
CANADA / JUDGMENT

Hale v. Keyes

2020 BCSC 559

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Supreme Court of British Columbia

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2020 BCSC 559 Hale v. Keyes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hale v. Keyes,

2020 BCSC 559

Date: 20200409

Docket: M160510

Registry: Vancouver

Between:

Karen Vanessa Hale

Plaintiff

And

Will Keyes

Defendant

Before: The Honourable Mr. Justice Basran

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, BC

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INTRODUCTION

- [1] On March 23, 2014, Karen Hale was driving up an incline when she was rear-ended by a truck driven by Will Keyes. The collision occurred when she slowed and pulled to the right so an oncoming truck could safely pass two pedestrians on the roadway (the "Accident"). Mr. Keyes admits liability for the Accident and there is no allegation that Ms. Hale was contributorily negligent.
- [2] Ms. Hale was relatively healthy prior to the Accident, which caused injuries to her neck and back. She also developed increased frequency and intensity of headaches and migraines after the Accident.
- [3] Ms. Hale seeks damages for her pain and suffering, past income loss, loss of future income earning capacity, cost of future care, and loss of homemaking capacity. She also seeks special damages.
- [4] For the reasons that follow, I have concluded that Ms. Hale is entitled to:
 - a) \$75,000 for non-pecuniary damages;
 - b) \$12,200 for past income loss;
 - c) \$85,300 for loss of future income earning capacity;
 - d) \$41,900 for cost of future care;
 - e) \$15,000 for loss of homemaking capacity; and
 - f) \$4,460 for special damages.

BACKGROUND FACTS

Pre-Accident Condition of Ms. Hale

- [5] Ms. Hale was born on June 13, 1985. She was 28-years-old at the time of the Accident and 34 at the date of trial. She is married and has three children from a previous relationship. Prior to the Accident, she was generally in good health both physically and mentally and had no functional or physical limitations. She had some episodic anxiety and post-partum depression in 2010. However, she had no sleep, mood, or irritability problems prior to the Accident. She managed the care of her three young children and her household, mostly on her own. Her partner at that time provided little assistance.
- [6] Starting at age ten, Ms. Hale occasionally suffered from migraine headaches and took medication for them. From that age to the time of the Accident, she had one of these headaches every four to five months. They did not interfere with her functioning and they did not affect her ability to work or care for her children. She managed these headaches by lying down for an hour, after which she usually felt better.

- [7] Katelin Offord-Harper is a friend of Ms. Hale. She described Ms. Hale prior to the Accident as funny, energetic, happy, and very involved with her young children. She recalled that Ms. Hale was responsible for all housekeeping tasks and her home was always well-kept.
- [8] Ms. Offord-Harper testified that Ms. Hale was extremely active with her children. She took them for long walks and to the park, played with them extensively, and had no difficulty keeping up with them.
- [9] According to Ms. Offord-Harper, Ms. Hale had no physical or functional limitations, no pain, no chronic illnesses or other health problems, and was not moody or anxious. She occasionally got headaches but pushed through them and they did not affect her ability to function.

Post-Accident Condition of Ms. Hale

- [10] Ms. Hale experienced pain in her neck and back shortly after the Accident occurred. Her mother took her to a hospital where she was assessed and released. She was unable to work on the day after the Accident because of pain.
- [11] Dr. Mavis Hollman, Ms. Hale's family doctor, assessed Ms. Hale on March 25, 2014. Dr. Hollman prescribed medication for the pain, ordered x-rays, and recommended that she not return to work. The medication did not ease Ms. Hale's pain so, two days later, she returned to Dr. Hollman and was prescribed a different pain medication.
- [12] On April 2, 2014, Dr. Hollman assessed Ms. Hale and prescribed physiotherapy. From April to June 2014, Ms. Hale underwent physiotherapy treatment two to three times per week. This treatment did not reduce her pain.
- [13] Soon after the Accident, Ms. Hale's headaches worsened and became more frequent. They lasted approximately three days and prevented her from caring for her young children. She needed to lay down for long periods and required help from others to care for her children. These headaches occurred once or twice per week.
- [14] Lorraine Hale, Ms. Hale's mother, recalls that in the days after the Accident, Ms. Hale was not well. She did not want to leave the house and was afraid of losing her job. She lacked energy, developed driving anxiety, and was uncharacteristically irritable with her children. She also became moody and short-tempered with her husband. She was not as outgoing as she used to be and was more emotional. She worried about her pain, the worsening migraines, and not being able to do her job to her expectations. Ms. Hale had difficulty doing dishes and laundry, so Lorraine Hale assisted with these tasks.
- [15] Lorraine Hale recalled that Ms. Hale's migraine headaches became significantly worse after the Accident. They were more severe and painful. Laying down for a few hours was not enough to resolve them and they often lasted for days at a time, and sometimes up to a week. The frequency and severity of Ms. Hale's migraines has not improved since the Accident.

- [16] Ms. Hale's headaches periodically prevented her from going to work or forced her to leave work. Lorraine Hale and Ms. Hale's partner coordinated their work schedules to care for the children during these periods. Lorraine Hale also noticed that Ms. Hale often had pain symptoms after working.
- [17] Ms. Offord-Harper testified that after the Accident, Ms. Hale had difficulty doing laundry and dishes and could not stand for very long. She assisted Ms. Hale with these tasks and helped look after the children when Ms. Hale suffered from headaches. Ms. Hale called Ms. Offord-Harper to ask for help caring for the children approximately every other day due to her headaches.
- [18] Ms. Offord-Harper noted that after the Accident, Ms. Hale could no longer play with the children in the park. Instead, she sat on a bench and Ms. Offord-Harper played with them. Ms. Hale could no longer slide with the children, push them on swings, or keep up with them. Her mood became more agitated and she could not tolerate loud noises. She struggled emotionally because she blamed herself for not being able to care for her children and was dismayed that she could not pick them up.
- [19] Ms. Offord-Harper observed that Ms. Hale continues to have migraines once or twice per week and she continues to have difficulty with household chores and taking care of her children, who now range in age from 8 to 12.

Ms. Hale's Employment and Educational History

- [20] Ms. Hale began a Care Aide course in 2009 and completed it in September 2013. She had two children during this period.
- [21] Her first care aide position was with Overlander Extended Care in Kamloops beginning in June 2013. She worked approximately 40 hours per week for \$21/hr on a casual, on-call basis. In this role, she assisted clients with dressing, toileting, bathing, feeding, ceiling track lifts, and sit-to-stand lifting. This was physically demanding work. Ms. Hale worked at Overlander until October 2013.
- [22] Next, starting on December 23, 2013, Ms. Hale worked for High Country Healthcare ("HCH"), a home support company, as a casual home support worker. This work involved driving to clients' homes and assisting them with meal preparation, showers, dressing, and taking their medication. This was also physically demanding, especially the tasks involved in dressing clients. Ms. Hale assisted 10-15 clients per day and worked approximately 40 hours per week. Her rate of pay was \$18.75/hr + \$.52/km. Ms. Hale thoroughly enjoyed this work because she felt like she could give back to a generation of people who performed similar tasks when they raised their children.

