
CANADA / JUDGMENT

Gabert v. Krist

2018 BCSC 2109

COURT

Supreme Court of British Columbia

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2018 BCSC 2109 Gabert v. Krist

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gabert v. Krist,

2018 BCSC 2109

Date: 20181129

Docket: M154983

Registry: New Westminster

Between:

Nadine Helen Gabert

Plaintiff

And

Jason Arthur Krist and

Canadian Dealer Lease Services Inc.

Defendants

Before: The Honourable Madam Justice Devlin

Reasons for Judgment

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Place and Dates of Trial:

New Westminster, B.C.

September 6-7, 10-14

and 17-20, 2018

Place and Date of Judgment:

New Westminster, B.C.

November 29, 2018

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I. introduction

- [1] On the morning of November 4, 2011, the plaintiff, Nadine Gabert, and her husband Howard had just set out on their annual Christmas shopping trip to Portland, Oregon, USA, when their vehicle was rear-ended as they were stopped at a red light at the intersection of 176 Street and 96 Avenue in Surrey, BC. Unfortunately, their shopping excursion came to an abrupt end and Ms. Gabert's life took a dramatic change. The defendant admits liability for the accident.
- [2] Ms. Gabert seeks an assessment of damages for injuries suffered in the collision. Specifically, she is seeking non-pecuniary damages, as well as compensation for loss of past and future earning capacity, loss of housekeeping capacity, costs of future care and special damages.
- [3] The defendant concedes that Ms. Gabert was injured in the collision. However, he disagrees with her about the nature, extent and impact of her injuries. He concedes that Ms. Gabert is entitled to some damages but primarily challenges the claims for past and future earning capacity and costs of future care.

II. background facts

Ms. Gabert's Circumstances Prior to the Collision

- [4] Ms. Gabert is 71 years-old and has been married to her husband Howard for 49 years. They have lived in the family home in Burnaby, BC, for over 40 years and that is where they raised three happy and healthy daughters. They now have seven grandchildren who are cherished by their loving grandmother Ms. Gabert.
- [5] Ms. Gabert received a Bachelor of Education in 1969 and taught until she took time out to raise her three daughters. She returned to work as a teacher in 1986 and obtained a degree in Early Childhood Education in 1991. Despite her love of teaching, Ms. Gabert retired from full time teaching in 2006 at the age of 59. Her plan at the time was to spend more time with her family and to travel with her husband who has also retired. However, her love of teaching drew her back to work as a part-time teacher or teacher on call ("TOC") for the school years in 2007, 2008 and 2009. She ceased working in a TOC capacity after three years because other aspects of her life required her attention. She was caring for her elderly parents and travelling to visit her three daughters and their growing families all of whom lived outside the lower mainland.
- [6] Ms. Gabert was a happy, busy retiree who enjoyed her family and friends. Family was of paramount importance to Ms. Gabert and she cherished the time she spent with her grandchildren. She was very much hands-on and well-engaged with her family. Ms. Gabert was close to her three daughters and enjoyed travelling to visit them and enjoyed receiving them when they came to stay at the family home. She enjoyed cooking, baking and hosting people at her home. Ms. Gabert was the true matriarch of her family. She hosted large family dinners at her house and was known for her ability to organize, host and otherwise entertain large family gatherings. To friends and family, she was the consummate hostess. She also enjoyed entertaining her friends at her home and playing cards. She was also active outside of the home, she went on walks, went out on shopping excursions with girlfriends, played golf, went to concerts and enjoyed a host of other recreational activities. When she retired, she enjoyed getting together with other retired teachers and friends to socialize. She was surrounded by loving family and friends and was very popular. She was happy.
- [7] Ms. Gabert performed all of the housekeeping tasks around the house. She was proud of her home and kept it very clean and organized. She did the grocery shopping, prepared the meals and cleaned-up. While her husband did the majority of yard work she assisted by trimming the bonsai junipers, which was a multi-year project.

- [8] When they retired, Ms. Gabert and her husband purchased a recreational vehicle ("RV") so that they could go on travel adventures for months at a time, or as Ms. Gabert described it as "gypsing". She described how they travelled all over Arizona sightseeing and meeting new people. Her plan was to continue to travel with her husband to warmer climates during the winter as "snow birds" and to expand their travel to include Europe and embarking on cruises. Ms. Gabert described her future as exciting.
- [9] Ms. Gabert was a healthy 64 year-old woman at the time of the accident. While she had some medical issues in the past, none of these were problematic. She had a history of migraine headaches which had been effectively treated with Botox. Since her early 30's she has taken medicine for coronary artery spasms. She did not suffer any side-effects from the medication. More recently, in August 2011, she had surgery for a bowel issue. Despite some post-operative set-backs, Mr. Gabert had recovered well from surgery. It is important to note that none of Ms. Gabert's pre-existing health issues restricted her lifestyle in any manner.

The Accident

- [10] On November 4, 2011, Ms. Gabert and her husband were excited about their Christmas shopping trip in Portland, Oregon as they had recently won a \$500 voucher which they intended to use on their trip. Mr. Gabert was the driver and Ms. Gabert was the passenger. At approximately 8 a.m. while they were stopped for a red light, their vehicle was rear-ended and pushed into the intersection.
- [11] Ms. Gabert testified that she heard a sound and then felt intense pain across her back. She could see glass on the dashboard and thought to herself "this is bad". She realized the car was in the middle of the intersection. She only has a vague memory of what took place at the crash scene but knows that she and her husband were both transported by ambulance to Surrey General Hospital. Mr. Gabert also described the collision. The impact broke the back of his seat which caused him to fall backwards. He ending up lying flat on his back.
- [12] Ms. Gabert testified that she was in pain and it seemed to have crept up to her neck and the base of her skull. At the hospital she was given a shot for her pain. Throughout the day and into the next day, she felt the pain creeping throughout her body. After several hours both Ms. Gabert and her husband were released from the hospital and taken home by her sister Faye.
- [13] Counsel tendered photographs of the Gabert vehicle at trial. The damage to the vehicle was extensive and beyond repair.

Ms. Gabert's Circumstances after the Accident

- [14] Ms. Gabert testified that immediately after the accident she felt overwhelming pain that became progressively worse. She described the pain as "crushing skull pain" which was situated around the base of her skull, down across the centre of her back, into her shoulder blades and collarbone area. The day after the accident, she developed tinnitus which is persistent. She also experienced pain in her arms and numbness in her feet.
- [15] Ms. Gabert saw her family doctor, Dr. Tai, the Tuesday following the weekend accident. She continues to see Dr. Tai regularly since the accident.
- [16] Ms. Gabert's neck pain has persisted since the accident and she was forced to adapt her body movement to reduce the amount of movement in her neck. I observed Ms. Gabert testify and it was obvious to me that she was restricted in her movements. The neck pain also causes nausea and dizziness. She has obtained some relief from the nausea with medication and she did obtain some relief from the neck pain through injections. However, she found the treatment experience frightening and testified that she was too scared to try it again. The "crushing skull pain" is a headache that is markedly different from the migraine headaches she had in the past. These headaches are debilitating.
- [17] Ms. Gabert's sleep pattern has also been altered. For months following the accident she could barely sleep as the pain was too intense and she was unable to get comfortable. Ms. Gabert takes sleep medication which enables her to sleep four to five hours per night as compared to the seven-and-a-half hours she would have slept prior to the accident.
- [18] In addition to the pain and headaches, Ms. Gabert has developed chronic fatigue which she describes as "overwhelming". On a good day, Ms. Gabert may have enough energy in her "energy envelope" to be outside the house for three to four hours before she is overcome with fatigue and requires rest and recovery time. Ms. Gabert also experiences full body pain, which while it overlaps with her neck and back pain, creates a different sensation. In November 2011, Ms. Gabert started physiotherapy once every two weeks which provided some relief from the pain. More recently, with the retirement of her regular physiotherapist she has not found the treatment as helpful and she continues to search for a replacement for her physiotherapist. She has also tried massage and acupuncture which provides some relief, albeit temporary only. She testified that she would be willing to explore any type of treatment that may provide her with some relief from her pain and fatigue but is mindful of the fact she only has so much energy in a day which she cannot unduly expend going from one treatment to another.
- [19] In late 2013, Ms. Gabert was seen by Dr. Arseneau at the Rapid Access Clinic at St. Paul's Hospital and continued to see him at the Complex Chronic Disease Program ("CCDP") which is at the BC Women's Hospital. As will be discussed later in these reasons, Dr. Arseneau has diagnosed Ms. Gabert's condition as chronic fatigue syndrome and fibromyalgia.

