ms. Thomson had hoped they would be. They would sunbathe in the yard or go to the beach but not do much more. They tried to hike Knox Mountain one day, but Ms. Floris quit when they got to the viewpoint, which is only partway up. Ms. Floris told her she "couldn't do it".
- [59] Ms. Floris is much the same today. Ms. Thomson has invited Ms. Floris on ski trips but Ms. Floris has always declined and so Ms. Thomson does not ask her any more. Formerly the two of them were always going out, and were never just hanging out. Now, hanging out is all they do. She feels Ms. Floris is not as energetic or "excited" as she was before. Formerly, she was willing to say "yes" to things; now, she just wants to stay home. In cross-examination, however, Ms. Thomson conceded they both have more responsibilities and less time for adventures than they did before.
- [60] Ms. Thomson was asked about the duties of a care aide. She said it is "extremely strenuous" and "very heavy work". She said the care aide practicum is quite different from actual practice because students have supervision and assistance during practicums, but in regular work care aides are on their own.
- [61] Ms. Thomson went to the Shambhala music festival with Ms. Floris in 2017. Ms. Thomson said she was disappointed that she did not spend a lot of time with Ms. Floris, which was due to the fact that Ms. Floris spent a lot of time at the campsite and Ms. Floris did not always go to the festival area at night.
- [62] Ms. Thomson went to the same festival in 2018, as did Ms. Floris. That year, Ms. Floris spent even more time at the campsite.
- [63] Ms. Thomson commented on Ms. Floris' driving. She said Ms. Floris had no difficulties driving prior to the accident. Afterward, however, there was a "huge difference". Ms. Floris is now hypervigilant and anxious as a passenger. As a driver she is extremely anxious and avoidant. Ms. Thomson noted Ms. Floris took the bus between Kelowna and Abbotsford even though she had a car.

B. Dawson Bremner

- [64] Mr. Bremner is Ms. Floris' boyfriend. He is 27 years old. He works as a pharmacy manager. He has known Ms. Floris since August 2017, and they have lived together since late 2017. They met at a music festival.
- [65] At that festival, Mr. Bremner noticed that Ms. Floris went back to their camp earlier than everyone else, and she missed a lot of the headline acts. Even at the music venue itself she would have to sit down regularly. The same thing happened the next year at the same festival.
- [66] Mr. Bremner said Ms. Floris' status varies day to day. She has good days and bad days. On a good day she is smiling and engaged, but on a bad day she is shorter, snappish and quieter.

- [67] At the end of a serving shift Ms. Floris is very stiff and she often asks him to massage her neck. When he does that he can feel muscle knots and spasms in the areas he is massaging. He said this happens "pretty close to daily". The areas she most commonly asks him to massage are the neck and upper back. She is not as bad on school days, but if she has a clinical rotation that day she will sit down for 30 minutes as soon as she gets home.
- [68] Their present joint activities consist of cooking for one another and going out for dinner.
- [69] Mr. Bremner is quite active. His group of friends like to hike in summer, and he snowboards in winter, usually a dozen or so times a season. Ms. Floris has not joined him in these activities. He and his group of friends went on a ski trip once, but Ms. Floris did not go.
- [70] Mr. Bremner's daughter is with them every second weekend. If they go together to a park, Ms. Floris does not do anything active; she simply observes and talks to the child rather than playing with her.
- [71] Mr. Bremner does the heavier household tasks. He carries the groceries. They share cooking duties.
- [72] They acquired a rental property in June 2019 and it needed some minor renovations and re-painting. Ms. Floris tried to help with the painting but she could only paint the middle areas and not anywhere down low or up high. He had to send her home and complete the job himself.
- [73] In 2017 and 2018, the two of them went to Mexico with members of her family (2017) and members of his family (2018). The 2017 trip mostly involved relaxing with Ms. Floris, but the 2018 trip involved more children and was "rougher for her". She spent a lot of time in their room. She would either start the day late or she would go back to their room during the day. They took a bus into the local town one day - a bus with a poor suspension - a trip that took about an hour. She was "pretty bad" after that trip.
- [74] As for driving, Mr. Bremner said Ms. Floris hates driving and avoids it when she can. He does most of the driving when they are together. When she drives she is very nervous and very defensive, and when he drives there is "a lot of gasping" on Ms. Floris' part. On longer trips, they have to stop so that she can stretch.
- [75] When asked if he has seen any change in her symptoms, Mr. Bremner said, "I can't say. She always seems to be in some sort of pain". He said her functioning seems to be the same.