- [23] Ms. Hale was working at HCH at the time of the Accident, but was unable to work for four and one half months after it. Commencing on June 16, 2014, Ms. Hale participated in an occupational rehabilitation program ("OR-1"). She was discharged from this program on July 14, 2014, having attended 13 of 15 sessions. This treatment improved her functioning. She returned to work at HCH for three days during the weeks of July 14, 2014 and July 21, 2014. She returned to full-time hours during the week of July 28, 2014.
- [24] Martin Giguere is a physiotherapist who works with patients in the OR-1. He confirmed that there is no reference in Ms. Hale's OR-1 clinical records regarding her ability to maintain postural tolerances such as stooping, crouching, and working in low level positions.
- [25] After returning to work at HCH, Ms. Hale found it difficult to drive to see her clients and experienced pain when she tried to dress them, particularly when bending over. She called in sick one to two times per week until August 2014, when she quit this position and moved to Alberta in order to obtain better medical care for one of her daughters. She remained in Alberta for approximately 20 months.
- [26] Once settled in Alberta, Ms. Hale began working as a casual care aide at Sunrise Village Seniors Home starting in November 2014 for 30-40 hours per week. This work involved helping clients bathe, dress, do laundry, and take their medications. It was hard for her to do the tasks involved in bathing and dressing clients because of her ongoing pain symptoms. She earned \$14-\$15/hr when she began and was earning \$17-\$19/hr plus shift premiums when she left in March 2016. During this period, she called in sick once every two to three weeks because of her pain symptoms.
- [27] From April 2016 to August 2016, Ms. Hale worked at PetSmart in Red Deer, Alberta.
- [28] Ms. Hale returned to BC in August 2016 and began an Office Administration Certificate program at Nicola Valley Institute of Technology ("NVIT") in September 2016. This was a full-time program that she completed in May 2017. Ms. Hale undertook this program to pursue her dream of opening her own seniors' home.
- [29] In May 2017, Ms. Hale began working part-time at a local hotel, the Desert Inn and at a local retailer. In June 2017, she began working at Nicola Meadows as a casual care aide in addition to working at the Desert Inn. This was an on-call position with four to eight hour shifts, some of which were split shifts.
- [30] In August 2017, Ms. Hale accepted a casual care aide position at the Florentine retirement home. While working at Florentine, she found it difficult to do two-person lifts of clients and had difficulty dressing them.
- [31] Ms. Hale estimates that she was unable to work and called in sick three to four times per month at Nicola Meadows and Florentine.

- [32] In September 2017, Ms. Hale enrolled full-time in the Executive Assistant Diploma program at NVIT. She completed this program in April 2018 and commenced an administration position at Nicola Meadows that paid \$17/hr. She also occasionally did care aide work at Nicola Meadows and remained there until July 2018.
- [33] From August 2018 to December 2018, Ms. Hale worked at Nicola Sushi as a server. In December 2018, Ms. Hale returned to her position at Florentine and she worked there until June 2019.
- [34] In July 2019, Ms. Hale began working at the Spirit Ridge Resort in Osoyoos, BC and she moved there in September 2019. As of July 2019, Ms. Hale signed a three-month seasonal contract to work as a pool server at Spirit Ridge at a rate of pay of \$12.65/hr. She also received an average of \$80/day in tips. She enjoyed this work and was able to carry and serve drinks, but the bending and slouching caused some pain in her neck and back. In October 2019, Ms. Hale became a full-time barista and banquet server at Spirit Ridge at a rate of pay of \$13/hr. Spirit Ridge accommodates her inability to lift heavy objects.
- [35] Ms. Hale plans to continue working at Spirit Ridge. She is not looking for other work and would like to progress to more senior positions at Spirit Ridge. She has called in sick twice in the last two months.
- [36] In summary, since the Accident, Ms. Hale returned to work full-time at HCH and then worked full-time at Sunrise Village, which she left for reasons unrelated to the Accident. She worked full-time at Nicola Meadows, then took a leave of absence to complete two full-time programs at NVIT. She worked as a care aide at Florentine and left this position because of her husband's relocation to Spirit Ridge. On multiple occasions after the Accident, Ms. Hale worked as a care aide.

Expert Medical Evidence

- [37] Dr. Sharmila Kulkarni and Dr. Tony Giantomaso, specialists in physical medicine and rehabilitation, examined Ms. Hale; and two neurologists, Dr. Donald Cameron and Dr. Richard Grosch, also examined her. Together, their expert reports made diagnoses of pain in the neck, shoulder, and mid-back as well as increased frequency and intensity of cervicogenic and migraine headaches. All of the medical experts concluded, and I agree, that Ms. Hale's injuries were caused by the Accident.

Dr. Kulkarni - Physiatrist

- [38] Dr. Kulkarni prepared two expert reports dated July 4, 2016 and October 11, 2019. In her 2016 report, she concluded that Ms. Hale had chronic neck and back pain combined with postural muscle deconditioning. She recommended that Ms. Hale work with a physiotherapist or kinesiologist to develop a consistent exercise program. In 2016, Dr. Kulkarni believed that Ms. Hale's prognosis for a return to the level she was at when she completed the OR-1 program was good and that she should not have any limitations in her

ability to return to care aide work.

[39] In 2019, Dr. Kulkarni provided an updated opinion. She stated that Ms. Hale's current symptoms seem to be consistent with those she observed when she examined her in 2016. She noted that the assessments completed by Drs. Cameron, Giantomaso, Grosch, and Ms. Webber, an occupational therapist, best reflected Ms. Hale's current status and that all of the medical experts agreed that Ms. Hale's prognosis for a significant recovery was poor. Dr. Kulkarni concluded that even with further rehabilitation and enhanced pain treatment, Ms. Hale would probably continue to have chronic pain and therefore be unlikely to return to full-time employment as a care aide.

Dr. Giantomaso - Physiatrist

[40] Dr. Giantomaso assessed Ms. Hale on July 31, 2019 and prepared an expert report dated August 1, 2019. He diagnosed:

- a) exacerbation and aggravation of previously existing migraine headaches;
- b) chronic post-traumatic cervicogenic headaches; and
- c) chronic post-traumatic neck and back pain.

[41] His prognosis was that Ms. Hale would continue to suffer from chronic pain over the long term because she has experienced ongoing pain since the Accident and most improvement in pain symptoms takes place in the first 6-12 months post-trauma.