- [20] Ms. Gabert has managed to wean herself off the opioids that were originally prescribed for her pain. She realized that the medication only masked her pain temporarily. However, she continues to take a host of medications to deal with her pain, nausea and sleep disorder.
- [21] I had the benefit of hearing from Ms. Gabert's husband Howard Gabert, her three daughters and several of Ms. Gabert's friends and former colleagues. Ms. Gabert's evidence about her pre-accident lifestyle and the impact her injuries have had on her life was corroborated by these witnesses. Collectively, they provided me with a portrait of Ms. Gabert as she was before the accident and testified to the dramatic change that attended every aspect of Ms. Gabert's life since the accident. While the nature of their relationship may differ, their descriptions of Ms. Gabert and her limitations post accident were remarkably similar so I need not detail all of their evidence. Collectively, their evidence established that Ms. Gabert is no longer the happy, energetic, confident woman ready to do anything who is capable of engaging in spontaneous activities. More often than not she will cancel at the last minute because she does not have the energy to engage with anyone outside of her home. Every aspect of Ms. Gabert's life is now structured and pre-planned. While Ms. Gabert has continued to travel as a "snow bird" with her husband during the first three months of the year, her enjoyment of travel has been dramatically altered. Rather than engaging in activities, Ms. Gabert remains largely sedentary whether she is at home or away. Every aspect of her life is now made contingent on the degree of pain and her energy level that she has at any given moment.
- [22] Since the accident, two of her daughters have moved back to the Vancouver area. Her daughter Andrea continues to reside in Boston. The time Ms. Gabert spends with her daughters and their family are dramatically different than before the accident. Rather than arriving at her daughters' home and taking over to provide her daughters rest, she is now the one in need of rest. Rather than taking care of her daughters, she is now the one who is taken care of by them. She can no longer physically engage with her grandchildren and is unable to play with them. She is only capable of sitting and watching them as they play but sometimes even that is too taxing for her.
- [23] The change in Ms. Gabert has been profound. I found Mr. Gabert's description of the extensive planning required so that Ms. Gabert could attend a Cirque du Soleil matinée event with her family is a powerful example of the fundamental change Ms. Gabert experienced. Mr. Gabert described how in advance of the event every stage of the day was planned out in minute detail. Every movement was choreographed with a view to the potential impact it would have on Ms. Gabert's well-being. Contingencies were put in place in the event Ms. Gabert's energy declined. While Ms. Gabert and her family enjoyed the day out together the stress and worry as to whether Ms. Gabert would be well enough to attend and whether the event would exhaust her was constant. Mr. Gabert described it as the best day for the family in three or four years. I found this description a striking contrast to the portrayal of Ms. Gabert pre-accident where this type of activity would not only have been routine for Ms. Gabert, she would have been the one to plan every aspect of the event for the

benefit and enjoyment of her family.

- [24] The Gaberts' relationship with one another has also been impacted and their long marriage has undergone considerable strain. Ms. Gabert testified at times that they were living in the same house but essentially apart. Mr. Gabert also testified that their relationship has gone through various phases some better than others and as Ms. Gabert's chronic pain developed he at times felt "cranky" towards her and the situation. They both testified that they were looking forward to their retirement years and to some time to travel. In particular, once retired, they planned to have Ms. Gabert travel with Mr. Gabert to his baseball team tournaments. Of course, that has not happened since the accident. Ms. Gabert is now completely dependent on Mr. Gabert who has now assumed the caregiver role.
- [25] Ms. Gabert was proud of her home and took great pleasure in ensuring her home was kept clean and orderly. Since the accident she is unable to maintain her household to the extent she was able to in her pre-accident capacity. She is now only capable of doing minimal housekeeping such as light dusting. Other more strenuous cleaning causes her pain and exhaustion. The household chores are now left for Mr. Gabert or other family members.

III. Expert evidence

- [26] The plaintiff led evidence from a number of medical experts. While I have read the experts' reports and considered their viva voce testimony, I will not review the medical evidence in detail. I will however detail the key findings and opinions of the medical experts.
- a) Dr. Linda Tai
- [27] Dr. Tai is a General Practitioner and has been Ms. Gabert's family doctor since 2003. Dr. Tai prepared a medical narrative report and opinion dated December 15, 2014, which was filed as an exhibit at trial. Dr. Tai was very familiar with Ms. Gabert's medical history and reported that she did not have any previous musculoskeletal issues prior to the accident.
- [28] Dr. Tai first saw Ms. Gabert four days after the accident on November 8, 2011. Dr. Tai conducted an examination of Ms. Gabert and determined that she had significant neck pain which felt very tight and radiated down to her lower back. In addition, her neck examination showed very limited range of motion in all directions and she had tenderness on palpation over her paracervical, trapezius, interscapular and parathoracic muscles. Dr. Tai concluded that Ms. Gabert has significant soft tissue injuries to her neck, thoracic and lumbar area. Dr. Tai recommended she apply alternating heat and ice to her neck and lower back and do some gentle stretching. She also referred her for physiotherapy treatments and to return in two weeks for a follow-up.
- [29] Dr. Tai's report details Ms. Gabert's subsequent visits throughout 2011 and regularly through to the date of the report. Ms. Gabert continued to have significant restrictions in her neck mobility and has persistent pain in her head, neck and lower back areas. Dr. Tai's report details the many pain medications she prescribed and the referrals she made to several

specialists for further investigation into Ms. Gabert's ongoing pain and headaches. These included: Dr. Simonett, a Physical Medicine specialist; Dr. Demco, for a posterior vitreous detachment in her eye; Dr. Woolfenden, for her facial pain and headaches; Dr. Reynolds, a Rheumatologist; and Dr. Arseneau at the pain clinic. In Dr. Tai's opinion, Ms. Gabert sustained soft tissue injuries to her neck, back and shoulder area. As of the date of the report, Ms. Gabert's issues and diagnosis include the following:

1. Chronic pain which is mostly in her neck region;
2. Cervicogenic headaches;
3. Tinnitus and vertigo;
4. Poor sleep; and
5. Altered mood due to pain and restricted function.

[30] Dr. Tai's prognosis for a full recovery was guarded. In Dr. Tai's opinion, Ms. Gabert will most likely continue to have some degree of chronic pain and concluded at page 6 of her report as follows:

I think she will continue to have some degree of disability which will affect her ability to perform her household tasks and her leisure activities. I believe she will continue to require physiotherapy treatments and may require further trigger point injections, Botox injections to help with her headaches and neck pain.

[31] Dr. Tai also opines that Ms. Gabert will need to continue with her various medications although these may be altered as her condition progresses. In cross-examination Dr. Tai agreed that she encourage patients to be as active as possible.

b) Dr. Arseneau

[32] Dr. Arseneau is a specialist in Internal Medicine and was qualified to provide expert opinion evidence in the area of internal medicine, particularly with regard to the assessment and treatment of central sensitivity syndromes, including fibromyalgia and chronic fatigue syndrome. He has over 20 years of clinical experience dealing with myalgic encephalomyelitis, chronic fatigue syndrome, fibromyalgia and other related sensitivity syndromes.

[33] Dr. Arseneau first saw Ms. Gabert in November 2013 at the St. Paul's Hospital Rapid Access Clinic. Based on Ms. Gabert's self-report, he concluded that Ms. Gabert was functioning well before the collision which was confirmed by his review of Dr. Tai's records. After the accident, Ms. Gabert experienced a number of painful areas. The pain then developed everywhere. After his meeting with Ms. Gabert, reviewing of her medical history and his consideration of her chronic pain, Dr. Arseneau concluded that Ms. Gabert's pain is consistent with fibromyalgia and chronic pain syndrome. Dr. Arseneau continued to treat Ms. Gabert after he transferred to the CCDP located at the BC Women's Hospital, in 2015. Dr.

Arseneau explained that Ms. Gabert's energy level is neither consistent nor reliable from day to day due to her disabling fatigue and post-exertional malaise. Given the duration and severity of her symptoms he opines her long-term prognosis is poor.

- [34] Dr. Arseneau also explained the challenges associated with diagnosing and treating those with chronic fatigue syndrome and fibromyalgia. The challenge is due to the fact that these syndromes which are just two of many central sensitivity syndromes, "don't have abnormalities that can be seen with a microscope or picked up by usual medical tests". Hence, the diagnosis is often met with skepticism from others in the medical field. Dr. Arseneau explained that the cause of fibromyalgia is unknown but the medical literature indicated it can be triggered by trauma, including motor vehicle accidents. At page 9 of his report, he elaborates on central sensitivity syndromes:

Central sensitivity syndromes (CSS) belong to a family of syndromes that don't have abnormalities that can be seen with a microscope or picked up by usual medical tests. They share the common mechanism of "central sensitization." Central means the problem is at the level of the brain and spinal cord. The neurons (brain and spinal cord cells) are "hyper-excitabile" or sensitized because of changes in the way the cells communicate chemically and through other mechanisms. The sensitized cells amplify, or make stronger, messages that we get from our sense (for example touch can feel like pain, normal lighting or sound can be experienced as uncomfortable). But the cells are not just sensitised; they often send "wrong' information as well, and they can also trigger abnormal responses to the environment. For instance, the cells can send information causing the heart to race, feelings of dizziness, or interfere with a body temperature regulation. New sensitivities to food, chemicals, and medications can also occur. Ms. Gabert has a total of 5 central sensitivity syndromes, the most debilitating of which are ME/CFS and FM. I sometimes see as many as 14 in the same individual and rarely only see one. Too often, the CSS have gone undiagnosed. We usually see a precipitant, or trigger, causing the onset of symptoms. The precipitant is some form of stressor. This includes infections (for example after a flu), physical trauma (for example after a car accident), or psychological stress or trauma (for example "burn out" or even a single traumatic event). In Ms. Gabert's case, I believe that, most likely, the precipitant is the subject MVA. As in Ms. Gabert's case, I often see more than one CSS precipitated by a single stressful/traumatic event.