C. Zofia Gajdamowicz

- [76] Ms. Gajdamowicz is the general manager of the S+L restaurant. She first met Ms. Floris in November 2016. She saw a lot of Ms. Floris at work because both of them worked at the restaurant full-time. She described Ms. Floris as very hardworking, reliable, responsible, well-rounded and mature for her age. She was very good with the customers. She said Ms. Floris was "always on the top of my staff list", meaning she was amongst the first servers to be scheduled in each scheduling period.
- [77] Ms. Gajdamowicz confirmed the various side duties of servers at S+L. She also described the types of server shifts at the restaurant, noting that the first server cut was usually the person who started his or her shift first. The "closers" work to the end and are not cut. Most servers want to close because they are then assigned the best sections. Servers working swing shifts or through shifts might get those preferred sections at lunch, but they would then be assigned to side areas of the restaurant for the dinner service.
- [78] Generally, closers are at the restaurant the longest and have the best sections, so they make more money than those on other shifts. Closing shifts typically start around 5:00 or 5:30 pm. She acknowledged that sales can be highly variable, and even a server on a swing shift can do well if the restaurant as a whole is really busy, but that does not happen as a general rule. Tips are generally 10 to 20 percent of sales, and six percent of tips is tipped out to the restaurant.
- [79] Since Ms. Floris started school she has worked swing shifts on Saturdays. This shift starts at 2:00 pm and runs for five or six hours at most.
- [80] Ms. Floris has not worked a closing shift for a long time. Ms. Gajdamowicz said Ms. Floris is "not one to complain but I know she struggles with neck and back pain and closing shifts are the most strenuous". Because of this, and because Ms. Floris is one their best employees, Ms. Gajdamowicz tries to accommodate her.
- [81] Ms. Gajdamowicz has known Ms. Floris long enough that she is able to read her. If Ms. Floris is having a bad day she will not complain but instead she "goes quiet". She might also rub her neck or do stretches. On good days, Ms. Floris is chatty.
- [82] Ms. Gajdamowicz is aware of Ms. Floris' limitations so she does not ask her to do heavier tasks such as moving wine boxes, racks of glasses or linen bags.
- [83] There are occasions when the restaurant has to call servers and ask that they come in earlier than scheduled. She has done this with Ms. Floris but many times Ms. Floris has been unable to come in early because she has a scheduled appointment, which is often a chiropractic appointment.

VII. Medical Witnesses

A. Dr. Mark Adrian

[84] Dr. Adrian is a specialist in physical medicine and rehabilitation. He prepared two reports at the request of plaintiff's counsel.

[85] Dr. Adrian's first report is dated January 19, 2018. The symptoms reported by Ms. Floris, as noted by Dr. Adrian in his report, are very similar to those she described in her testimony, so I will not summarize those here.

[86] Dr. Adrian concluded as follows:

- a) Ms. Floris experiences clinical features of a diagnosis of mechanical neck, mid and lower back pain. "Mechanical" spinal pain implies that there is structural damage to the tissues of the spinal column;
- b) Ms. Floris' neck, mid and lower back pain symptoms are causally related to the motor vehicle accident; and
- c) the headaches she experiences are cervicogenic in nature or, in other words, are related to her neck injury.

[87] Dr. Adrian gave the following prognosis:

In general, individuals suffering from mechanical spinal pain following an injury experience improvement over time. Some individuals, however, experience persistent pain despite the passage of time. [] In my experience, individuals suffering symptoms beyond two years from the injury date are unlikely to experience further meaningful improvement.

In Ms. Floris' situation, over two years have elapsed since the accident. She experiences persistent regularly occurring and physically limiting pain involving her spinal column. The prognosis for further recovery of the injuries suffered to her spinal column into the future is poor. It is unlikely the injuries suffered to her spinal column will undergo progressive deterioration over time. Due to the injuries suffered to her spinal column, Ms. Floris' neck, mid back, and lower back are vulnerable to injury into the future.

[88] Dr. Adrian said the following about Ms. Floris' functional capacity and limitations:

Ms. Floris will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured structures involving her spinal column. Specifically, she will probably continue to experience difficulty performing employment, recreational and household activities that involve prolonged sitting, standing, stooping, and walking; impact activities; heavier or prolonged carrying and lifting; prolonged or repetitive reaching; and repetitive motion of the neck. These physical limitations are unlikely to improve into the future. In my opinion, Ms. Floris is permanently partially disabled due to the injuries suffered in the motor vehicle accident.

Ms. Floris is not suited to employment whose core components involve the above-listed physical aspects. She works as a server. She modifies her work activities. If these modifications were not available, or if Ms. Floris were required to perform work activities with greater physical demands, she would probably experience difficulty performing that type of work.

