

CANADA / JUDGMENT

Hau v. Patterson

2020 BCSC 1069

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2020 BCSC 1069 Hau v. Patterson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hau v. Patterson,

2020 BCSC 1069

Date: 20200720

Docket: M175099

Registry: Vancouver

Between:

Lisa Hau

Plaintiff

And

Laura Patterson, Kathleen Ann Patterson

and David Lawrence Patterson

Defendants

Before: The Honourable Madam Justice Forth

Final Trial Reasons

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Place and Date of Trial:

Vancouver, B.C.

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Place and Date of Judgment:

Vancouver, B.C.

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Introduction

- [1] The plaintiff, Lisa Hau, was injured in a motor vehicle accident that occurred on August 14, 2015 in North Vancouver, B.C. She was stopped on Dollarton Highway waiting to merge onto the Ironworkers Memorial Second Narrows Bridge when she was rear-ended by a vehicle driven by the defendant, Laura Patterson. Ms. Hau commenced this action against Ms. Patterson and the registered owners of the vehicle, Kathleen Ann Patterson and David Lawrence Patterson, seeking damages for the injuries she sustained in the accident. The defendants have admitted liability for the accident.
- [2] The defendants concede that Ms. Hau was injured in the accident and suffered some physical injuries. However, the defendants disagree with the plaintiff about the nature, extent, and seriousness of the injuries she claims were caused by the accident.

- [3] The defendants argue that Ms. Hau suffered from pre-existing conditions and has failed to mitigate her damages after the accident in not attempting to locate sedentary work to offset any income loss.

Issues

- [4] The issues raised by the pleadings, evidence, and submissions are:
1. What are the nature, extent, and duration of the injuries suffered by Ms. Hau as a result of the accident?
 2. What is the appropriate award for general damages for pain and suffering?
 3. What is the appropriate award for past wage loss or loss of earning capacity?
 4. What is the appropriate award for future wage loss or loss of earning capacity?
 5. Should the award for past and future wage loss be reduced due to any failure by Ms. Hau to mitigate her loss?
 6. What is the appropriate award for the cost of future care?
 7. What is the appropriate award for special damages?

Background

- [5] Ms. Hau was born on December 6, 1982. Her parents immigrated to Canada from Vietnam and settled in Red Deer, Alberta, where Ms. Hau and her older brother were born. It is clear that her parents instilled in her a strong work ethic, fostering in her the value of responsibility, education, and being, as her mother put it, a "good citizen of Canada". Ms. Hau wanted to follow her parents' example of working hard and pursuing an education.
- [6] Ms. Hau was raised in Red Deer and started working at age 9, assisting her older brother in delivering newspapers. By age 10 or 11 years, she was assisting her mother in cleaning houses. When she turned 14, she began working weekends and in the summer time. She started as a busser at a restaurant and by age 16, she was working as a server.
- [7] She graduated from high school in 2000 as part of the International Baccalaureate program. She enrolled at Red Deer College with the intention of obtaining a Bachelor of Science and Education. When she was 19 years old, she had a medical emergency that required surgery and hospitalization. She testified that while in the hospital, she had an "epiphany" wherein she felt the need to paint as part of her healing process. Her mother, who testified, recalled that her daughter had a passion for art from when she was very little.
- [8] In 2001, Ms. Hau returned to Red Deer College and enrolled in a visual arts diploma program. She obtained her diploma in 2003 while continuing to work part-time jobs. After graduation, she worked as a bank teller and in a hog factory.