[42] Dr. Giantomaso recommended:

- a) a long-term pain management strategy, including a trial of Botox, but emphasized that this would not be curative;
- b) passive therapies such as physical therapy, chiropractic, massage therapy, and acupuncture with the objective of decreasing pain flare-ups and maintaining competitive employment;
- c) a functional capacity evaluation; and
- d) active rehabilitation for at least 16-24 sessions with a personal trainer or kinesiologist.

[43] Dr. Giantomaso described a vicious cycle in which active rehabilitation can cause migraine headaches which discourages migraine sufferers from exercising. This inactivity may reduce migraines, but the resulting deconditioning can worsen pain in the neck and back and prevents improvement of these symptoms.

[44] He found that Ms. Hale did not amplify or exaggerate her symptoms, and as a result, his examination of her was valid. He also found that her self-reported limitations were reasonable given her post-traumatic injuries.

Dr. Cameron - Neurologist

- [45] Dr. Cameron completed a neurological consultation of Ms. Hale on July 22, 2019 and completed an expert report on July 28, 2019, and a subsequent report on August 24, 2019 in response to Dr. Grosch's expert report.
- [46] He concluded that it is probable that Ms. Hale will remain permanently partially disabled because of her neck and back pain and will continue to have intermittent post-traumatic headaches. He believes that these headaches are linked to her neck and shoulder pain, are chronic, and therefore are unlikely to improve. He believes that her work activities will be restricted to permanent light duties.
- [47] Dr. Cameron believes that Ms. Hale should try Botox treatment as part of an overall pain management program. If this therapy is effective, he thinks she will need this therapy every three months, indefinitely, but he does not believe that this therapy will resolve Ms. Hale's headaches. He also does not expect her chronic pain condition will improve because it is now more than five years since the Accident and most improvement takes place within the first two years after the traumatic incident. He acknowledged that long term compliance with Botox treatment is low and that in his experience, many clients who try this treatment opt out of it after a year even if they are deriving some benefit from it.
- [48] In response to Dr. Grosch's opinion that Ms. Hale is suffering from obvious psychological problems involving anxiety and depression following the Accident, Dr. Cameron noted that Ms. Hale did not appear obviously depressed when he examined her. He would defer to a specialist in psychology or psychiatry but would not otherwise change his opinion from his previous report of July 28, 2019.

Dr. Grosch - Neurologist

- [49] Dr. Grosch conducted a neurological examination of Ms. Hale on April 9, 2019 and completed an expert report on June 26, 2019, followed by an addendum to this report on September 12, 2019, and a minor clarification of this addendum on October 31, 2019.
- [50] Dr. Grosch diagnosed:
- a) soft tissue injuries that have become myofascial in Ms. Hale's interscapular area and low back;
 - b) cervicogenic and migraine headaches;
 - c) no neurological problems; and
 - d) psychological problems involving anxiety and depression.
- [51] Dr. Grosch acknowledged that psychological or psychiatric problems were not within his area of expertise but his "feeling" was that these issues were influencing Ms. Hale's symptomology.

- [52] Dr. Grosch concluded that Ms. Hale's prognosis is poor because it has been five years since the Accident and her symptoms persist.
- [53] In his September 12, 2019 addendum, Dr. Grosch disagreed with Dr. Cameron's recommendation that Ms. Hale try a course of Botox for her recurring migraine headaches. He pointed out that this treatment is usually reserved for patients who suffer 15 or more headaches per month and Ms. Hale gets these headaches two to three times per month. He believes that the potential benefits are outweighed by the expense, discomfort, and time required for Botox treatments. Instead, Dr. Grosch recommended over-the-counter or triptan-based pain medications.

Functional Capacity Evaluation and Cost of Future Care Recommendations

- [54] Erin Webber, a registered occupational therapist, assessed Ms. Hale on July 24 and July 29, 2019 to determine her functional abilities and limitations and to provide future care recommendations. On August 7, 2019, she completed a functional capacity evaluation and cost of future care report.
- [55] Ms. Webber found that Ms. Hale provided a high level of effort during the testing but showed a consistent level of fear and a guarded approach to strength-based activities. She concluded that Ms. Hale's performance on the strength tests was consistent with her descriptions of the challenges she faced in performing the activities of daily living. Ms. Hale did not fake or exaggerate her symptoms.
- [56] Ms. Webber concluded that Ms. Hale was not suited to jobs that require extensive and prolonged overhead reaching or prolonged crouching and kneeling with simultaneous forward bending.
- [57] Ms. Webber pointed out that the OR-1 program did not address risk factors for recovery. Although Ms. Hale may have been able to move 50 pounds at the end of that program, there was no indication of frequency of this action in the OR-1 program. Mr. Giguere, who administers the OR-1 program, testified that this was a one time testing. Ms. Webber believes that being able to do something once in a clinical setting is insufficient to confirm that an individual can do this type of task on an ongoing basis in a work setting.
- [58] Mr. Webber found that Ms. Hale has no limitations with sitting, standing, or walking. This does not contradict Ms. Hale's testimony because she used to be able to walk, sit, and stand for several hours at a time and now is restricted to doing these things for about an hour. That is a marked change for Ms. Hale but it may not constitute a restriction from the perspective of an occupational therapist.
- [59] Ms. Webber concluded that Ms. Hale is suited to categories of work that are sedentary and only some types of light and medium work. She concluded that Ms. Hale is not capable of doing the full range of tasks associated with care aide and home support worker roles and she cannot do most medium strength work.

- [60] Based on the results of the functional capacity evaluation, Ms. Webber concluded that Ms. Hale is physically capable of performing the activities of daily living, including regular household chores and childrearing, in a paced manner. She recommended that Ms. Hale continue to avoid heavy outdoor work.
- [61] Ms. Webber made several recommendations regarding Ms. Hale's treatment and future care needs on the assumption that Ms. Hale will make modest improvement in her ability to manage her symptoms and improve her daily functioning. She provided cost estimates for the Botox treatments recommended by Drs. Giantomaso and Cameron. She also recommended that Ms. Hale obtain an annual gym pass to enable her to do a strength and conditioning program and that she receive funds for 12 symptom management treatments per year for physiotherapy and massage therapy.
- [62] Ms. Webber determined that Ms. Hale would be an ideal candidate for an intensive multi-disciplinary chronic pain program that she described as the "gold standard" for positive outcomes. Dr. Giantomaso believes that Ms. Hale would have benefitted from this type of program earlier in the course of her treatment. Ms. Webber based this recommendation on her finding that emotional factors such as fear of pain and symptom exacerbation are significantly reducing Ms. Hale's daily functioning. This three to five week program is only available in larger centers and the nearest one to Ms. Hale's residence in Osoyoos, BC is 380 kilometers away in Surrey, BC. The total cost of attending this program, including travel, hotel, and meals, is approximately \$12,650 to \$19,120 depending on the length of the program.