Such, I believe is the case for Ms. Gabert whose FM, ME/CFS were precipitated by the subject MVA. Had she not been involved in both these, I believe she would be in the same state of health as prior to this event.

- [35] Dr. Arseneau recommends that Ms. Gabert work with an occupational therapist to "define the limits of her energy envelope". Dr. Arseneau does not agree with those who might recommend regular exercise and "pushing through the pain" as that approach would likely make her condition worse. Dr. Arseneau explained that in many cases including that of Ms. Gabert performing the activities of daily living and enough physical activity. Once a patient can deal with the activities of daily living will a more formal exercise program be recommended. At page 10 of his report, Dr. Arseneau explained that patients like Ms. Gabert

are "not simply deconditioned; they have a mitochondrial disorder that imposes harsh limits on what they can do: pushing through those limits only makes them feel worse".

- [36] Dr. Arseneau's prognosis for Ms. Gabert is bleak. He opines it is more likely than not that Ms. Gabert will remain disabled indefinitely and that she has likely reached her maximum medical improvement. At page 11 of his report he concludes:

Without significant support for physical duties and appropriate time for resting every day, I believe that it will be difficult to have meaningful impact on Ms. Gabert's pain, fatigue, and other symptoms. Without this help and time for resting, I predict that more than likely, she will experience a progressive deterioration in her symptoms.

- [37] With respect to future treatment, Dr. Arseneau strongly recommends that the focus be on the prevention of further deterioration in Ms. Gabert's functional status and quality of life as well as on her symptom relief and coping strategies. The reality is there is no cure for chronic fatigue syndrome or fibromyalgia. Dr. Arseneau observes that Ms. Gabert is highly-motivated and willing to do anything that might improve her health.

c) Dr. Hawkeswood

- [38] Dr. Hawkeswood is a physiatrist who was qualified to provide expert opinion evidence in the assessment, diagnosis and treatment of musculoskeletal and neurologic conditions. Dr. Hawkeswood had prepared a medical legal opinion dated June 30, 2017, which was filed as an exhibit at trial. He testified in his capacity as an independent medical examiner.
- [39] Dr. Hawkeswood bases his opinion on a single assessment of Ms. Gabert which took place on June 13, 2017, as well as a review of the clinical records regarding both pre- and post-accident events.
- [40] Dr. Hawkeswood opined that Ms. Gabert suffered a grade II whiplash-associated disorder affecting the cervical, thoracic and lumbar spine. In simple terms he described her condition as a bad neck and back. More specifically, her pain includes mechanical neck pain with a prominent myofascial component; soft tissue pain in her upper to mid interscapular (thoracic) pain and mechanical low back pain. He also diagnosed Ms. Gabert with pain over the occiput, causing headaches with cervicogenic features, sleep disruption, low mood and frustration; chronic fatigue, fibromyalgia or central sensitization and polypharmacy, which is likely contributing to her chronic fatigue.
- [41] Dr. Hawkeswood concluded that Ms. Gabert's current cervical and thoracic pains are likely attributable to the motor vehicle accident, her lower back pain was likely pre-existing but her occipital headaches were likely an indirect complication of her neck pain. Further, Dr. Hawkeswood also concluded that Ms. Gabert's overall physical and emotional well-being has been impacted by "the collective elements of chronic fatigue, chronic sleep disruption, and reliance on medication, medication side effects and chronic pain".

[42] As with Dr. Arseneau, Dr. Hawkeswood also provided recommendations for a treatment plan but noted that she is not likely to recover from the accident and any changes in her condition would be "relatively subtle in the face of chronic pain".

d) Dr. Hershler

[43] Dr. Hershler is a specialist in Physical Medicine and Rehabilitation. He was qualified to provide expert legal opinion evidence in the field of physiatry, including the assessment, diagnosis and treatment of musculoskeletal conditions and impairments. Dr. Hershler based his opinion on a single assessment of Ms. Gabert on September 24, 2012, and on his review of her clinical records. His report dated September 25, 2012, was filed as an exhibit at trial.

[44] Dr. Hershler met with Ms. Gabert approximately ten months after the accident and he noted that she was extremely limited in moving her head and neck. Palpation of the cervical spine caused "exquisite pain" in her neck area particularly over C1 and to a diminishing degree, throughout the cervical spine. In summary, he diagnosed Mr. Gabert with the following injuries:

- (1) Upper cervical spine which is probably a ligamentous injury, but there is associated muscle tightness and muscle pain in that region (myofascial pain);
- (2) Probable symptomatic aggravation of pre-existing arthritic change in the spine which adds a further component to the neck pain and provides yet another reason for the tightness and pain with palpation in the neck and upper shoulders muscles. The upper cervical spine injury combined with the muscle tightness in the neck and shoulder has led to loss of range;
- (3) Tinnitus and possible vestibular dysfunction; and
- (4) Secondary sleep disturbance and mood changes.

[45] Dr. Hershler opined that Ms. Gabert's injuries and symptoms were caused by the motor vehicle accident. While the degenerative changes in the cervical spine predated the accident they were asymptomatic.

[46] In cross-examination, Dr. Hershler agreed that at a certain age one can develop tinnitus but he disagreed that it could develop naturally in one day. He explained that age-related tinnitus is a slow process which develops over time while trauma-based tinnitus occurs abruptly, as in the case of Ms. Gabert. Dr. Hershler stressed that while certain conditions may develop in the body as it ages, it is not the same as sudden, chronic conditions such as those observed with Ms. Gabert.

e) Dr. O'Shaughnessy

[47] Dr. O'Shaughnessy was qualified to provide expert opinion evidence in the field of psychiatry, including the assessment, diagnosis and treatment of psychiatric conditions and disorders. His expert report dated December 14, 2015, was filed as an exhibit at trial.

- [48] Dr. O'Shaughnessy based his assessment on his meeting with Ms. Gabert on December 1, 2015, together with his review of various clinical records provided to him. Dr. O'Shaughnessy agreed with the previous assessments that Ms. Gabert presents more with a "fibromyalgia pattern of symptoms and chronic pain than she does with any psychiatric illness". Dr. O'Shaughnessy acknowledged that Ms. Gabert was unhappy with her condition but he did not think any psychiatric factors had a role.
- [49] Dr. O'Shaughnessy had no recommendations in terms of psychiatric treatment other than for Ms. Gabert to try to be as active as possible to assist with her overall mental health. However, in doing so, he deferred to the opinions of those in the field of psychiatry for their recommendations in this regard. With respect to medications, Dr. O'Shaughnessy does not support the use of opioids for soft-tissue injuries.

IV. credibility and reliability

- [50] The factors to be considered when assessing credibility were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd*, [2012] SCCA No. 392. The assessment of credibility involves the consideration of the witness' ability and opportunity to observe events, the firmness of the witness' memory, the ability of the witness to resist the influence of interest in modifying her recollection, a consideration of whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections, the witness' demeanour generally, a consideration of whether the witness' evidence seems generally unreasonable, impossible, or unlikely and whether the witness has a motive to lie. Fundamentally, the question is whether the witness' evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.
- [51] If the plaintiff's account of his or her change in physical, mental, and or emotional state as a result of the accident is not convincing, then the hypothesis upon which any expert opinions rest will be undermined: *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 [Samuel] at paras. 15, 49-50. The defendant does not dispute that Ms. Gabert suffers from chronic neck pain which is limiting her lifestyle, but maintains that the diagnoses of chronic fatigue, fibromyalgia and tinnitus did not result from the accident. The defendant urges me to closely scrutinize Ms. Gabert's evidence because he says her testimony is neither credible nor reliable as it is based on her subjective account of her pain. In support of his position, the defendant says Ms. Gabert tended to exaggerate her limitations. For example, she claims she could not turn her neck or do housekeeping and described flare-ups after she tried to vacuum, yet she is still able to drive her car. Further, they say she refused to acknowledge that some of her medical problems pre-existed the accident and conveniently failed to recall some of the treatment recommendations made to her. In addition, they say her evidence regarding her plans to return to work are inconsistent and reflect poorly on her reliability.

- [52] I do not agree with the defendant's characterization of Ms. Gabert's testimony. I had the opportunity to observe Ms. Gabert during her two days of testimony. I was impressed with Ms. Gabert and found her to be a sincere and honest witness who endeavoured to provide the Court with an accurate and detailed account of her situation as it was before and as it is after the accident. I did not find frailties in her memory, or that she was influenced by an interest to change her recollection of the events in her favour. I find no support for the suggestion by the defendant that Ms. Gabert tended to "catastrophize" her injuries or their consequential limitations on her abilities. Her testimony as to the impact of her injuries on her life was corroborated by the independent evidence of the witnesses' testimonies which I heard. Indeed, I see a woman who was once a strong, independent, happy person who now describes the life altering impact this accident has had on all aspects of her life. I am satisfied that Ms. Gabert's evidence is consistent with the medical evidence regarding her injuries and the impact they have had on her life after the accident.
- [53] Additionally, the medical evidence establishes a compelling portrait of an injured person who has and continues to deal with the adverse effects of her pain. The evidence is based on multiple assessments of Ms. Gabert and review of her clinical records. Her recollection and testimony as to her post-accident condition is clear and corroborated by the preponderance of the expert testimony. Moreover, there is simply no support for the defendant's suggestion that some of Ms. Gabert's problems pre-existed the collision. As I have noted earlier, she did have a history of migraines and recent bowel surgery, but neither of these conditions contributed to the chronic pain she now suffers post-accident.
- [54] With respect to the suggestion that Ms. Gabert provided inconsistent evidence regarding her intention to return to work, I do not accept the defendant's submission. There is ample evidence to corroborate Ms. Gabert's testimony that she always intended to return to work as a TOC even though she had retired from full time teaching. While Ms. Gabert did not discuss her intention to return to work as a TOC with the physicians she dealt with immediately after the accident that does not detract from the evidence provided by Ms. Gabert, her husband and her daughter.
- [55] I found Ms. Gabert to be a credible witness and I accept her evidence.