[89] Dr. Adrian recommended that Ms. Floris resume the exercises she was given in the kinesiology sessions. He said it would be reasonable for her to continue with chiropractic treatments if she continued to experience short-term benefit from them.

[90] Dr. Adrian's second report is dated September 24, 2019. Again, the symptoms he noted were very similar to those Ms. Floris described in her testimony. His conclusions and recommendations essentially remained the same. He added the following:

Whether she will tolerate the physical activities required of training to become a health care assistant and the physical aspects of that type of employment remains to be seen.

[91] In cross-examination, it was suggested to Dr. Adrian that the symptom descriptions in his respective reports suggested some improvement in Ms. Floris' symptoms, but Dr. Adrian did not agree. He said her pain levels vary according to her activities, although he said her headaches might be less ("maybe"). He agreed she seemed to be doing more walking than before. He agreed it is possible she will see meaningful improvement but he thought it unlikely.

B. Dr. Harpreet Sangha

[92] Dr. Sangha is a specialist in physical medicine and rehabilitation. He assessed Ms. Floris at the request of defence counsel and prepared a report dated October 29, 2019. Again, the symptoms and limitations he summarized were essentially the same as those described by Ms. Floris in her testimony.

[93] Dr. Sangha characterized Ms. Floris' presentation as follows:

1. Cervical and bilateral forequarter strain with chronic cervical and bilateral periscapular region myofascial impairment.
2. Lumbosacral strain with mechanical back pain (SI joint +/- lower lumbosacral facet contribution) with superimposed gluteal myofascial pain.
3. Cervicogenic headaches.

[94] Dr. Sangha also noted that Ms. Floris "did not present with any indication of pain amplification or inappropriate illness behaviour".

[95] Dr. Sangha said this about prognosis:

Ms. Floris' overall prognosis is somewhat guarded. It is now four years since the motor vehicle accident. I will make recommendations for treatment and hopefully this may result in some further improvement in her condition.

[96] Dr. Sangha made the following treatment recommendations:

- a) trigger point injections. In his testimony he said it is hard to estimate how many of these treatments might be needed because the efficacy of these injections ranges from "no effect" to relief lasting several months;
 - b) applying heat prior to stretching;
 - c) use of a TENS unit;
 - d) decreasing chiropractic treatments to avoid dependency;
 - e) a trial of medication that is used in myofascial pain; and
 - f) a short course (six weeks) of active rehabilitation, which would likely aid her in relying less on passive modalities such as chiropractic. He later added that the sessions should be once or twice a week;
- [97] As to Ms. Floris' prospective career as a care aide and nurse, Dr. Sangha said "it is unclear whether she will be able to complete these types of roles given the heavier functional requirements." He surmised that she may be able to "condition" and be able to meet the requirements of those jobs, but said "it is difficult to completely ascertain what the interference of her myofascial impairment will be as a healthcare aide". As to a nursing career, he said:

Whether she can then pursue a career in nursing would need to be determined. There are multiple roles within the nursing profession that have various physical demands anywhere from sedentary to very heavy such as when working on a surgical floor or in an Emergency Department. Her decision with respect to this ultimate goal will need to be deferred until it is understood how she responds to her current pursuit to work as a Care Aide.

VIII. Positions of the Parties

A. Plaintiff

[98] The plaintiff's claim for damages is as follows:

Non-pecuniary damages:

\$80,000 to \$100,000

Past loss of capacity:

\$10,000 to \$15,000

Loss of future earning capacity:

\$90,000 to \$140,000

Cost of future care:

\$40,000

Special damages:

\$13,949.55

Total

\$233,949.55 to \$308,949.55

- [99] The plaintiff reviewed the various effects the accident injuries have had on her. She does not make a separate claim for loss of housekeeping capacity, but asks that this loss be taken into account in the assessment of non-pecuniary damages. She cited the following cases in support of her claim for non-pecuniary damages: *Kuras v. Repo*, 2014 BCSC 1634; *Lauriente v. Schoonhoven*, 2017 BCSC 2246; *Block v. Schmitt*, 2019 BCSC 1575; *Woelders v. Gaudette*, 2016 BCSC 1066 and *Blackman v. Dha*, 2015 BCSC 698. The plaintiff submitted that *Kuras v. Repo* was the closest on point.
- [100] Ms. Floris' past income loss is a loss of capacity claim, not a calculated claim. The plaintiff notes that the loss has three components: (1) the lost work shift the day after the accident; (2) her lost earnings from the Abbey Road restaurant, which were lost when she found she could not handle the two jobs she was working; (3) the less lucrative shifts she worked at both Sammy J. Peppers and S+L.
- [101] As for future earning capacity, Ms. Floris submits she satisfies all of the factors set out in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.), and so she meets the test for an award. There are now employment avenues that are closed to her and there is a reasonable prospect she will lose income from that and from the employment she is able to handle. For this head of damages, counsel cited cases involving relatively youthful plaintiffs, where the loss was assessed by reference to several years of annual earnings, and suggested two or three years of earnings at the earnings level of a care aide would be appropriate.
- [102] As for cost of future care, the plaintiff submitted several variations of future costs and applied present value tables to arrive at a present value to age 65.
- [103] Only one component of special damages is in dispute, that being the amounts paid for kinesiology services. On that issue, the plaintiff points out that she went to a kinesiology facility on the recommendation of a health care professional and so she should be entitled to recover the cost.

B. The Defendant

- [104] The defendant emphasized that he does not dispute that Ms. Floris suffered injuries. The issue in this case is the extent to which those injuries have actually affected the plaintiff's life.
- [105] The defendant noted: (1) Ms. Floris only lost one day of work; (2) she said she often felt "completely better" after a chiropractic treatment; (3) she managed to perform her duties at restaurants without accommodations from the employers; (4) even with the knowledge of

the physical demands of care aides Ms. Floris chose to embark on that job as a career; (5) she acknowledged that she has good days and bad days, and a "good day" is one where she ends the day in no pain; (6) she has not sought any help for her driving anxiety or lower energy levels; and (7) it is possible that her symptoms will improve.

[106] On non-pecuniary damages, the defendant cited the following cases: *Lawrence v. Parr*, 2004 BCSC 2004; *Randhawa v. Chiang*, 2014 BCSC 631; *Kostecki v. Li*, 2014 BCSC 1056; and *Maltese v. Pratap*, 2014 BCSC 18. The defendant said *Randhawa v. Chiang* is the closest to the case at bar.

[107] On past loss of income, the defendant notes that Ms. Floris held down two jobs for only a limited period of time, and it is likely she could not have kept up that level of work in any event. As for the claimed losses associated with working less lucrative shifts, this claim lacks substance or specifics founded in the evidence and is therefore too speculative to be a basis for an award. The defendant conceded the plaintiff should be awarded a sum representing one day's income from the Abbey Road restaurant.

[108] As for loss of future earning capacity, again the defendant submits the impact her symptoms may have on her future vocation is too much of an unknown to justify an award. In the years after the accident, the plaintiff has demonstrated the capacity to work full-time, or to go to school full-time, and so without more concrete evidence there is no proper basis on which an award should be made.

[109] As for cost of future care, the defendant referred to several items that were recommended by Dr. Sangha and suggested an amount in the range of \$1,500 to \$2,500 would suffice to cover those costs.

[110] Finally, on special damages the defendant agrees to items totalling \$7,855.60, but objects to a substantial component of the kinesiology cost. The defendant says Ms. Floris had 69 kinesiology sessions, far more than was needed to get exercise guidance or to elevate her fitness level. Instead, these were essentially structured personal training workouts for her. These sums should be disallowed.

[111] The defendant submits the following would be appropriate awards in this case:

Non-pecuniary damages:

\$40,000.00

Past income loss:

One work shift

Loss of future earning capacity:

0

Cost of future care:

1,500.00

Special damages:

7,855.60

Total:

\$49,335.60

IX. Discussion

A. Credibility and Reliability

[112] I found Ms. Floris to be an honest, forthright witness. She did not exaggerate, she reasonably conceded points that operated against her interests, and her testimony accorded well with that of collateral and medical witnesses.

B. Findings

[113] I am satisfied Ms. Floris suffered injuries to her neck, upper back and lower back that have caused significant pain and discomfort since the subject accident. While her symptoms have fluctuated in severity such that she has both "bad days" and relatively "good days", her symptoms nonetheless affect most areas of her life. Her injuries and symptoms give rise to severe headaches once or twice a week and these interfere with her sleep. The accident also caused what I would describe as a mild to moderate driving anxiety.

[114] The injuries and their after-effects have caused her to change her lifestyle significantly. Formerly, she was an active individual who enjoyed running, advanced yoga and vigorous outdoor activities. Now, her activities are mostly sedentary in nature. This has had negative consequences for her social relationships.

[115] I conclude as well that Ms. Floris' injuries and symptoms have interfered with her ability to work. I accept her evidence in this regard, which was confirmed in most material respects by the testimony of Ms. Gajdamowicz, who I found to be a good witness. I will return to this subject later.