RELIABILITY AND CREDIBILITY ASSESSMENT

- [63] There were some conflicts between Ms. Hale's evidence at trial and her testimony at her examination for discovery. Mr. Keyes takes the position that this indicates that her evidence is not reliable. He does not suggest, nor do I believe, that Ms. Hale is not credible. In my view, Ms. Hale did her best to answer questions and the conflicts in her evidence were on relatively minor matters. During her oral testimony, Ms. Hale was visibly nervous and uncomfortable, probably due to pain symptoms.
- [64] I accept the evidence of Ms. Hale and the other witnesses as both credible and reliable.

QUANTUM OF DAMAGES FOR PAIN AND SUFFERING

Relevant Legal Principles

- [65] Ms. Hale must prove on a balance of probabilities that the Accident caused her injuries. She need not establish that the admitted negligence of Mr. Keyes was the sole cause of her injuries, but she must demonstrate a substantial connection between the Accident and her physical and psychological injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28-30.
- [66] Some of the relevant factors in assessing non-pecuniary damages include:

- a) age of the plaintiff;
- b) nature of the injury;
- c) severity and duration of the pain;
- d) disability;
- e) emotional suffering;
- f) loss or impairment of life;
- g) impairment of family, marital, and social relationships;
- h) impairment of physical and mental abilities; and
- i) loss of lifestyle

Stapley v. Hejslet, 2006 BCCA 34 at para. 46.

[67] Once causation has been established, the burden shifts to the defendant to prove that the plaintiff failed to mitigate some of her loss or injury. If a plaintiff has not pursued a recommended course of medical treatment, the defendant must prove that the plaintiff acted unreasonably in declining the medical treatment and the extent, if any, by which the plaintiff's damages would have been reduced had she acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57.

[68] The question of whether a person has been reasonable in refusing recommended treatment is one for the trier of fact to decide based on the circumstances of the case, taking into account the degree of risk from the treatment, the gravity of the consequences for refusing it, and the potential benefit to be derived from it: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 at 151-52, 162-63.

[69] Mitigation is a subjective/objective test: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56. The first part of the test asks whether the reasonable patient, having all the information at hand that the plaintiff possessed, ought to have undergone the treatment. The second part asks the extent, if any, to which the plaintiff's damages would have been reduced by that treatment. Also see *Rhodes v. Surrey (City)*, 2018 BCCA 281 at para. 66.

[70] The reasonableness of the steps a plaintiff takes in mitigation is a question for the trier of fact. The trial judge is entitled to look at the plaintiff's personal circumstances and their ability to follow the advice: *Gill v. Lai*, 2019 BCCA 103 at para. 26.

The Plaintiff's Position on Non-Pecuniary Damages

- [71] Ms. Hale submits that prior to the Accident, she enjoyed a wide range of recreational activities and was very physically active. She enjoyed rollerblading, long walks, swimming, puzzles, and regular visits to the park with her children. She attended the gym five to seven days a week. Although she had a history of headaches, they were not debilitating and she was fully functioning. She was actively involved with her children and did most of the housework.
- [72] Since the Accident, she is unable to rollerblade because she has balance problems and this activity aggravates her back pain. She can no longer go for long walks and her capacity to swim has decreased. Lorraine Hale testified that her daughter's mood has deteriorated since the Accident and she is more irritable and short-tempered. Ms. Hale's increased frequency and intensity of headaches, combined with her persistent neck and back pain, are the most significant effects of the Accident.
- [73] Ms. Hale submits that she made reasonable efforts to follow treatment recommendations and that her personal circumstances are relevant to her mitigation efforts. As a mother of three young children, she needed to continue working to provide for her children. She notes that at one time, she was working three jobs to support her family. She was constrained from fully participating in the recommended exercise program by her personal, financial, and family circumstances.
- [74] Ms. Hale submits that the following cases provide guidance in assessing the amount that should be awarded to her for her pain and suffering:
- a) *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81: The 41-year-old plaintiff suffered soft tissue injuries and chronic pain, anxiety, and depression as a result of the accident. In awarding \$180,000 in non-pecuniary damages, the Court determined that the accident had "fundamentally transformed" the plaintiff: para. 108.
 - b) *Rintoul v. Gabriele*, 2011 BCSC 858: The 27-year-old plaintiff was involved in a pedestrian/motor vehicle accident and suffered a brain injury as a result. She had problems with her memory and concentration and suffered from significant neck and upper back pain as well as daily headaches, and more severe headaches once or twice a month. The Court awarded \$175,000 in non-pecuniary damages.
 - c) *Noftle v. Bartosch*, 2018 BCSC 766: The 46-year-old plaintiff suffered injuries to her neck, collar bone, shoulders, and back. She also suffered from migraines, headaches, and sleep disturbances. These injuries affected her ability to do housework and chronically affected her emotions. She was no longer able to pursue recreational, volunteer, and employment activities from which she derived a great deal of enjoyment. The Court awarded \$170,000 in non-pecuniary damages.

[75] Based on these cases, Ms. Hale submits that she should be awarded \$175,000 in non-pecuniary damages.

The Defendant's Position on Non-Pecuniary Damages

[76] Mr. Keyes acknowledges that Ms. Hale has suffered an injury and has neck and back pain combined with increased frequency of headaches and migraines. He points out that Ms. Hale recovered to some extent through 2018 and she has been able to find numerous jobs since the Accident. He characterizes her symptoms as intermittent, aside from daily headaches, and suggests that her approach to treatment was "less than enthusiastic". He suggests that her neck and back pain may improve, as could her headaches.

[77] Mr. Keyes relies on the following cases with respect to the quantum of Ms. Hale's non-pecuniary damages:

- a) *Suthakar v. Humble*, 2016 BCSC 155: The Court awarded \$70,000 in non-pecuniary damages to the plaintiff. She had neck, shoulder, and low back pain as well as headaches because of an accident. She was off work for three to four months after the accident and suffered from symptom exacerbation and pain in performing her employment duties. These symptoms left her exhausted after working and affected her ability to play with her children. These symptoms were expected to continue for many years if not indefinitely.
- b) *Kodelja v. Johal*, 2017 BCSC 164: A 40-year-old teacher was awarded \$80,000 in non-pecuniary damages following a motor vehicle accident. She developed pain in her neck, shoulder, and upper and lower back. She also suffered from a daily headache that became severe three to four times per week and she experienced nausea and light sensitivity. She also felt tingling and numbness in her right arm. Her symptoms improved over time but plateaued after two years. She developed chronic myofascial pain syndrome and post traumatic thoracic outlet syndrome, with mild to moderate ongoing pain.
- c) *Sen-Laurenz v. Napoli*, 2019 BCSC 1379: The plaintiff was awarded \$90,000 in non-pecuniary damages in respect of a motor vehicle accident that resulted in chronic soft tissue injuries that did not fully recover. These injuries included Whiplash Associated Disorder, soft tissue injuries in her neck and back, chronic myofascial pain syndrome, altered shoulder blade and postural biomechanics, deconditioning, headaches, moderate depression in partial remission, ongoing anxiety, emotional upset, poor sleep, difficulty with concentration and memorization, binge eating disorder, and weight gain. The injuries impeded her education and delayed her entry to medical school. In the five years between the accident and trial, there was some improvement in these symptoms. However, she continued to suffer from headaches, back, and neck pain, combined with impaired sleep, stamina, and mood function. She could only sit for short periods and her concentration and memory remained impaired.