V. Causation

The Legal Principles

- [56] The plaintiff bears the burden of proving that but for the negligent act or omission of the defendant the injury would not have occurred. The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimis: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 [Athey] at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

- [57] The Supreme Court of Canada's decision in *Clements v. Clements*, 2012 SCC 32 [Clements] revisited the causation test. The Court affirmed the predominance of the "but for" causation test, which is a factual determination that is to be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury: at para. 9.
- [58] Athey's "material contribution" test is appropriate without showing factual "but for" causation only in cases where it is otherwise impossible to determine which of multiple negligence acts flowing from multiple actors in fact caused the injury: *Clements* at para. 13.
- [59] Additionally, the plaintiff is not required to establish that the defendant's negligence was the sole cause of his or her injuries. As long as the defendant is part of the cause of the injury, the defendant is liable, even if his or her act alone was not enough to create the injury: *Athey* at paras. 17-20; see also *Mirsaeidi v. Coleman*, 2014 BCSC 415 at para. 50.
- [60] Here, I am satisfied that the Clements' robust and common sense approach to "but for" applies. Ms. Gabert must establish on a balance of probabilities that her injuries would not have occurred but for the negligence of the defendant.

Positions of the Parties

- [61] Ms. Gabert's position is that the accident has caused her chronic pain mostly in her neck area. It has caused her to suffer chronic headaches, tinnitus, chronic fatigue syndrome and fibromyalgia. The evidence established that before the accident, Ms. Gabert was pain-free, healthy, active, independent and looking forward to enjoying her "golden years" being a grandmother to her expanding family. Ms. Gabert submits there is no alternative explanation or cause for her injuries but for the accident.
- [62] The defendant concedes that Ms. Gabert suffers moderate soft tissue injuries to her neck and back with associated headaches and emotional upset as a result of the accident. However, the defendant denies that Ms. Gabert's diagnosis of chronic fatigue syndrome and fibromyalgia results from the accident. As I understand the submission, it is that:
- The diagnosis of fibromyalgia and chronic fatigue syndrome is controversial and is based solely on the subjective report of Ms. Gabert;
 - Dr. Arseneau assumed the role of an advocate;
 - The diagnosis lacked objective testing; and
 - There were other plausible explanations for Ms. Gabert's symptoms.
- [63] While he challenges the diagnoses of chronic fatigue and fibromyalgia he acknowledges that "pain is pain" and he accepts that Ms. Gabert suffers pain.

Discussion

- [64] At the time of the accident, Ms. Gabert experienced immediate and intense pain in the area of her neck and back. She soon developed headaches which she described as "crushing skull pain". This immediate, intense pain in the neck and back area evolved into chronic headaches, tinnitus, chronic fatigue syndrome and fibromyalgia. All of the experts agree that the injuries in the motor vehicle accident have resulted in Ms. Gabert's chronic pain condition. Applying a robust and common sense approach to my assessment of the evidence, I find as a fact that Ms. Gabert has established on a balance of probabilities that but for the accident of December 4, 2011, she would not have developed her current chronic condition.
- [65] I find no merit in the submission that Dr. Arseneau assumed the role of an advocate on behalf of Ms. Gabert or that he was motivated by financial gain. Dr. Arseneau was qualified to provide expert opinion evidence in the assessment and treatment of central sensitivity syndromes, including fibromyalgia and chronic fatigue syndrome. He has over 20 years of clinical experience in the area of diagnosis and in the treatment of complex chronic diseases. While I find Dr. Arseneau to be passionate about his work in the field of chronic pain and the challenges associated with diagnosing and treating the disease, albeit one that is not easily detected by standard medical tests or readily apparent with a microscope, I do not find his testimony improperly overzealous or untoward. There is no indication in Dr. Arseneau's testimony or report that he fails in his primary duty to the Court. It seems to me the defendants are grasping at any weakness they may find in Dr. Arseneau's testimony no matter how tenuous; but I find that he provided me with an objective, non-partisan and fair assessment of Ms. Gabert's chronic condition and which was appropriately confined to his area of expertise. Additionally, I note that Dr. Hawkeswood also opined that fibromyalgia or central sensitization and chronic fatigue are both likely relevant diagnoses of Ms. Gabert's condition.
- [66] Further, I find no support for the suggestion that Dr. Arseneau's diagnosis is questionable because it is based largely on Ms. Gabert's self-report. I previously mentioned the case of Samuel in assessing the reliability and credibility of Ms. Gabert's evidence. There are several propositions of law affirmed by that case that speaks to the defendant's concern related to Ms. Gabert's self-reporting. The decision in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 13 A.C.W.S. (2d) 318 (B.C.S.C.) [Price], also contains germane principles regarding the reliability of a plaintiff's subjective complaints of persistent pain.
- [67] The Court of Appeal in *Samuel* affirmed that to some extent, all experts must rely on what their patients tell them. What the experts say in respect of what the patient tells them is not generally admissible for the truth of their contents. But that opinion will be received by the court since it "defines to an extent his area of exploration and, if confirmed by the doctor's objective observations and by the patient's evidence given at the trial, may be convincing. I see no other approach to medical evidence": *Samuel* at para. 44, citing to *Leonard v. British Columbia Hydro & Power Authority* (1964), 49 D.L.R. (2d) 422, 50 W.W.R. 546 (B.C.S.C.), at

para. 8.

- [68] Additionally, in *Price*, Chief Justice McEachern, (as he then was) discussed the judge's role in "[translating] injuries to damages" where the assessment of damages is based in a plaintiff's self-report, stating that it is "necessary to weigh and consider all the evidence": at 397, 398. The availability of objective evidence to corroborate a plaintiff's subjective complaints of injury and persistent pain is important in assessing the damages for a plaintiff's self-report of recurrent and continuing injuries.
- [69] I agree with these propositions. In *Ms. Gabert's* case, there is no indication that her self-reporting upon which Dr. Arseneau based his opinion was doubtful or dubious in the manner that the subject reports were impugned in *Samuel*. Moreover, there is no issue in respect of the admissibility of the statements *Ms. Gabert* made regarding her injuries after the accident from which Dr. Arseneau draws to make his diagnoses. *Ms. Gabert* testified viva voce to her condition, which when assessed with the totality of the medical evidence before me, led me to conclude that she is credible in her description of her injuries. As *Price* admonishes, an absence of objective and reliable evidence to shore up a plaintiff's subjective complaints or where there is uncorroborated "self-reporting" of pain, will not attract an award of damages. But in this case, there is credible and objective evidence that speaks to her chronic condition. I find that Dr. Arseneau is entitled as per *Samuel's* propositions set out above, to rely on what *Ms. Gabert* relayed to him in respect of her injuries in coming to his diagnoses. His opinion as to her chronic fatigue syndrome and fibromyalgia is the reasoned product of his observations of *Ms. Gabert*, and when considered together with her testimony and other medical evidence, Dr. Arseneau's testimony attracts considerable weight. Having accepted *Ms. Gabert's* description of her own injuries in light of the preponderance of the medical evidence, it is not inconsistent or a great leap for me to find, in light of the balance of Dr. Hawkeswood report and other medical evidence, that Dr. Arseneau's diagnoses of *Ms. Gabert's* condition as chronic fatigue syndrome and fibromyalgia as compellingly and causally linked to the accident.
- [70] I also note that there was no medical evidence tendered that supports the defendant's submission that there were other plausible explanations for some of *Ms. Gabert's* symptoms. Indeed, Dr. O'Shaughnessy noted that *Ms. Gabert* had a relatively benign medical history except for her bowel surgery a few months before the accident. The defendant acknowledges that *Ms. Gabert* suffers pain; and concedes that "pain is pain", but he cannot point to other medical evidence to support the argument that there is some other plausible explanation for her symptoms. Mere assertions alone that there are other explanations for her symptoms does not assail the finding on the preponderance of evidence that but for the defendant's negligence, *Ms. Gabert* was left with her chronic condition. I cannot speculate as to what lies in the realm of possibility. At any rate, a plaintiff need not establish that the defendant's negligence was the sole cause of her injuries or to establish causation with scientific precision.