[116] There was very little difference between the medical opinions proffered by the parties. Dr. Adrian said Ms. Floris experiences persistent regularly occurring and physically limiting pain involving her spinal column. He said she would probably continue have difficulty performing activities that involve her spinal column and, specifically, she would likely continue to have difficulty with activities that involve (1) prolonged sitting, standing, stooping, and walking; (2) impact activities; (3) heavier or prolonged carrying and lifting; (4) prolonged or repetitive reaching; and (5) repetitive motion of the neck. He concluded Ms. Floris was permanently partially disabled due to the accident-related injuries.

[117] Dr. Adrian concluded the prospects for further recovery were poor.

- [118] Dr. Sangha's opinion was very similar, although he also proposed some different treatments that he said may result in some further improvement, although in saying that he used the term "hopefully". Dr. Sangha said the overall prognosis was "guarded".
- [119] The defendant seized upon Dr. Sangha's mention of possible further improvement and made submissions based on that. However, the language Dr. Sangha used was one of hope rather than of any firm or even reasonable prospect. It does not offer much of a foundation for the defendant's argument on this issue.
- [120] I accept the opinions of both Dr. Adrian and Dr. Sangha.

C. Non-Pecuniary Damages

- [121] I have reviewed the cases cited by the parties. In general, I found the cases cited by the plaintiff to be much closer to the mark than those cited by the defendant. The defence cases, which assessed non-pecuniary damages between \$32,000 and \$42,000, involved: (1) a plaintiff who suffered regular myofascial pain symptoms for about a year, but just occasional flare-ups after that (*Lawrence v. Parr*); (2) a plaintiff whose symptoms resolved in two of the three areas of complaint, with the symptoms in the remaining area being "episodic" and likely to improve (*Randhawa v. Chiang*); (3) a plaintiff whose symptoms had improved by 85 percent and were still improving (*Kostecki v. Li*); and (4) a plaintiff whose symptoms were expected to improve with conditioning, who had failed to mitigate his damages by taking treatment, and who was nonetheless still able to play hockey and golf (*Maltese v. Pratap*). These cases are really quite different from the case at bar.
- [122] The plaintiff asks that her claim for loss of housekeeping capacity be dealt with as part of non-pecuniary damages. This accords with the law on the subject, which I recently summarized in *Javan Parast v. Curry*, 2020 BCSC 877:
- [251] The law relating to loss of housekeeping capacity was discussed by the Court of Appeal in both *O'Connell v. Yung*, 2012 BCCA 57 [O'Connell] and *Kim v. Lin*, 2018 BCCA 77 [Kim].
- [252] In *O'Connell*, the court said:
- [67] As I understand the principle, it is the loss of a capacity - an asset - that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required .
- [253] In *Kim*, 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.

[123] I am satisfied that Ms. Floris has suffered a loss of capacity to do heavier household tasks or tasks that involve movements away from her body (reaching, and painting). I have reflected that loss of capacity in my assessment.

[124] Based on the findings I summarized earlier, and having considered the various factors set out in *Stapley v. Hejslet*, 2006 BCCA 34, I assess non-pecuniary damages at \$85,000.

D. Past Loss of Earning Capacity

[125] The plaintiff submits there are three aspects to her claim for lost income or lost income-earning capacity:

- a) one work shift lost at the Abbey Road restaurant following the accident;
- b) her inability to work at Abbey Road (in addition to her other job), which prompted her to resign that part-time employment; and
- c) her inability to work the more lucrative closing shifts at both the Sammy J. Peppers and S+L restaurants.

[126] The defendant acknowledges the loss associated with the one lost work shift, but says: (1) Ms. Floris would not have continued to work at Abbey Road while working at Drumeo during the week because that schedule was not sustainable; and (2) the evidence about the differential in earnings between swing shifts and closing shifts is too vague, uncertain and speculative to warrant any award.

[127] The evidence from Ms. Floris is that she resigned her weekend employment at the Abbey Road restaurant in September 2015, four months after the accident, because she found the restaurant work to be too physically demanding. She was already struggling at her regular employment at Drumeo, work that was much more sedentary in nature. I accept this evidence.