- d) *LaRocque v. LaRocque*, 2019 BCSC 655: The 33-year-old plaintiff was awarded \$90,000 in non-pecuniary damages six years after a motor vehicle accident. Her injuries are summarized at para. 73:

She sustained injuries to her cervical and thoracic spine; right shoulder; right arm, hand and wrist; psychological injury (including anxiety); and an increase in the severity and frequency of her headaches. As a result of the MVA, she has developed [thoracic outlet syndrome (TOS)] in her right arm and hand; myofascial neck pain; aggravation of pre-existing right shoulder pain; a doubling of her pre-existing headaches; adjustment disorder (AD); and aggravation of her pre-existing low mood (dysthymia) with anxiety features. The prognosis for the TOS is guarded and she will likely continue to experience symptoms which will wax and wane throughout her life. The cervicogenic headaches are also likely to persist into the future.

[78] Mr. Keyes submits that the injuries suffered by the plaintiffs in the last two cases were more severe or wide ranging than Ms. Hale's injuries because both involved myofascial pain injuries and headaches as well as additional mental health disorders and/or thoracic outlet syndrome.

[79] Mr. Keyes submits that Ms. Hale failed to mitigate her losses by:

- a) failing to see a neurologist until 2018;
- b) failing to attend recommended physiotherapy or kinesiology;
- c) failing to continue with her exercises following occupational therapy; and
- d) failing to act on the recommendations of Dr. Oyler, a neurologist the plaintiff visited for her headaches, and Dr. Cameron.

[80] Mr. Keyes asserts that Ms. Hale did not take reasonable steps to obtain funding for the treatment she required. She is therefore not entitled to rely on her impecuniosity as an excuse for failing to follow treatment recommendations. Mr. Keyes submits that Ms. Hale's non-pecuniary and loss of earning capacity damages should be reduced by 20% to 30% to reflect her failure to mitigate.

Analysis and Findings of Fact on Non-Pecuniary Damages

[81] Prior to the Accident, Ms. Hale was able to do all household chores including cooking and cleaning. She rollerbladed for up to two hours, went on long walks, played with her children in the park, and enjoyed movies and puzzles. She also swam with her children on weekends and went to the gym five to seven days per week, where she did weight training and cardiovascular exercises.

- [82] After the Accident, while living in Alberta, Ms. Hale received massage therapy, physiotherapy, and did yoga. These treatments were somewhat helpful but she continued to have neck and back pain and daily headaches. She took two Advil tablets, twice a day to manage her neck and back pain as well as her headaches. When she got migraines during this period, she needed either her partner or a babysitter to take care of her children.
- [83] Ms. Hale's migraine headaches became significantly worse in terms of intensity and frequency after the Accident. Lying down for a few hours was not enough to resolve them and they often lasted for days at a time and sometimes up to a week. This has not improved since the Accident.
- [84] Ms. Hale did not drive for one to two months after the Accident. She either walked or received rides to her appointments with her mom, friends, or aunt, Denyse Merchant. She also has difficulty sleeping. She tried medication and reduced her significant intake of coffee, but still has sleep problems.
- [85] Ms. Hale can no longer roller blade because this activity flares her back pain. She can walk and swim for a maximum of one hour, which is a reduction from her pre-Accident ability to do these activities for several hours at a time. She also has not been able to exercise at a gym.
- [86] Her ability to do household activities such as sweeping, mopping, and cleaning dishes is reduced because of her pain. She also has difficulty with shovelling snow, mowing the lawn, and operating a weed eater. She is able to do some meal preparation and dishes. She has difficulty doing dishes and laundry. I will consider Ms. Hale's loss of homemaking capacity later in these reasons.
- [87] Ms. Hale's children have to be careful in how they approach her. They cannot jump into her arms. She is unable to take them to the park and play with them as she did before the Accident.
- [88] Ms. Hale returned to work within four months of the Accident and was working full-time by the end of 2014. In order to support her family, she worked at or close to full-time in 2015, which was her highest earning year since the Accident.
- [89] Ms. Hale's mood has been affected by the Accident. Her mother describes her as irritable, short-tempered, impatient, and somewhat depressed. She has not been diagnosed with depression.
- [90] Ms. Hale suggests a range of \$160,000 to \$180,000 and submits that \$175,000 is reasonable. The cases cited by counsel for the plaintiff each involve more serious circumstances than those faced by Ms. Hale. In Pololos, the Court found significant social isolation, anxiety, and depression as a result of the plaintiff's accident. In Rintoul, the plaintiff had cognitive issues caused by a brain injury. In Noftle, the plaintiff was unable to pursue work, volunteer, and recreational activities that she had previously been very involved in and that had given her a great sense of fulfillment, which caused a significant change to her lifestyle and identity.

- [91] Mr. Keyes asserts that a range of \$70,000 to \$80,000 is reasonable for non-pecuniary damages. He believes that aside from Ms. Hale's daily headaches, her symptoms are intermittent and in the mid to moderate range which is consistent with her ongoing employment history. In *Suthakar and Kodelja*, the Court found that the plaintiff had improved by 50%.
- [92] In my view, the cases cited by Mr. Keyes more closely approximate the injuries suffered by Ms. Hale as compared to the cases relied on by her. The cases cited by Ms. Hale involve more serious injuries that had more dramatic impacts on the plaintiffs' lives. Ms. Hale's symptoms are most analogous to those faced by the plaintiff in *Kodelja*. She has undoubtedly faced persistent and ongoing neck and back pain combined with daily headaches and migraine headaches that are more frequent and intense than those she had before the Accident. These symptoms have affected her physically and emotionally and they have affected the quality of her life and her relationships. This is most apparent in regards to her ability to parent her children and do activities with them.