- [71] The defendant also argued that Ms. Gabert's tinnitus is unrelated to the accident and instead is a natural consequence of aging. However, as I previously mentioned, Dr. Hershler diagnosed Ms. Gabert with tinnitus that resulted from the accident. He testified to the difference between age-related tinnitus which develops slowly over-time and trauma based tinnitus which develops suddenly. It was his opinion that Ms. Gabert's sudden onset of tinnitus stemmed from a source of trauma. I accept his evidence.
- [72] I have considered the evidence of Ms. Gabert, her family and friends as well as the expert medical opinions tendered at trial. After assessing the totality of the evidence, I am satisfied that Ms. Gabert has established on a balance of probabilities that her injuries consist of chronic headaches, tinnitus, chronic fatigue syndrome and fibromyalgia all of which manifest as chronic, debilitating pain that was caused by the motor vehicle collision on November 4, 2011.

vi. assessment of damages

A. Non-Pecuniary Damages

The Legal Principles

- [73] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. Compensation should be fair to all parties which is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Benavides v. John Doe*, 2015 BCSC 1831 at para. 94; *aff'd by Benavides v. Insurance Corp. of British Columbia*, 2017 BCCA 15.
- [74] The appropriate amount of compensation is not merely a function of the seriousness of the plaintiff's injuries viewed in isolation. As outlined by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45, 46, leave to appeal *ref'd* *Stapley v. Hejslet*, [2006] SCCA No. 100, courts must consider the effect of the injuries on the plaintiff's particular circumstances, taking into account factors such as the plaintiff's age, the nature of the injury, the severity and duration of the plaintiff's pain, the extent of any disability, the effect on family and social relationships, impairment of the plaintiff's mental and physical abilities, and the impact on the plaintiff's lifestyle. It is therefore necessary for the court to have an "appreciation of the individual's loss": at para. 45.
- [75] I previously mentioned *Price*. The correct approach to assessing injuries which depend on subjective reports of pain was discussed in that decision. In *Price*, the Court explained that translating an individual plaintiff's subjective complaints about injury, pain, and loss into compensatory damages is never a simple matter. The task is particularly challenging in cases of soft tissue injury involving subjective reports of pain, with "little or no objective evidence of continuing injury", and where "complaints of pain persist for long periods": at 397, 399; see also *Redmond v. Krider*, 2015 BCSC 178 at para. 137.

- [76] The assessment of non-pecuniary damages is also influenced by each plaintiff's personal experiences in dealing with her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25. Equally important is the trier of fact's subjective appreciation of the evidence describing those injuries, the pain, suffering, loss of amenities and disability and their consequences on the plaintiff's personal and economic future: at para. 25.
- [77] Ultimately, the Court must make an award of damages for pain and suffering and loss of enjoyment of life that is tailored to the specific circumstances of this plaintiff.

Position of the Parties

- [78] Ms. Gabert submits the appropriate range for non-pecuniary damages in this case is \$200,000 - \$225,000. She relies on:
- *Scoates v. Dermott*, 2012 BCSC 485 [Scoates] (\$250,000);
 - *Tan v. Mintzler*, 2016 BCSC 1183 (\$210,000);
 - *Burdett v. Eidse*, 2010 BCSC 219 [Burdett], varied on future income earning capacity only by *Burdett v. Eidse*, 2011 BCCA 191 (\$200,000);
 - *Dionee v. Romanick*, 2007 BCSC 436 (\$185,000); and
 - *Wong (Litigation guardian of) v. Towns*, 2015 BCSC 1333 [Wong] (\$180,000).
- [79] Counsel for the defendant contends that non-pecuniary damages should be in the range of \$100,000 to \$120,000. They cite to:
- *Bevacqua v. Yawroski*, 2012 BCSC 880 [Bevacqua] (\$85,000);
 - *Carroll v. Hunter*, 2014 BCSC 2193 (\$90,000);
 - *Tchir v. South Coast British Columbia Transportation Authority*, 2014 BCSC 1119 [Tchir] (\$110,000); and
 - *Hosseinzadeh v. Leung*, 2014 BCSC 2260 [Hosseinzadeh] (\$125,000).
- [80] It would not serve any real purpose to recount every salient detail of the cases cited to by counsel. While the cases give some guidance as to the general range of damages that might be considered "fair and reasonable", the result in each case is largely fact-driven. While I take some guidance by the assessment of damages set out in the proffered cases, my task is to determine the appropriate amount of compensation in this particular case, based on an individualized assessment of Ms. Gabert's loss.

Discussion and Award of Non-Pecuniary Damages

- [81] I have considered the impact of the injuries on Ms. Gabert's general well-being in coming to a decision on the appropriate award under this category.

- [82] Before the accident, Ms. Gabert was a healthy and happy retiree who in the company of her adoring husband, set out on a Christmas shopping trip. She had a full life constituted of a loving spouse, daughters and an ever expanding group of cherished grandchildren. She was the family matriarch, the one everyone relied on for her strength and guidance. She had an extensive social network composed of friends, neighbours and fellow retired teachers.
- [83] She was active, strong, independent and ready to embrace all that her golden years had in store for her.
- [84] Ms. Gabert's future is dramatically different now from that what she envisioned that morning on November 4, 2011. She is no longer the high-functioning senior she was who was capable of managing her household, preparing meals, cleaning or shopping. On the rare occasion that she has guests to her house, she is no longer the hostess; rather, she is primarily a passive participant while her husband or daughters assume the role of host. Her once active social life and recreational life is no more. The bleak reality is that Ms. Gabert's chronic fatigue syndrome and the constant pain from her fibromyalgia together with her relentless tinnitus and headaches, have had a debilitating impact on her emotional and physical well-being. They are life-altering.
- [85] The injuries have taken an emotional toll on Ms. Gabert. It was evident to me during her testimony that Ms. Gabert is sad and also frustrated because she can no longer participate in activities with family and friends as she previously did. Ms. Gabert is particularly sad because she is unable to physically engage with her grandchildren as she once did.
- [86] Rather than enjoying her golden years as planned, her days have been occupied with attending her multiple and varied therapies which have produced only temporary, rather than long-term relief. While she is committed to doing anything which might ease the pain, all of Ms. Gabert's conditions proved to be chronic, persistent and debilitating many years after the collision, and her prognosis is poor. I am mindful of the statement in *Mathroo v. Edge-Partington*, 2015 BCSC 122 at para. 96, that any limited life expectancy is essentially canceled out by the golden years doctrine. Accordingly, I consider the term "golden years" as illustrative, but it does not on its own justify or impact the appropriate award. Ms. Gabert's age and seniority is already a consideration that informs this non-pecuniary award.
- [87] In determining the appropriate award, I have considered the nature and scope of Mr. Gabert's injuries, the severity of her symptoms, the bleak prognosis of her medical doctors and her emotional suffering. I recognize the frustration she feels in her exclusion from full participation in family activities; the adjustments she has made to her lifestyle, including household chores; the effects of the injuries on her relationship with her husband, children and extended family; and the impact on her ability to enjoy her retirement years.
- [88] Many of the plaintiff's cases occupy the higher end of the non-pecuniary quantum range. There are distinguishable features from those authorities that are absent from Ms. Gabert's case. In *Scoates*, the plaintiff was younger and involved in a total of four accidents. The nature and extent of his severe injuries is highly distinguishable. In *Burdett*, the plaintiff

also suffered mild traumatic brain injury that severely undermined his executive functioning and rendered him competitively unemployable. In Wong, the Court acknowledged that the 80 year-old plaintiff's injuries triggered a "rapid onset of dementia symptoms" (at para. 94) which dramatically alerted her well-being and enjoyment of life.

[89] However, I'm not convinced that the lower range of damages which the defendant's cases occupy is sufficient to address the impact of Ms. Gabert's injuries on her enjoyment of life. The plaintiff's injuries in Bevacqua did not involve chronic conditions, and the impact of that plaintiff's injuries on her life was far less debilitating. I find Tchir and Hosseinzadeh more compelling in respect of the quantum awarded for non-pecuniary losses. In Tchir, the plaintiff suffered injuries to her shoulder and knees among other injuries which caused chronic problems for her. There was an application of the "crumbling skull" doctrine in relation to the plaintiff's arthritis, however, the Court awarded \$110,000. In Hosseinzadeh, the plaintiff also developed chronic pain and fibromyalgia among other issues. She faced a grim prognosis and was partially disabled from her activities of daily living. The plaintiff was awarded \$125,000 for her non-pecuniary losses.

[90] Having reviewed the cases provided by both parties, I assess Ms. Gabert's non-pecuniary damages at \$160,000.

B. Cost of Future Care

The Legal Principles

- [91] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, courts must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, 30 A.C.W.S. (2d) 257 [Milina] (B.C.S.C.), aff'd by *Milina v. Bartsch* (1985), 63 B.C.L.R. 122, 6 A.C.W.S. (3d) 233 (B.C.C.A.); *Williams (Guardian ad litem of) v. Low*, 2000 BCSC 345 (B.C.S.C.); *Spehar (Guardian ad litem of) v. Beazley*, 2002 BCSC 1104.
- [92] The test for determining the appropriate award for cost of future care is an objective one based on medical evidence. Awards for costs of future care must be both medically justified and reasonable. The award of damages must be moderate and fair to both parties: *Milina* at 84; *Riding-Brown v. Jenkins*, 2014 BCSC 382 at para. 47.
- [93] In *Warick v. Diwell*, 2018 BCCA 53, the Court of Appeal affirmed that a cost of future care claim is only proven if a plaintiff can establish a real and substantial risk of future pecuniary loss, citing to *Graham v. Rourke* (1990), 74 D.L.R. (4th) 1 (O.N.C.A.). Damages are to be assessed, not mathematically calculated. Damages should allow for contingencies for the possibility that the future may differ from the evidence at trial: *Krangle (Guardian ad litem of) v. Briscoe*, 2002 SCC 9 [Krangle] and *Uhrovic v. Masjhuri*, 2008 BCCA 462. An award for

services not previously used should be made only where the services are likely to be incurred on a going-forward basis: *Gilbert v. Bottle*, 2011 BCSC 1389.