[128] The plaintiff's claim under this heading involves a hypothetical question: What would the plaintiff have done but for the accident? As the Court of Appeal noted in *Grewal v. Naumann*, 2017 BCCA 158:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere

speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

- [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.
- [129] I am satisfied that the plaintiff has shown she might well have continued to work at Abbey Road on weekends up to the point she moved to Kelowna in May 2016. She was young and fit and, as I accept, had and has a strong work ethic. I also note her pay rate at Drumeo was not much more than minimum wage, which is not an easy income level to live on. While she might not have worked two full shifts at Abbey Road every weekend - which would have left her without any days off - I conclude there is a substantial possibility she would have worked at least one shift each weekend.
- [130] The plaintiff assesses this loss by using the average of her Abbey Road earnings from March 2015 until she resigned in September 2015, which is \$573 per month. Using the plaintiff's suggested figure of \$125 in earnings per shift (though the actual range of per-shift earnings is wider than that), this average reflects about 4.5 shifts per month, or just over one shift per weekend. This appears to be a reasonable average. The resulting total is about \$4,000 over seven months, which is the length of time between her resignation at Abbey Road and her move to Kelowna.
- [131] There are a few contingencies. Ms. Floris might have taken some weekends off, and restaurants tend to be slower in winter. Taking these matters into account, I assess this aspect of her loss at \$3,000.
- [132] The final aspect of the claim for past loss of capacity relates to the type of restaurant shifts Ms. Floris worked. The plaintiff says she took either "first cut" or swing shifts rather than the more lucrative closing shifts because the latter were too physically demanding. She says this qualifies as a lost capacity to earn income.
- [133] The defendant says the evidence on the point is too uncertain. He notes that earnings of servers varied for a number of reasons not necessarily tied to the type of work shift, and on an earlier shift Ms. Floris might sometimes have made more than she would have done on a closing shift.
- [134] I agree that, on the evidence, the earnings of servers varies quite a bit, but what was clear from the evidence was that closing shifts were generally more lucrative. As Ms. Gajdamowicz put it, "closers" are at the restaurant for the longest time and they have the best sections, so they usually make more money than those servers who work other shifts.

[135] The evidence also establishes that Ms. Floris either chose, or was given, less lucrative shifts because she could not handle the burdens of longer shifts. The evidence on this point was as follows:

- a) May 2016 to September 2016 (Kelowna): Ms. Floris said she worked about 30 hours a week at Sammy J. Peppers, and after her shifts all she could manage was to shower, lay down and put ice packs on her sore areas. Ms. Thomson said that even though Ms. Floris wanted to make money she usually asked to be "first cut" at the restaurant;
- b) September 2016 to September 2017 (Abbotsford): After a month-long stint back at Abbey Road, Ms. Floris began work at S+L. She said she had to do closing shifts at S+L at the beginning of her time there, and after these shifts she would be sore in her upper neck and back. She was then assigned swing shifts for much of the next year, which I took to mean 2017;
- c) September 2017 to December 2017 (Kelowna): Ms. Floris secured work at another restaurant, working three or four shifts a week. At this restaurant she was given "almost all" closing shifts and found that she had to retreat to the bathroom "almost every shift" to relieve the pain;
- d) January 2018 to August 2019 (Abbotsford): Ms. Floris resumed work at S+L. She was assigned either swing shifts or early start shifts, four or five times a week. These shifts were four to seven hours in duration. Ms. Gajdamowicz noted the difficulty Ms. Floris had with closing shifts and so she accommodated her by scheduling her for less strenuous shifts; and
- e) September 2019 to present: Ms. Floris testified she tried to work both Saturdays and Sundays at S+L while she was going to school, but found it too physically and mentally demanding, and she was left with insufficient time to complete her schoolwork. Currently, she works at S+L one day a week, either a swing shift or an early start shift, which typically gives her between 4 to 7 hours of work. Ms. Gajdamowicz confirmed that since Ms. Floris started school she has worked swing shifts on Saturdays. This is a five or six hour shift that starts at 2 pm.

[136] Based on the foregoing, I am satisfied that Ms. Floris' injuries impaired her ability to work the more lucrative but also more demanding work shifts, and that she would likely have worked those shifts had the accident not occurred. Although the defendant argues the plaintiff was able to work the more demanding shifts, in the case of the second Kelowna stint that came at a cost of her having to retreat to the bathroom for pain relief in order to get through the shift. Although a plaintiff must take reasonable steps to mitigate a loss, this does not mean that she must suffer undue pain or sacrifice other aspects of her life to do so.

[137] Based on the largely uncontradicted evidence in this case, I am satisfied that Ms. Floris was and is not reasonably capable of working the more demanding, but more lucrative, restaurant shifts. I am also satisfied she would likely have worked these shifts had the accident not occurred. She has therefore suffered a loss.