- [9] In 2004, she returned to school at the University of Calgary on a part-time basis enrolling in the Bachelor of Fine Arts degree, with a specialization in photography. While at university, she continued to work part-time in a sports bar. She graduated in 2007 with her Bachelor's degree.
- [10] After graduation, she travelled for one and a half years throughout Southeast Asia and Australia. In Australia, she worked at pubs, bars, and restaurants. While travelling she cut other people's hair and enjoyed the experience. She decided to pursue cutting hair as a career. She returned to Red Deer in 2009 and worked at a restaurant and a furniture store.
- [11] In 2010, she moved to Vancouver to pursue a hair styling career. She researched and chose to apply to the John Casablancas Institute since it appeared to have the most artistic program. She was granted a scholarship. She started at John Casablancas in October 2010 in the six-month program. As part of the apprenticeship, students had to obtain work, and Ms. Hau applied to the Chop Shop. She had heard about the Chop Shop from a friend. She was attracted to the "rockabilly" vibe of the salon and felt that it was "avant garde" and "artistic".
- [12] She commenced working at the Chop Shop while still at school. She initially worked for free, mainly cleaning the salon after school. She was eventually hired to work at the reception desk and then was given the opportunity to use a chair to cut hair. After she completed her schooling, Ms. Hau was hired at the Chop Shop as a hairstylist.
- [13] Although Ms. Hau was new to Vancouver, she made efforts to get to know people and was able to build up a book of business at the Chop Shop within six months to one year. A full book of business is when a hairstylist has enough clients to be fully booked at least two weeks in advance.
- [14] Ms. Hau thrived as a hairstylist. The owners of the Chop Shop selected her to open their first franchise location in Gastown. In May 2012, Ms. Hau opened Lisa's Chop Shop on Abbott Street. She worked full time as a hairstylist and managed the salon. She testified that her plan was to keep the salon long-term and possibly expand and create another Chop Shop.
- [15] In the spring of 2015, another hairstylist, Kirsten Hart, began to take on some of the managerial duties so that Ms. Hau could devote more time on the floor hairstyling.
- [16] Ms. Hau was an active individual. She enjoyed a number of recreational activities including a variety of power yoga, hiking, and belly dancing.
- [17] At the time of the accident, she was living with a partner and his autistic daughter.
- [18] On August 14, 2015, Ms. Hau was driving a 2004 Lexus RX330 wagon, when she stopped to merge onto the bridge. While stopped, she was hit from behind by a 2007 Hyundai Sante Fe GLS wagon driven by the defendant, Ms. Patterson.
- [19] The accident resulted in damage and repair of \$4,823.93 to Ms. Hau's vehicle and \$2,863.90 to the other vehicle.

- [20] Ms. Hau testified that when she was hit from behind, her head was turned to the left doing a shoulder check. She describes the impact as a "pretty hard hit". She recalls that her body got pushed forward. She was able to get out of her vehicle and exchange information with the other driver. She was upset and in shock. She felt she was okay, proceeded to work, and completed her shift. The next day she felt some symptoms in her neck, shoulder, and upper back.

Issue 1: What are the Nature and Extent of the Injuries Suffered in the Accident?

Plaintiff's Position

- [21] As a result of the accident, Ms. Hau claims she suffered soft tissue injuries to her neck, shoulders, back, hip, and glutes, along with headaches. She also claims she had some difficulty sleeping and some mood disruption.
- [22] Prior to the accident, Ms. Hau was physically very active and healthy. She was able to hike the Grouse Grind, and would sometimes climb it once or twice a week. She participated in yoga two to three times a week including power yoga. She belly-danced about once a week.
- [23] She also enjoyed painting for fun. She would paint whenever she had time.
- [24] Prior to the accident, Ms. Hau did experience intermittent discomfort in her right shoulder and up the right side of her neck, as well as symptoms in her right arm. She had experienced these for many years, dating back to when she was a server. She described the symptoms as discomfort, tightness, or soreness that would surface roughly every few months. She would typically seek some form of treatment and the symptoms would subside.
- [25] She sought treatment from a variety of practitioners. In the two years prior to the accident, she saw a massage therapist, chiropractor, acupuncturist, and athletic therapist/naturopath on a number of occasions. Her main complaints and the focus of the treatments were to her right shoulder, forearm, and neck. She responded well to the treatments provided. She did complain of some occasional pain in her lower back and hip area. Her acupuncturist noted occasional occipital headaches in February 2014.
- [26] Ms. Hau also received some massage therapy for relaxation and started using a float tank around 2013 for introspection.
- [27] Ms. Hau took a very proactive approach to her health; she described it as being body aware and connected to herself. She would seek treatment if she felt symptoms to "nip [any discomfort] in the bud". Her family doctor, Dr. Trent Faraday, testified that she was not the type to use prescription medication.
- [28] Of particular significance, the pre-accident symptoms did not impair her ability to work, and she had not taken any time off work in the two years prior to the accident, nor did she have any limitations in her recreational activities.

- [29] After the accident, Ms. Hau first noticed some symptoms the next day and attended a walk-in clinic on August 18, 2015. She did not have a regular family doctor at that time. Over the next weeks and months, she experienced worsening symptoms in her neck, shoulders, shoulder blades, and upper back. In her neck, she experienced symptoms of it being "really tight and stiff" with sharp pains going up the back and base of her neck. She had the same symptoms across both shoulder blades and the trapezius. She has developed a constant ache and soreness in these areas.
- [30] Ms. Hau described an amplification of right arm pain, right shoulder, and neck pain. The intermittent pain she had experienced prior to the accident became a constant pain with increased severity. She developed headaches and more difficulty sleeping as the discomfort and pain would wake her up.
- [31] At some point after the accident, she developed pain in her low back, hips, and glutes.
- [32] The symptoms progressed for nearly four years after the accident and then plateaued in the past year. She continues to have symptoms of tightness and stiffness in her neck with decreased mobility. She gets headaches once in a while. She still has the amplified pain in her right shoulder and sometimes in her low back and "a little bit" into her hips.
- [33] She was active in her rehabilitation, attending a variety of treatments. She testified that her injuries have significantly affected her ability to work as a hair stylist and her recreational pursuits. She returned to a gentler type of yoga, less strenuous hiking, and to a "somatic" form of dance, which allows the dancer to listen to their body and move accordingly.