Position of the Parties

- [94] Ms. Gabert submits that an award in the range of \$528,154.51 to \$686,980.00 would be appropriate. Ms. Gabert relies on the costing information provided by Russell McNeil, an Occupational Therapist enlisted by Ms. Gabert to prepare a Cost of Future Care Report and the report of Economist Hassan Lakhani in which he calculated the present value of future care expenses based on Mr. McNeil's report.
- [95] The defendant submits that an award of \$40,000 - \$50,000 is appropriate for the cost of future care. He significantly relies on Dr. Hawkeswood's recommendations. He argues that many of the items identified by Mr. McNeil are either unjustified or unreasonable.

Discussion

- [96] All physicians agree that Ms. Gabert's condition is chronic and that her prognosis is bleak. Ms. Gabert's injuries have resulted in chronic, persistent debilitating pain which will continue to impact every aspect of her everyday life. The recommended course of treatment is focused on preventing further deterioration of her condition.
- [97] Mr. McNeil summarizes recommendations for minimum future care at pages 25-26 of his report in Appendix E. His recommendations are based on his own assessment of Ms. Gabert together with his review of the medical reports. Economist Hassan Lakhani produced a report dated May 30, 2018, in which he calculated the present value of the future care expenses Mr. McNeil identified. For ease of reference, I will refer to the items as set out at Appendix E of the McNeil report.
- a) Pain Management
- [98] There is ample evidence that Ms. Gabert has had difficulty sleeping through the night. She was prescribed medication which has assisted to a certain extent. Mr. McNeil considers sleep as a critical part of pain management and recommends some sleep aids - foam mattress, body pillow and contoured pillow. He also recommends a heating pad and a TENS machine to manage her ongoing pain. While Dr. Hawkeswood questions the utility of a TENS machine and the defendants argue that many of these items have already been obtained and others are not justified, I am prepared to accept the items listed as valid pain management tools. These recommendations result in an award of \$2,600.
- b) Homemaking Assistance

[99] There is ample evidence to support a claim for homemaking assistance including recommendations from both Dr. Arseneau and Dr. Hawkeswood. While the defendant challenges the recommended frequency of this award they do concede that some housekeeping assistance is required. Mr. McNeil recommends four hours of weekly homemaking assistance in the amount of \$5,928 per month for a total of \$44,170; and 16 hours of seasonal cleaning in the amount of \$456 per year for a total of \$3,398.

[100] I approve this award. However, the award should reflect the fact that Ms. Gabert will be away from her residence for three months (between January and March) annually. Therefore, based on Dr. McNeil's recommendation of \$5,928 per year for four hours of weekly homemaking, and accounting for Ms. Gabert's absence for one quarter of each year, I assess her future costs for homemaking assistance at \$41,200.00. Further, I am prepared to award her costs of seasonal cleaning, not at the 16 hours that Dr. McNeil recommends, but at eight hours of seasonal cleaning per year. Accordingly, I assess her seasonal care costs at \$1,700.

[101] The total for these two costs is \$42,900.

c) Yard Work

[102] I agree with the defendant that there is no basis for any award for yard work and this cost is denied.

d) Rehabilitation/Health Related Costs

[103] There are a broad range of treatments recommended under this heading. While counsel for the defendant challenges many of these recommendations he does agree that Ms. Gabert should engage in further physiotherapy, massage therapy and acupuncture although he does not agree that these should be for an indefinite basis. The evidence has established that these passive treatments do provide Ms. Gabert with some relief and improve her ability to deal with her chronic symptoms. Given Ms. Gabert's admission that there are only so many treatments she can do in a day and Mr. McNeil's opinion that treatments may be provided sequentially to enable therapeutic breaks, I find a more conservative award should be granted. Therefore, I approve physiotherapy once per month for three years (\$3,600) and acupuncture and massage on a basis of once per month for two years each for a total of \$4,800. The total award is \$8,400.

[104] The defendant also agrees that there is ample evidence to support an award for an occupational therapist and counsellor. With respect to occupational therapy, Dr. Arseneau recommended that Ms. Gabert continue to work with an occupational therapist with specific expertise in chronic fatigue syndrome and fibromyalgia. I am satisfied that 12 sessions for a total of \$2,000 should be awarded for this service.

[105] Dr. Arseneau also recommends 20-30 sessions of one-on-one counselling to assist Ms. Gabert with her significant limitations and ongoing symptoms. Mr. McNeil reports that a registered psychologist would charge \$220 per hour. I am mindful of the fact that Ms.

Gabert will continue to travel for several months out of the year and hence she will not be available to engage in counselling as often as Dr. Arseneau recommends. Therefore, I am prepared to approve counselling sessions once per month for two years for an award of \$3,960.

[106] Exercise program - While Dr. Hawkeswood recommends an exercise program, Ms. Gabert is not seeking an award for the cost of an exercise program.

[107] Neurofeedback, Transcranial Stimulation and Hyperbaric Oxygen Treatment- Dr. Arseneau recommended these three treatment options on a trial basis. Dr. Hawkeswood was doubtful that Ms. Gabert would require all these treatment options. I agree with the defendant that the evidence does not establish that these items are reasonably necessary to promote the improvement of Ms. Gabert's chronic condition. I find the utility of these treatments is speculative and I deny this award.

[108] IV Lidocaine/IV Ketamine - While Dr. Arseneau recommends both treatment options, Ms. Gabert submits that she is only seeking an award for the cost of IV Lidocaine. Dr. Arseneau testified that many patients with Ms. Gabert's condition exhaust medication options but are still left with significant pain which can be addressed by induction treatments of lidocaine. He explained the lidocaine induction treatment can result in a significant reduction in pain. Dr. Hawkeswood testified that IV Lidocaine is not something he would typically recommend but did acknowledge that it may be an option but should not be undertaken on a weekly, monthly or indefinite basis. Given that Ms. Gabert has testified she is willing to try anything which might alleviate her pain and her ongoing challenges with medications I am satisfied that this is a cost likely to be incurred by Ms. Gabert. I am prepared to award Ms. Gabert the cost of one year of this treatment and award her \$18,900.

[109] Naturopath - Dr. Arseneau recommends Ms. Gabert work with a naturopath to determine what are the best supplements and natural preparation for her ongoing needs. I am satisfied this is would benefit Ms. Gabert and am satisfied that a cost of \$1,800 should be awarded for this service. Since the actual amount of supplements that Ms. Gabert may utilize is yet uncertain, I will award \$20,000 for this cost.

e) Medications

[110] Ms. Gabert has been prescribed a variety of medications to deal with her injuries since the accident. According to Dr. Arseneau, Ms. Gabert has not benefited or tolerated many medications due to sensitivity associated with her chronic condition but recommends that she continue with a host of medications. Both Dr. Arseneau and Dr. Hawkeswood opined that Ms. Gabert might benefit from medical cannabis rather than Nabilone, a synthetic cannabis. The annual cost of Nabilone is \$2,467.40 which based on the Lakhani cost assessment for the remainder of Ms. Gabert's lifetime, would result in a cost of \$34,928.51. The annual cost of medical marihuana is estimated to be significantly higher at \$9,125.00 per year.

[111] The defendant concedes that future medications are medically justified and suggests an award of \$25,000 considering the cost of medications to trial have been \$23,916. I agree. Ms. Gabert's figure far exceeds the costs she will likely incur in her consumption of Nabilone to promote her health and recovery. She bases the \$34,928.51 as projected over the remainder of her lifetime use. This is unrealistic. I am prepared to award her the costs for Nabilone only until she is 80 years-old. Additionally, there is uncertainty in the evidence as to what combination of medications will assist Ms. Gabert in the future. Furthermore, I factor in the contingency that she may do better with less medications and may choose to utilize the IV Lidocaine treatment for a period; accordingly, I award \$30,000 for Ms. Gabert's cost of medications.

[112] In summary, I award \$130,560 for cost of future care.

C. Loss of Earning Capacity

(a) Past Loss of Earning Capacity

The Legal Principles

[113] Both past and future income loss is properly premised on the basis of a loss of income earning capacity. Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49; *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 [Rowe] at para. 28.

[114] Further, the damages are not based on a fixed value that has been assigned to an abstract capacity to earn. Rather, the value of a particular plaintiff's capacity to earn is equivalent to the value of the earnings that she or he would have received over time, had the tort not been committed: *Rowe* at para. 29.