Quantum of Damages

- [93] Having considered all of the relevant cases referred to by the parties and Ms. Hale's circumstances and prognosis, I conclude that she is entitled to \$75,000 in damages for pain and suffering.

Mitigation

- [94] The plaintiff asserts that she has mitigated her damages. She believes that she did the best she could given her personal circumstances. These include her being the primary caregiver, and for a period of time between relationships, sole provider for her three young children. She emphasizes that she had to return to work to support them.
- [95] Mr. Keyes submits that Ms. Hale did not follow all of the treatment suggestions of Dr. Oyler in 2013 or 2018. He suggests that if she had done so, she might have successfully reduced the frequency and severity of her headaches. Mr. Keyes also notes that in May and June of 2016, Ms. Hale received treatment recommendations from physicians to do physiotherapy and active rehabilitation and she did not completely follow through with them. He also notes that Ms. Hale did not pursue further funding from WorkSafe BC for gym memberships or other treatments prescribed by various health professionals. He suggests that all of Ms. Hale's damages, including non-pecuniary damages, be reduced by 20% to 30% based on her failure to mitigate.
- [96] The onus is on Mr. Keyes to prove a failure to mitigate and he has not met this burden. Ms. Hale's personal circumstances, ability to follow advice, and context are important in assessing mitigation. After their relationship ended, the father of her children left her with three young children and approximately \$3,000 in unpaid debt. She moved to Alberta to try to get better treatment for her disabled daughter. I accept that Ms. Hale was compelled to

return to work in order to support her family and pursuing treatment recommendations understandably became a secondary priority to caring for and supporting her children. Ms. Hale cycled through a number of positions after the Accident and she seemed to lose jobs for reasons unrelated to the Accident, but there is no evidence that she was not doing all that she could to manage her circumstances. On the contrary, throughout most of the post-Accident period, she worked consecutive jobs and at times multiple jobs to support her family.

[97] I accept that Ms. Hale simply did not realize that she could ask WorkSafe BC for funding to enable her to use a fitness facility. In my view, Ms. Hale's personal, financial, and family circumstances constrained her ability to obtain more treatment to improve her symptoms. Furthermore, there is no evidence to suggest that active rehabilitation or more detailed psychological treatment would have reduced her damages.

[98] In my view, Mr. Keyes has not discharged his onus to establish that Ms. Hale failed to mitigate her damages.

QUANTUM OF DAMAGES FOR PAST INCOME LOSS

Relevant Legal Principles

[99] The principles applicable to the assessment of past income loss are:

- An assessment of a loss of income involves a consideration of hypothetical events.
- The plaintiff need not prove these hypothetical events on a balance of probabilities.
- A hypothetical possibility will be taken into account provided that the plaintiff establishes that it is a real and substantial possibility, and not mere speculation.
- Once a hypothetical possibility is established, the Court must consider the likelihood of the event occurring in determining the measure of damages.
- A causal connection must be established, on a balance of probabilities, between the accident and the pecuniary loss claimed.
- It is up to the trial judge to determine what approach to use to quantify the loss (i.e., an earnings approach or a capital asset approach).
- The plaintiff is entitled to recover her net loss of earnings. This is calculated by deducting provincial and federal income tax and Employment Insurance premiums from her gross loss of earnings.

See: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48 (Goepel J.A. in dissent, but not on this point); *Griffioen v. Arnold*, 2019 BCCA 83 at para. 67; *Smith v. Knudsen*, 2004 BCCA 613 at paras. 36-37; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 186; ss. 95 and 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231; and s. 180 of the Insurance (Vehicle) Regulation, Reg. 447/83, as amended.

The Parties' Positions on Past Income Loss

[100] Ms. Hale submits that she should receive \$8,150 for past income loss in respect of the time she missed at HCH. Mr. Keyes agrees with this amount.

[101] Ms. Hale also submits that she should receive past income loss for two days of work per month over the past five-and-a-half years for an additional \$7,017. Mr. Keyes agrees that she should get some amount in respect of this period, but estimates her additional past income loss to be \$1,500.

Analysis and Factual Findings on Past Income Loss

[102] The parties agree that from April 14 to July 29, 2014, WorkSafe BC paid Ms. Hale wage loss benefits of \$7,014.52.

[103] I accept Ms. Hale's evidence that she has missed approximately two days of work per month because of her injuries, most notably her migraine headaches. I am satisfied that she is entitled to \$15,200 for past income loss. A further reduction of approximately 20% is warranted to calculate the net value of Ms. Hale's past income loss.

[104] On this basis, I conclude that Ms. Hale is entitled to \$12,200 in past income loss as a result of the Accident. This amount includes the wage loss benefits of \$7,014.52 that WorkSafe BC paid Ms. Hale. She is therefore entitled to a further \$5,185 for past income loss.

ENTITLEMENT TO DAMAGES FOR FUTURE LOSS OF EARNING CAPACITY

Relevant Legal Principles

[105] The principles applicable to the assessment of future loss of earning capacity are:

- A plaintiff should be put in the position she would have been in absent the accident, to the extent possible.
- The court should compare the plaintiff's likely future working life absent the accident to what is likely to occur with the accident having happened.
- The assessment must be based on evidence, but is not a mathematical calculation.
- The plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss.
- Comparison to other cases is generally of limited utility, though other cases can provide some guidance.
- The court can employ the "earnings approach" or the "capital asset" approach in assessing the loss.
- The capital asset approach is typically used in cases where the plaintiff has an uneven earnings history and involves the following factors:

- o Has the plaintiff been rendered less capable overall of earning income from all types of employment?
- o Is the plaintiff less marketable or attractive as a potential employee?
- o Has the plaintiff lost the ability to take advantage of all job opportunities that might otherwise have been open?
- o Is the plaintiff less valuable to herself as a person capable of earning income in a competitive labour market?
- The overriding principle is the "overall fairness and reasonableness of the award".

See: Pololos at para. 133; Gregory at paras. 32 and 33; Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.); Gilbert v. Bottle, 2011 BCSC 1389 at para. 233; and Rosvold v. Dunlop, 2001 BCCA 1 at paras. 10-11.

[106] Ms. Hale's own perception that she has a diminished capacity to earn income in the future is insufficient. She must show that there "is a realistic possibility [that] she will be less able to compete in the marketplace--with economic consequences, not merely psychological ones": Kim v. Morier, 2014 BCCA 63 at para. 8.

The Plaintiff's Position on Future Loss of Earning Capacity

[107] Ms. Hale would prefer to continue her career as a care aide but she cannot do this type of work because of her ongoing pain symptoms. She thoroughly enjoyed being a care aide and contemplated eventually opening her own seniors' centre. To this end, she completed two years of training at NVIT and obtained an Office Administration Certificate and an Executive Assistant Diploma.