Defendants' Position

- [34] The defendants concede that Ms. Hau sustained soft tissue injuries to her neck with associated headaches as a result of the accident. They acknowledge that she has sustained an aggravation of her pre-existing right shoulder, trapezius, and upper back symptoms. The defendants dispute that the accident caused any injury to the low back, hip or SI joint.
- [35] The defendants submit that there are some residual symptoms but that Ms. Hau made an excellent recovery from the injuries and was able to resume a number of her recreational activities within the first couple of weeks or months following the accident. She has returned to all of her recreational activities with some modifications.

Applicable Law

- [36] In order to establish that the accident caused her injuries, Ms. Hau must prove on a balance of probabilities that, but for the accident, she would not have suffered the injuries.
- [37] The Supreme Court of Canada considered causation in *Clements v. Clements*, 2012 SCC 32, and confirmed that the basic test for determining causation remains the "but for" test articulated in *Snell v. Farrell*, [1990] 2 S.C.R. 311, and *Athey v. Leonati*, [1996] 3 S.C.R. 458. 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 "but for" test recognizes that compensation for negligent conduct should only be awarded where a substantial connection between the injury and the defendant's negligent conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.

- [38] A plaintiff is not required to establish that the defendant's negligence was the sole cause of his or her injuries. The tortfeasor must take his or her victim as the tortfeasor finds them, and the tortfeasor is liable even if other causal factors for which the defendant is not responsible result in the victim's losses being more severe than they would be for the average person. At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in but for the accident, and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event: see *Snell; Athey* at paras. 32-35; *Woelders v. Gaudette*, 2016 BCSC 1066 at para. 123. In considering whether a pre-existing condition would have impacted the plaintiff in the future, regardless of the defendant's negligence, the court may take into account if there was a "measurable risk" which may reduce the overall award: *Gohringer v. Hernandez-Lazo et al*, 2009 BCSC 420 at para. 92.

Analysis

- [39] In my view, Ms. Hau was a forthright and credible witness. I found her genuine and honest, and I have no reason to doubt the veracity of her testimony. I was impressed respecting all aspects of her evidence. She did not exaggerate the nature or extent of her injuries. I find that she is a stoic and determined individual who has done her very best to return to her work and other activities.
- [40] Ms. Hau testified that she was hit from behind while she was looking over her shoulder, and her body was pushed forward. She was able to get out of the vehicle and exchange information with the other driver. She was upset but mainly because the other driver did not ask if she was okay. She was able to continue to work and completed her shift as a hairstylist that day.
- [41] The next day, Ms. Hau attended a pre-arranged appointment with Matthew Bennett, an athletic therapist/naturopath. In May 2015, she had pre-purchased an eight-session package to alleviate symptoms in her right shoulder, neck, and forearm. At the session after the accident, she reported symptoms in her neck, shoulder, and upper back. Mr. Bennett appears to record a note of pain in her neck, thoracic, and lumbar spine, as well as headache.
- [42] I do note that it is always challenging to try to interpret handwritten notations by various health care professionals when they are not called to interpret their notes. Many practitioners use specific acronyms and abbreviations that can be difficult to interpret, and have handwriting that is challenging to decipher. A potential means of assisting the court would be to have the key handwritten notes transcribed by the treating health care

professional. This would not only assist the court, but would also assist experts who face the same challenges deciphering these handwritten notations when reviewing a plaintiff's medical history.