- [138] The plaintiff suggests the loss may be assessed by assuming that in each bi-weekly pay period she would have worked two to three extra closing shifts, worked one extra hour per shift, and earned \$50 more in tips per shift. This translates into additional earnings of about \$120 to \$188 for each bi-weekly pay period. For a 24-month period, these lost earnings would total between \$6,200 and \$9,750.
- [139] While this loss is not capable of precise arithmetic calculation, I conclude the plaintiff's approach provides a reasonable basis for an assessment. As for adjustments or contingencies, I again note the possibility of less work at certain times of the year as well as the prospect that she might have taken time off, but against those matters is the fact that the relevant period of loss appears to be closer to 36 months than to the 24 months postulated by the plaintiff.
- [140] Doing the best I can on the available evidence, I conclude that \$12,000 is fair assessment of Ms. Floris' loss of past income-earning capacity. For clarity, that \$12,000 sum includes the \$3,000 assessed earlier.

E. Loss of Future Earning Capacity

- [141] For convenience, I summarize the law in this area by adopting my summary from *Ali v. Padam*, 2017 BCSC 1849:
- [246] In *Perren v. Lalari*, 2010 BCCA 140, the court reviewed the law relating to loss of future earning capacity and concluded as follows:
- [32] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original.]

- [247] If the future loss cannot be more easily measured in a pecuniary way, the proper approach is to assess the loss as a form of capital asset by considering the factors set out in *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [*Brown*], which were endorsed by the Court of Appeal in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393. In *Brown* the court said the proper inquiry is whether:

- a) the plaintiff has been rendered less capable overall from earning income from all types of employment;
- b) the plaintiff is less marketable or attractive as an employee to potential employers;
- c) the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
- d) the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[248] In *Morgan v. Galbraith*, 2013 BCCA 305 [Morgan] the Court of Appeal provided further guidance when assessing future losses using the capital asset approach:

[56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.

[142] Given the evidence as a whole, and in particular the medical evidence detailing Ms. Floris' physical limitations, I am satisfied that there is a real and substantial possibility of a future event that will lead to an income loss on her part. These limitations have led to an income loss in her career as a restaurant server, and there is a real and substantial possibility they will also lead to an income loss in future careers, whether due to additional time away from work or because of limitations in the type of work she can take on.

[143] I appreciate that Ms. Floris has chosen a career that physical work of a type that she may not be able to handle in the long term. Both Dr. Adrian and Dr. Sangha expressed concerns about Ms. Floris' ability to tolerate the heavy work of a care aide, or even the work of a nurse. However, this does not detract from the fact that she is permanently partially disabled (as Dr. Adrian concluded) and, in fact, it highlights the loss of capacity she has suffered.

[144] Since this loss cannot be readily measured in a pecuniary way, then it must be assessed using the capital asset approach. On this point, I am satisfied that Ms. Floris meets all the *Brown v. Golaiy* factors. She is less physically capable overall, she is less marketable and attractive to employers, she cannot take advantage of all job opportunities that may come her way and she is less valuable to herself in a competitive labour market.

- [145] The plaintiff submits that since Ms. Floris is relatively young and has not established a clear career path, this loss should be assessed based on two or three years' income as a care aide. Since the current pay rate for care aides results in an annual income of about \$48,000 per year, the plaintiff suggests an award in the range of \$90,000 to \$140,000.
- [146] The authorities establish that in cases involving young persons with no established career, the assessment of damages for loss of future earning capacity is more at large than it is a calculation or similar measurement: *Sinnott v. Boggs*, 2007 BCCA 267. In *Pallos v. I.C.B.C.* (1995), 53 B.C.A.C. 310 [Pallos], Finch J.A. said (at para. 43) that in some cases the assessment of this type of loss may be made by awarding the plaintiff's annual income "for one or more years". In that case, the court awarded the equivalent of about one year's income. Other cases have awarded or endorsed awards equivalent to of two years' income (*Romanchych v. Vallianatos*, 2010 BCCA 20) and three years' income (*Miller v. Lawlor*, 2012 BCSC 387).
- [147] In *Pallos*, the plaintiff had established a partial permanent physical disability that could have an effect on his employability and capacity to work. Even though he earned more after the accident than he did before, the court found there was a compensable loss of future earning capacity.
- [148] Taking all of the relevant factors into consideration, I conclude that Ms. Floris' loss of future earning capacity should be assessed by reference to two years' income. The plaintiff puts her expected annual income at \$48,000 per year, but this assumes full-time work (40 hours per week for 52 weeks a year), without accounting for any negative contingencies, including typical labour market contingencies. It may be, for example, that she would not secure full-time, full-year work immediately after finishing her training. I conclude \$40,000 is a more appropriate figure.
- [149] Accordingly, I assess damages for loss of future earning capacity at \$80,000.