[115] Mr. Justice Steeves in *Mojahedi v. Friesen*, 2016 BCSC 1225 provided a succinct explanation for past loss of earning capacity as follows:

[73] A claim for past loss of earnings is for the loss of earning capacity or the loss of the value of the work that the plaintiff would have performed but was unable to perform because of the injury (*Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 (CanLII), at para. 30). The loss of earning capacity rather than the loss of actual income is considered, although loss of income can be a way to measure loss of capacity.

[116] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

- [117] Recently in *Grewal v. Naumann*, 2017 BCCA 158 [Grewal], the Court of Appeal summarized what constitutes a "real and substantial possibility" applicable to assessing the loss of past and future income earning capacity:
- [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.
- [118] The law recognizes that contingencies and other uncertain factors make it impossible to calculate lost opportunities including a loss of income earning capacity, with precision: *Erickson v. Sibble*, 2012 BCSC 1880 at para. 271. A loss of income earning capacity, whether past or future, requires the assessment of damages which considers the overall fairness and reasonableness of the award taking into account all positive and negative contingencies. It is not a calculation according to a mathematical formula: *Schenker v. Scott*, 2014 BCCA 203 at para. 53; *Abbott v. Gerges*, 2014 BCSC 1329 at para. 165.

Position of the Parties

- [119] Ms. Gabert seeks an award for past income loss based on the assumption that she would have worked as a TOC beginning in April 2015 up to trial. Ms. Gabert acknowledges that she was retired at the time of the accident but her intention was to return to work as a TOC just as she had done in the period between 2007 and 2009. Ms. Gabert testified that she stopped being a TOC in 2009 due to a variety of family commitments which required her attention. In addition to taking care of her elderly father, she also spent extended amounts of time travelling to see her daughters who all lived out of town: her daughter Liana who lived in Williams Lake, Kristen in Edson, Alberta, and Andrea in Boston, Massachusetts, USA. In connection with this, Mr. Gabert estimated that they travelled 150 days in 2009 and had houseguests for 140 days. Simply put, Ms. Gabert says she had no time available to devote to teaching. However, in 2013, the demands of family commitments that took up much of Ms. Gabert's time abated as two of her daughters moved back to the lower mainland with their young families. Moreover, in the fall of 2014, her elderly father passed away. Ms. Gabert was adamant that with more time on her hands she would have returned to what she loved - teaching. Mr. Gabert also testified that Ms. Gabert always intended to return to teaching and

it was simply a question of when.

[120] The defendant denies that Ms. Gabert incurred any past wage loss because at the time of the collision she was retired, had ceased working as a TOC and had no plans to return to work. In support of their position they rely on the fact that following the collision Ms. Gabert told Dr. Tai she was retired as reflected in the CL19 form Dr. Tai completed for ICBC; she told various doctors who examined her that she was retired and reported to ICBC she was retired. In addition, the defendant refers to Ms. Gabert's June 5, 2015, examination for discovery in which she stated "I wasn't going to teach any more because we wanted to enjoy life." The defendant says in light of her own admission that she was retired with no mention of a plan to return to work she has failed to demonstrate on the balance of probabilities that she has suffered any past income loss. Alternatively, they submit that should the Court find that Ms. Gabert has established that she intended to return to work and hence a past loss of income is related to the accident, then past gross wage loss should be determined by considering the period between March 2015 and the date of trial at the same frequency as she did in the three years as TOC prior to the accident.

Discussion

[121] There is no dispute that Ms. Gabert was a dedicated and gifted teacher. Teaching is her passion. The question is whether Ms. Gabert established that there was a real and substantial possibility that she would have returned to work as a TOC in 2015? The standard of real and substantial possibility does not require that Ms. Gabert demonstrate that it was more probable than not that she would have returned to a TOC position and earned income, the pecuniary loss for which she now claims compensation. As Athey states, the standard requires more than speculation, but less than a balance of probabilities. With this in mind, I am persuaded by all of the evidence that had it not been for the accident Ms. Gabert would have returned to work as a TOC 2015 upon return from her winter travels. She was passionate about teaching, and with her time freed up from several family commitments, if it were not for her injuries, she has demonstrated a real and substantial possibility that she would go on to work again as a TOC. The defendant argues that Ms. Gabert has not shown on a balance of probabilities that she has any past wage loss. However, that is not the inquiry here. The compensation to be made is for a loss of capacity, or the value of the work that Ms. Gabert would have performed but for her injuries; what is at issue here is not a strict demonstration of an actual loss of earnings or a past event that attracts the balance of probabilities standard.

[122] As I said earlier, Ms. Gabert was a strong, active, independent woman. Teaching was neither stressful for her nor physically demanding. It was her passion. I have considered the fact that Ms. Gabert reported to Dr. Tai and other treating physicians that at the time of the collision she was retired. This was consistent with what she told others and it was the truth. However, when considering the circumstances, in my view, nothing turns on the fact that Ms. Gabert identified as retired rather than, as the defendant would seem to suggest,

identify as a retired teacher who intended to return to work as a TOC in the future.

- [123] There was no evidence that Ms. Gabert had a specific job to return to but there is no dispute, and I am prepared to accept, that as of 2015, there was a high demand for teachers in the lower mainland and this has only increased after the decision in *British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49 [British Columbia Teachers' Federation], which reduced class size and in turn increased the demand for teachers. I am satisfied that as of 2015, there was a real and substantial possibility that Ms. Gabert would have, but for her injuries, had an opportunity to return to work as a TOC.
- [124] Having determined that Ms. Gabert has established a past loss of earning capacity I turn now to the issue of quantum. Athey states that the quantification of losses that flow from hypothetical events is assessed by a consideration of the chances of the loss occurring. Ms. Gabert submits that she would have returned to work mid-April 2015 for ten weeks and then September - December 2015 for 14 weeks and the same pattern of 24 weeks would have occurred in 2016 and 2017 with ten weeks in 2018 to the date of trial. Given the increased demand for teachers post-British Columbia Teachers' Federation, Ms. Gabert says she would have worked at minimum two days perhaps three days per week. Ms. Gabert relies on the evidence from Lyn Black, a fellow retired teacher to establish an hourly rate for a TOC position and Ms. Gabert seeks \$75,000 for past loss of income earning capacity. There was no calculation done by an economist to assist me in the determination of this quantum.
- [125] I agree with the defendant that Ms. Black's evidence does not assist in determining quantum. Ms. Black based her salary estimate on her personal experience but there is no means by which I can determine if her estimates are reliable. Therefore, the only means to assess compensation is by considering Ms. Gabert's income from her work as a TOC. I note that Ms. Gabert does not disagree with this approach but submits I should consider 2007 as the base since that was the year she did the most teaching.
- [126] As I said, I have found that there was a real and substantial possibility that but for the accident Ms. Gabert would have returned to a TOC position in 2015 and that she would have worked approximately the same frequency as in 2007 and 2008.
- [127] I have considered that 2009 (\$3,485) was a lower yield year. Accordingly, after considering the increase in demand for teachers and Ms. Gabert's passion for teaching, I average the two best years (2007 (\$7,996) and 2008 (\$6,518)) which yields \$7,257. Assessing this amount or value of Ms. Gabert's pecuniary loss from the date accident to the date of trial and accounting for any contingencies or likelihood that she would have gone traveling or otherwise not returned to a TOC position, I award Ms. Gabert \$35,000 for loss of earning capacity.

(b) Loss of Future Earning Capacity

The Legal Principles

- [128] A claim for loss of future earning capacity raises two key questions: 1) has the plaintiff's earning capacity been impaired by his or her injuries; and if so, 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not an application of a purely mathematical calculation. *Hoy and Williams*, 2014 BCSC 234 at para. 153.
- [129] In *Morgan v. Galbraith*, 2013 BCCA 305 [Morgan], the Court of Appeal noted that a plaintiff must establish a "real and substantial possibility" that his or her earning capacity has been impaired (at para. 53). The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 35 A.C.W.S. (2d) 96 (B.C.S.C.); *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 52 A.C.W.S. (3d) 458 (B.C.C.A.) [Pallos]; *Pett v. Pett*, 2009 BCCA 232.
- [130] In *Reilly v. Lynn*, 2003 BCCA 49 [Reilly], leave to appeal ref'd *Reilly v. Lynn*, [2003] S.C.C.A. No. 221, the Court of Appeal summarized the legal principles that inform an analysis for future loss of earning capacity as follows:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati*, supra, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79.
- [131] The essential task of the Court to assess an award is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32.
- [132] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both approaches are correct. The "earnings approach" will generally be more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren]. Where the

loss is proven but "is not measurable in a pecuniary way" the "capital asset" approach is more appropriate: Perren at para. 39. This approach is more typically used in cases where the plaintiff has no clear earnings history: Sirak v. Noonward, 2015 BCSC 274 [Sirak] at para. 202.

Positon of the Parties

[133] Ms. Gabert is seeking an award for loss of future income in the amount of \$50,000 on the basis that she would continue to work as a TOC until she is 75. The defendant takes the position that Ms. Gabert had retired from teaching and is therefore not entitled to any award for future loss.