[108] Ms. Hale suggests that the capital asset approach is the more suitable method of assessing her loss of future earning capacity. She believes that four years of earnings of \$42,660 per annum, a total of \$170,640, is reasonable compensation for her future loss of income earning capacity.

The Defendant's Position on Future Loss of Earning Capacity

[109] Mr. Keyes agrees that the capital asset method is appropriate to assess Ms. Hale's future loss of earning capacity. He notes that Ms. Hale has held five different care aide positions since the Accident and that she enjoys working at Spirit Ridge, and her decision to work there is connected to her husband's relocation.

[110] Mr. Keyes submits that \$15,000 to \$35,000 is reasonable for Ms. Hale's future loss of earning capacity. He points out that the high end of this range is approximately equivalent to Ms. Hale's highest income earning year.

Factual Findings and Analysis on Future Loss of Earning Capacity

- [111] Ms. Hale has been working since a few months after the Accident and the frequency of her occupational changes seem to be unrelated to it. Her highest earnings were with Overlander, approximately \$21/hr. She stopped working there before the Accident. Ms. Hale received approx. \$18/hr at HCH, which is where she worked at the time of the Accident. At Spirit Ridge, she earned \$13/hr + tips of at least \$60/day, which is about \$20/hr. This work is seasonal, temporary, and requires no training. Her current position at Spirit Ridge does not generate the same amount of tips.
- [112] I am satisfied that Ms. Hale is no longer able to work as a care aide. Six years after the Accident, she continues to suffer from pain symptoms that render her incapable of performing all of the physical tasks performed by care aids. I am unconvinced that her ability to move 50 pounds once equates to an ability to perform this and the other demanding tasks performed by care aides on a recurring and ongoing basis. She does not have the positional tolerances or capacity to do this work on a daily basis. Furthermore, as Ms. Webber described, it would not be reasonable to expect Ms. Hale to work in an environment that provokes an emotional fear response to the expectation that she will need to do the physical tasks associated with working as a care aide.
- [113] Applying the factors in Brown, I find that Ms. Hale is less capable overall of earning income for all types of employment because she is no longer able to work in her chosen occupation. She undertook training to become a care aide and persisted in completing this course during the period when she had two young children. She is less marketable and attractive as a potential employee because she no longer has the ability to perform several physical tasks including lifting medium weight objects, stooping, crouching, kneeling, or forward reaching. As a result, Ms. Hale is no longer able to take advantage of all job opportunities that were previously open to her. She may be able to perform some of the lighter duties associated with care aide work, such as dispensing medication, but she is incapable of performing the full range of care aide tasks. Ms. Hale perceives herself as less capable of earning an income in the marketplace because of her physical limitations and she is dismayed by her inability to continue working as a care aide. She has found an employer who accommodates her physical limitations but her current employment is seasonal, temporary, requires little or no training, and pays less than she would earn as a care aide.
- [114] Ms. Hale has demonstrated a commitment to working and supporting her family. While it is true that she worked as a care aide in the years since the Accident, I accept that she did so out of necessity and was either unable to perform all of the required tasks or did them with pain and difficulty. There was little evidence to explain Ms. Hale's recurrent changes of employment. It is possible that her physical limitations were at least part of the reason her employment changed frequently.

[115] Considering Ms. Hale's relatively young age and that most of her working life is ahead of her, an award of two years of income for a care aide is fair and reasonable in these circumstances.

[116] Ms. Hale is entitled to \$85,300 for future loss of earning capacity.

QUANTUM OF DAMAGES FOR COST OF FUTURE CARE

Relevant Legal Principles

[117] The principles applicable to the assessment of costs of future care are:

- Providing adequate damages for future care for an injured plaintiff is of paramount importance;
- The purpose of such an award is to provide for assistance directly related to the injuries caused by the accident;
- The test for determining an appropriate award is an objective one based on medical evidence;
- The focus should be on the plaintiff with fairness to the other party being achieved by ensuring that the expenses are legitimate and justifiable;
- The plaintiff needs to show: (a) a medical justification for the items claimed; and (b) that the amount claimed is reasonable;
- "Medical justification" is broader than "medically necessary";
- Specific items of future care need not be expressly approved by medical experts; it is sufficient if the totality of the evidence supports the award for specific items;
- Common sense should be employed in this assessment;
- No award should be included for items that would be incurred in the absence of the accident; and
- A plaintiff must prove that it is likely that they will use the services or treatments for which they are advancing a claim;

See: Thompson at para. 149; Maltese v. Pratap, 2014 BCSC 18 at para. 78; and Izony v. Weidlich, 2006 BCSC 1315 at para. 74.

The Parties' Positions on Cost of Future Care

[118] Ms. Hale relies on Ms. Webber's recommendations for cost of future care. She testified that she would try Botox injections, attend a chronic pain program, attend the gym, resume massage therapy and physiotherapy, and take the recommended medications.

[119] Curtis Peever, an economist, prepared a Present Values of Cost of Future Care Report. The present values of the low cost estimate and high cost estimate are \$54,963 and \$191,093, respectively. Ms. Hale asserts that she should receive \$180,000 for cost of future care because she has many years of managing her injuries ahead of her, the high cost estimate does not include the cost of medications for which dosage has not been determined, and she will likely need pain management treatment indefinitely.

[120] Mr. Keyes notes that Ms. Hale has spent less than \$5,000 on treatment over the five years since the Accident. He submits that an award of \$10,000 to \$20,000 is appropriate, comprised of:

- a) \$2,500 for active rehabilitation/kinesiology;
- b) \$500 for gym pass/exercise equipment;
- c) \$2,000 for passive therapy; and
- d) \$5,000 to \$15,000 for migraine/headache management.

[121] Mr. Keyes contends that Ms. Hale is not entitled to an award to attend a comprehensive pain management program, a gym pass, and passive therapy for life, because these items are not medically necessary and are unreasonable. He notes that she has only attended ten passive therapy sessions since January 1, 2015, so 12 sessions per year for the rest of her life is not reasonable.

[122] Mr. Keyes submits that Ms. Hale is unlikely to undergo Botox treatments. This was first recommended to her in May 2018 and she has yet to try this treatment. He also highlights Ms. Hale's fear of needles and inconsistent compliance with treatment recommendations.

Analysis on Costs of Future Care

Comprehensive Pain Program

[123] Ms. Webber described the comprehensive pain program as the "gold standard" in her report. It is an intensive, multi-week, full-time program. From Ms. Hale's current residence in Osoyoos, BC, the nearest location of this program is Surrey, BC. This program was not recommended by Ms. Hale's treating physicians, Drs. Kulkarni, Giantomaso, or Cameron. For this reason, I conclude that it is not medically justified.