F. Cost of Future Care

- [150] Dr. Sangha made several treatment recommendations, including trigger point injections, use of a TENS unit, a trial of medications used in myofascial pain and a six-week course of active rehabilitation. He recommended decreasing chiropractic treatments to avoid dependency, whereas Dr. Adrian felt it would be reasonable for Ms. Floris to continue with chiropractic treatments if she continued to experience short-term benefit from them.
- [151] The plaintiff noted that, in addition to those treatments, she uses over-the-counter medication, as needed, to control her pain.
- [152] The plaintiff approaches the problem of quantification in a very generalized fashion, calculating that 26 chiropractic treatments per year bring about a present value cost of about \$39,000 for age 65. She then compares it to the cost of medication, based on certain assumptions (though I note prior usage was largely unproven), which results in a present

value figure of about \$36,000. The plaintiff says, one way or another, she will need pain relief, whether by medication or by chiropractic treatment. Adding amounts for trigger point injections, TENS machine and pads and brief rehabilitation program results in a figure of \$40,000 for her cost of future care claim.

- [153] The defendant submits the sum of \$1,500 (later increased in submissions to \$2,500) would be sufficient to account for some ongoing chiropractic treatments, the use of medication not otherwise covered by benefits, the purchase of a TENS machine and a short course of active rehabilitation.
- [154] It is very difficult to assess these future care costs given the uncertainties. For example, Dr. Sangha was unable to give an estimate for the number of trigger point injections needed because the efficacy of these injections ranges from "no effect" to relief lasting several months. The TENS machine (which requires pads that have to be replaced) may or may not provide relief. If it does not, then new pads will not be needed. The same with the prescription medications, which may or may not work. Finally, it is difficult to assess the future cost of over-the-counter medications as there is no accurate figure for the plaintiff's current usage.
- [155] I accept the need for certain treatments, those being trigger point injections (which, despite the uncertainties, I assess at \$500), TENS machine and some supply of pads (assessed at \$250), six to twelve active rehabilitation sessions (at a median cost of \$693), and a trial of myofascial pain medication (assessed at \$500). I also accept that the plaintiff will likely incur costs for over-the-counter medication, and I conclude that \$2,000 is adequate to cover that cost.
- [156] As to chiropractic treatments, I conclude it is not reasonable to award the cost of regular chiropractic treatments to age 65, as sought by the plaintiff. I prefer the opinion of Dr. Sangha, who thought it best that the plaintiff wean herself from these treatments. I accept that occasional (but not regular) chiropractic treatments might still be appropriate, and I conclude that \$2,000 is a reasonable sum for those.
- [157] The total of those items is \$5,943, which I round to \$6,000 for the award under this head of damages.

G. Special Damages

- [158] The only disputed expenses here relate to the 69 kinesiology treatments claimed by the plaintiff. According to the defendant, the cost of those treatments and associated mileage totals \$6,093.95. Items totalling \$7,855.60 are conceded.
- [159] The plaintiff said she went to a kinesiology facility on the recommendation of her chiropractor. The defendant objects to these on the basis that the plaintiff used them, in effect, as personal training sessions or as an "expensive gym". No medical practitioner prescribed that volume of treatment.

[160] There is merit in both submissions. While Ms. Floris can rightly rely on her chiropractor's recommendation, at some point she should have realized that she could and should continue the same exercises in a much less expensive manner.

[161] Dr. Sangha's recommendation of 12 kinesiology sessions (six weeks, one or two times per week), provides some general guidance about what might be reasonable. Recognizing that Ms. Floris is, of course, not a medical professional, I consider that she should have realized the excessive nature of the expense after perhaps 20 sessions. I would therefore allow the cost of 20 of the 69 sessions, or 29 percent of the total cost of \$6,093.95. That sum is \$1,766. Adding that sum to the conceded items, the amount allowed is \$9,621.60.

X. Conclusion

[162] I award damages to the plaintiff as follows:

Non-pecuniary damages:

\$85,000.00

Loss of past income-earning capacity:

12,000.00

Loss of future earning capacity:

80,000.00

Cost of future care:

6,000.00

Special damages:

9,621.60

Total:

\$192,621.60

[163] The parties have leave to address any adjustments that may be needed to finalize the award.

[164] Unless there are matters the parties wish to bring to my attention, the plaintiff will have her costs of this action at Scale B.

"Blok J."

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CASE PAGE <https://chat.esheria.ai/case-law/canada/floris-v-castillo-2020>

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