Discussion

[134] Just as with my consideration of Ms. Gabert past loss of earning capacity, I do not consider her retirement from full time teaching as a bar to recovery for a loss of future earning capacity. In my view, the same rationale for awarding Ms. Gabert for past lost of earning capacity applies to her claim for loss of future capacity, that is, it is the impairment of a capacity to earn income or the loss of a capital asset that attracts compensation: Sirak at para. 169. To not award otherwise would create an inconsistent result based on effectively, the same set of considerations. As I said earlier, Ms. Gabert was a robust, healthy and energetic woman who but for the debilitating, chronic injuries resulting from the collision, would have had ample energy to work as a TOC and enjoy life with her husband, family and friends. Ms. Gabert's age would not be a hindrance to her performance as a TOC.

[135] In determining the appropriate award I have considered the testimony of both Ms. Gabert and her husband that the plans for were to travel more and spend more time with family and friends. In addition, despite Ms. Gabert's insistence that she is not "old" I must factor in her age. On the other hand, I have also considered Ms. Gabert's passion for teaching and her vast experience together with the demand for qualified teachers which would provide her with ample opportunity to work as a TOC.

[136] In this case, the earnings approach as set out in Perren is appropriate as Ms. Gabert's losses are easily measurable given that she has some earnings history as a TOC and is no longer working at all. The task is to compare Ms. Gabert's likely future working life had the accident not occurred to her likely future working life given the accident did occur. I postulate that her annual projected loss is based on the same average she made in her best years applied over the few remaining working years she has, but adjusted significantly for the greater negative contingencies that may attend on her future income earning capacity claim, as this is an assessment of her loss of income earning capacity, not a calculation. Still, many of the considerations material to her claim for loss of past income earning capacity have application to her future claim as well.

- [137] Having already concluded that the accident caused Ms. Gabert's injuries, I find that those injuries also caused a loss of future earning capacity. All of the medical evidence established that Ms. Gabert will continue to suffer chronic, debilitating pain in her future. I find that Ms. Gabert has established a real and substantial possibility that her ongoing chronic pain condition will lead to loss of future earning capacity. I find that Ms. Gabert has suffered an impairment of a capital asset which is her ability to earn income. Indeed, but for the accident, Ms. Gabert would have as a real and substantial possibility, continued to work as a TOC as I earlier concluded under the assessment of her loss of past income earning capacity.
- [138] I do not however, agree that the totality of evidence supports an award in the amount advanced by Ms. Gabert. As Reilly instructs, I must consider the overall fairness and reasonableness of the award and assess Ms. Gabert's losses ever mindful that the course of future events is unknown. I must allow for contingencies that may weaken the assumptions undergirding the award for loss of Ms. Gabert's future income earning capacity. Accordingly, I consider that Ms. Gabert says she may have gone on to travel more frequently or participate in other recreational activities with her husband as she has said. Further, I note that Ms. Gabert may not have had a financial need to return to work given her pension. With all respect to Ms. Gabert, her age may also have contributed to a potential decision to ultimately not return to teaching as she nears 75 years-old. I agree with the plaintiff that at this inquiry, the vicissitudes of Ms. Gabert's future involve much more negative contingencies; Ms. Gabert may have been called away to attend to family members who may be ill or who have other needs as she does have a large extended family. Taking all the negative and positive contingencies of life into account and assuming Ms. Gabert works until the age of 75, I assess Ms. Gabert's future loss of earning capacity for the four year period from trial until she turns 75 at \$15,000.

D. Loss of Housekeeping Capacity

The Legal Principles

- [139] This head of damage addresses the loss of the value of work which the plaintiff would have rendered but for the injuries which they cannot now perform. That loss of ability to work in a manner that is valuable to them and others should be compensated, but it is not the same as that awarded under damages for future cost of care. The assessment of future care costs involves a consideration of the losses that the plaintiff may reasonably be expected to be required: *O'Connell (Litigation Guardian of) v. Yung*, 2012 BCCA 57 [O'Connell]; see also *Yip v. Saran*, 2014 BCSC 1283 [Yip] at paras 81-82.
- [140] In *Kim v. Lin*, 2018 BCCA 77 [Kim], the Court of Appeal recently revisited the assessment of a loss of housekeeping capacity. The Court upheld the trial decision that awarded \$418,000.00 in housekeeping capacity to a 27-year-old plaintiff. In this decision, the Court clarified the discretion that trial judges retain to address the claim for loss of housekeeping capacity either as part of the non-pecuniary loss assessment or as a segregated pecuniary

damage. The true nature of the loss suffered by the plaintiff may inform which valuation method a trial judge chooses. As a guide, if a plaintiff suffers an injury that would make a reasonable person in the plaintiff's circumstances unable to carry on the necessary household work or where the plaintiff 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 line with a loss of amenities, or increased pain and suffering, the loss may be compensated by a non-pecuniary damages award: Kim at para. 33.

[141] An award should be approached conservatively, but not at the expense of reasonableness: Kim at para. 35.

Positon of the Parties

[142] Ms. Gabert seeks an award of \$140,000 for her loss of housekeeping capacity as a distinct head of damage separate and apart from her claims for the cost of housekeeping assistance as part of her costs of future care.

[143] The defendant submits that if there is a loss, which he says is nominal, it is more appropriate to compensate for that as part of the non-pecuniary award. Alternatively, if the Court is satisfied there is a basis to grant an award, a quantum no greater than \$10,000 would be appropriate.

Discussion

[144] Ms. Gabert testified, as did her husband, that before the accident, she was someone who took responsibility for all household chores, including cooking, washing dishes, laundry and doing the household cleaning, such as vacuuming. Her daughters and her friends testified that Ms. Gabert ran the household and was a proficient housekeeper. However, following the accident, she can no longer perform these household chores other than perhaps some light dusting and she has to pace herself and cannot do the other chores as she does not have the energy due to her chronic fatigue syndrome and fibromyalgia. Most, if not all, of the household chores have been foisted upon Mr. Gabert.

[145] The opinions of Dr. Tai, Dr. Hawkeswood, Dr. Arseneau and Dr. O'Shaughnessy all concur that Ms. Gabert requires assistance with housekeeping in order to reduce the risk of further deterioration. Given that it is not expected that Ms. Gabert's chronic condition will improve, the physicians agree that Ms. Gabert requires housekeeping support on a long-term basis.

[146] I am persuaded on the evidence that due to Ms. Gabert's chronic condition she has suffered a loss of an asset - an ability to do housekeeping work. I am satisfied that she suffered an injury that would make a reasonable person in her circumstances unable to carry on the necessary household work, and she has not simply suffered a loss of amenities. Per the distinction set out in Kim, this loss of capacity should be compensated as a pecuniary loss and not as part of the non-pecuniary award.

[147] However, Ms. Gabert's position on the cost which I should award her under this head of damages is excessive. When determining the amount of this award, I must consider the fact that Ms. Gabert will be travelling for several months each year which will reduce the need to carry out household chores. There was no evidence led before me regarding the need for housekeeping chores while Ms. Gabert is away. This award should also be subject to contingencies that may arise given Ms. Gabert's age and possibilities that when Ms. Gabert is away, there is no housekeeping required and thus no compensation should be awarded for the loss of a capacity to perform services the demand for which is not even engaged. Ms. Gabert's failure to account for these contingencies in her pleaded amount does not respect the proposition that a plaintiff ought not to be put in a better position than her original one: *Athey* at para. 32.

[148] Accordingly, I award \$60,000 in loss of housekeeping capacity damages.

E. Special Damages

The Legal Principles

[149] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This stems from the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina* at 78.

Positon of the Parties and Discussion

[150] Ms. Gabert submits that an award of \$51,047.67 should be made based on an agreed amount of \$49,560.17, as well as the amount of \$1,487.50, for the cost of obtaining an MRI of her head and neck.

[151] Counsel for the defendant agreed that Ms. Gabert incurred these costs but challenges the necessity of some of these costs. In particular, he challenges the mileage claim of \$3,756.68 arguing that it was not reasonable for Ms. Gabert to make single trips for each treatment without tendering any evidence to support his view. He also challenges the cost of massage therapy while Ms. Gabert was in California despite the fact that he concedes massage therapy is a legitimate future care item. I do not consider the defendant's opposition to these expenses valid. However, I agree with the defendant that the cost of the MRI was not medically justified or reasonable. Dr. Tai testified that she had scheduled a CT scan but Ms. Gabert chose to prefer an MRI despite the specific recommendation by Dr. Tai. While Ms. Gabert may have preferred to have an MRI I agree with the defendant that the MRI was not medically necessitated by the accident for Ms. Gabert's restoration and rehabilitation. I deny the claim of \$1,487.50.

[152] Accordingly, I find that Ms. Gabert is entitled to reimbursement for her special damages in the amount of \$49,560.

VII. Summary

[153] In summary, I award the following damages:

Head of Damage Award

- i. Non-pecuniary damages \$160,000
- ii. Cost of Future Care \$130,560
- iii. Past Loss of Earning Capacity \$35,000
- iv. Loss of Future Earning Capacity \$15,000
- v. Loss of Housekeeping Capacity \$60,000
- vi. Special Damages \$49,560

TOTAL \$450,120

viii. Costs

[154] In the event that the parties are unable to agree on costs, they are at liberty to apply to me in writing to settle the matter within 60 days of the issuing of these reasons.

"Devlin J."

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