[124] I also doubt that Ms. Hale will actually attend this program. She is the primary caregiver to her children and I do not believe she will be able to leave her life in Osoyoos, BC, for several weeks to attend this type of program.

Botox Treatments

- [125] Botox treatments were recommended by Drs. Cameron and Giantomaso. Dr. Grosch recommended enhanced use of medication and did not recommend Botox treatments, largely because he does not believe the frequency of her migraines warrants this treatment.
- [126] I accept that Botox treatments are medically justified because they may provide some relief to Ms. Hale's persistent migraine symptoms. In my view, the frequency and severity of her migraines supports trying this treatment and I believe that there is a real and substantial likelihood that Ms. Hale will undergo Botox treatment because she is suffering from ongoing daily headache pain. It is possible that she will resist future treatment after an initial series of injections and it is also possible that this treatment may prove to be ineffective. Her aversion to needles is a relevant consideration.
- [127] I do not accept that it is reasonable to assume that she will undergo this treatment until age 65. I accept the evidence of Dr. Cameron that long term compliance with this treatment is low and that many clients who try this treatment opt out of it after a year even if they are deriving benefit from it.
- [128] Taking into account the medical evidence, the reasonableness of the expense, and the likelihood that Ms. Hale will undergo this treatment, I find that \$5,000 is an appropriate award for Botox treatment.

Gym Pass

- [129] I am satisfied that Ms. Hale will make use of a gym pass on an ongoing basis. Maintaining her physical abilities through regular exercise is both medically justified and reasonable. She exercised regularly before the Accident and I accept that she would have continued doing so, to the extent possible, if she could afford a gym pass. I accept her explanation that she was unaware that she could have asked WorkSafe BC for funding for a gym pass. Ms. Hale is entitled to \$7,400 for the present value of a gym pass to age 65.

Physiotherapy and Massage Therapy

- [130] Ms. Hale has not consistently used physiotherapy or massage therapy since the Accident. In her experience, they provide temporary relief of her pain symptoms but they do not have a lasting impact. I accept that she will continue to periodically undergo these treatments and she may increase the frequency with which she undergoes this type of treatment as she gets older. However, it is unlikely that she will attend 12 passive therapy sessions per year until age 65. In these circumstances, it is reasonable to expect that she will use approximately four sessions per year to age 65. On this basis, I find that the present value of passive therapy that Ms. Hale is entitled to is \$12,000.

Medications

[131] Ms. Hale takes Advil tablets on a daily basis. Although Dr. Cameron recommended that she stop using Advil because it may cause rebound headaches, Ms. Hale finds this medication to be effective and continues to use it. Dr. Grosch recommended that she take over-the-counter pain medication or triptan-based medications to manage her daily headaches and migraines. Dr. Cameron recommended that she try alternate prophylactic daily medications.

[132] I accept that these medications are both medically necessary and justified. Ms. Hale is best positioned to determine which medications are effective. I believe that she will use the recommended medications to provide relief from her ongoing headache and migraine pain symptoms.

[133] Applying the present value multiplier provided by Mr. Peever, in my view, Ms. Hale is entitled to \$17,500 for medications. Included in this amount are the medications recommended by Drs. Cameron and Grosch.

[134] In total, Ms. Hale is entitled to \$41,900 for the cost of future care.

QUANTUM OF DAMAGES FOR LOSS OF HOMEMAKING CAPACITY

Relevant Legal Principles

[135] The principles applicable to the loss of homemaking capacity are:

- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
- A plaintiff who has suffered an injury that would make a reasonable person in her circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
- Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, the loss may instead be compensated by a non-pecuniary damages award.
- As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
- Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

See: *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63; and *Kim v. Lin*, 2018 BCCA 77 at paras. 28-34.

The Parties' Positions on Loss of Homemaking Capacity

- [136] Ms. Hale submits that she had no difficulty with household chores prior to the Accident. Her mother, Lorraine Hale, confirmed that her ex-husband did not do much housekeeping or childcare and Ms. Hale did the majority of this work, including laundry, dishes, and cooking. Ms. Offord-Harper testified that Ms. Hale often completed household chores before going to work and that Ms. Hale liked having a tidy home.
- [137] After the Accident, Ms. Hale required assistance from her mother, aunt, and friends to maintain her household and care for her children. She had difficulty with mopping, dishes, rug cleaning, and carrying laundry. To this day, she divides household tasks with her husband and continues to have difficulty cleaning the bathroom, doing dishes, and mopping.
- [138] Ms. Hale asserts that her loss of capacity to perform homemaking tasks and carry out childcare responsibilities warrants an award of \$25,000.
- [139] Mr. Keyes denies that Ms. Hale is entitled to an award for loss of homemaking capacity. He suggests that Ms. Hale is capable of doing most household chores except for bathroom cleaning. He also asserts that her capabilities are likely to improve and that she is unlikely to use homemaking assistance at this time and would only need this assistance if her living situation were to substantially change.

Factual Findings and Analysis on Loss of Homemaking Capacity

- [140] I accept that Ms. Hale required the assistance of her family and friends in the months following her Accident. Over time, she was able to take on more homemaking and childcare tasks, but she performed these tasks out of necessity, at a reduced level, and with pain. To date, she continues to have difficulty with physically demanding household chores and her ability to provide childcare is also limited by her pain symptoms. She is now able to do most household chores, albeit with some difficulty. For this reason, Ms. Hale's loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, and it will be compensated by a non-pecuniary damages award.
- [141] I note that this award is intended to reflect Ms. Hale's loss of a capacity and she entitled to compensation whether or not replacement services are actually purchased. Lorraine Hale and Ms. Offord-Harper provided homemaking and childcare assistance gratuitously and I am satisfied from their evidence, along with the testimony of Ms. Merchant--the plaintiff's aunt--and Ms. Hale, that her childcare and homemaking abilities were diminished as a consequence of the Accident.
- [142] In my view, it is appropriate in the circumstances of this case to award Ms. Hale \$15,000 for her loss of homemaking capacity.

QUANTUM OF SPECIAL DAMAGES

[143] The parties agree that Ms. Hale is entitled to special damages of \$4,460, consisting of \$4,314 expended by WorkSafe BC and additional amounts for mileage incurred by Ms. Hale for travel to various treatment providers.

CONCLUSION

[144] Ms. Hale is entitled to:

- a) \$75,000 for non-pecuniary damages;
- b) \$12,200 for past income loss;
- c) \$85,300 for loss of future income earning capacity;
- d) \$41,900 for cost of future care;
- e) \$15,000 for loss of homemaking capacity; and
- f) \$4,460 for special damages.

COSTS

[145] If the parties wish to make submissions on costs, they may be filed within 60 days of the date of this judgment. If no submissions are received, Ms. Hale will have her costs at Scale B.

"Basran J."

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