- [43] On August 18, 2015, Ms. Hau attended a walk-in clinic. It is not clear what the handwritten notations refer to on the clinical notes.
- [44] Ms. Hau testified to worsening symptoms in her neck, shoulders, shoulder blades, and trapezius. She was able to locate a family doctor and commenced seeing Dr. Faraday on April 16, 2016.
- [45] Dr. Faraday, an expert in family medicine, prepared two reports and testified at trial on behalf of the plaintiff. Dr. Faraday remains her family doctor. At the April 16, 2016 visit, Ms. Hau reported headaches, as well as neck, and upper and lower back pain that was affecting her ability to sleep. She reported that aggravating factors included holding her arms in front of her while hairdressing, dancing, some yoga poses, and painting. The doctor recommended that she continue physiotherapy and acupuncture, and obtain a lumbar support for her vehicle.
- [46] Dr. Faraday saw Ms. Hau on an ongoing basis, and his opinion was that she suffered musculoligamentous injuries to her neck, upper back, lower back, and gluteus muscles with ongoing pain because of the accident. His opinion was this was chronic and would likely to be persistent. His view was that the treatments she had sought had assisted in the relief of her pain.
- [47] Dr. Faraday's view was that Ms. Hau would have an ongoing reduced ability to work as a hairstylist. He anticipated that she would experience acute exacerbations of her pain in the future, which would likely require some rest from work for a few days and passive paramedical care.
- [48] Dr. Faraday relied exclusively on his own clinical records and the history he took from Ms. Hau. Prior to the preparation of his two reports, he had not reviewed any pre-accident or post-accident reports from other practitioners. During cross-examination, after being taken to various entries in other pre-accident records, he changed his opinion on causation of Ms. Hau's pain in her right shoulder, trapezius, and upper back. In light of her pre-accident records, his opinion was that Ms. Hau's pain in those areas is due to both her pre-existing condition and the accident. He did not change any other aspect of his opinion.
- [49] Ms. Hau sought treatment for her injuries. She attended physiotherapy, acupuncture, massage therapy, active rehabilitation, and floating. All of the treatments assisted in the temporary relief of pain and discomfort. She also regularly uses a variety of equipment, such as a TENS machine, massage balls, and a chi machine as part of a home treatment regime. She has had her mother provide treatments such as cupping, energy healing, and massage. Her mother is not medically trained but has an interest in Eastern healing methods.

- [50] Most importantly, it appears that these types of treatments have provided assistance to the degree that Ms. Hau does not rely on any prescription pain medications. She uses Robaxacet for pain relief, and melatonin to assist in sleep, as needed.
- [51] Dr. Gillian Simonett, a specialist in physical medicine and rehabilitation, provided two reports and testified at trial on behalf of the plaintiff. Dr. Simonett first assessed Ms. Hau on November 29, 2017 and prepared a report dated December 4, 2017. She opined that Ms. Hau probably suffered from myofascial neck pain and related tension headaches as a result of the accident. Her view was that the low back and hip pain were in keeping with myofascial pain, likely related to deconditioning. In her report, she explains that deconditioning refers to relative weakness associated with reduced/altered use. During the assessment, Ms. Hau was asymptomatic.
- [52] In cross-examination, Dr. Simonett agreed that the low back and hip region pain was likely an indirect cause of the plaintiff's back and hip pain. She explained in re-examination that "deconditioning" would fall into the "indirect camp".
- [53] Dr. Simonett reassessed Ms. Hau on February 11, 2020 and prepared a report dated the same day. None of Dr. Simonett's opinions changed in her second report. On this assessment, the doctor did find some asymmetry in the neck range of motion, and reproducible pain along the bilateral cervical paraspinal muscles as well as the trapezius muscles. The doctor noted palpable taut bands in the medial parascapular region with associated pain.
- [54] Dr. Simonett's opinion was that Ms. Hau had a poor prognosis for a full recovery. She was likely re-aggravating her symptoms given the physical tasks associated with her work. Her view was that she would likely continue to require ongoing treatments to help manage her pain. Her opinion was that passive modalities, such as massage therapy, may be beneficial for improving pain flare-ups, but ongoing strengthening is likely more effective.
- [55] The defendants submitted during their closing arguments that during cross-examination Dr. Simonett was evasive on several occasions and would not concede on simple questions such as the overall reliability of her opinions further to a review of the plaintiff's pre-accident records. The suggestion is that the nature of her evidence strayed from that of an independent medical expert to an advocate and therefore the weight given to her opinion ought to be reduced accordingly.
- [56] The parties ordered transcripts of the expert witnesses' testimony. I have closely reviewed the exchange the defence counsel refers to and it is clear that the doctor was trying to understand the questions posed and answer them to the best of her ability. This doctor fairly conceded when it was appropriate to do so. I am of the view there is no merit in this defence submission. My view of Dr. Simonett's testimony was that she presented as a fair, impartial, and objective expert. I note that an expert is entitled to defend their opinion as noted in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2007 BCSC 899:

- [15] the statement that an expert should not be an advocate [] is sometimes misunderstood. There is a difference between an expert who advocates for a party and one who advocates for his or her opinion. By that I mean that an expert opinion should be confined to the expert's field of expertise and to the question within that field that is at issue. It should be the result of careful and objective consideration of all relevant facts and scientific principles and not based on extraneous considerations.
- [16] In short, the Court should be able to approach the opinion with some confidence that the expert would have rendered the same opinion if he or she had been consulted by the opposite party. However, once an expert has formed an opinion through that process, he or she may be firm, emphatic or even strident in the way he or she expresses the opinion or defends it against contrary opinions.
- [Emphasis in original]
- [57] Dr. Robert Froh, orthopedic surgeon, provided two expert reports and testified at the trial on behalf of the defendants. He assessed Ms. Hau on October 21, 2019 and prepared a report dated December 6, 2019. He prepared an updated report dated April 21, 2020 commenting on other reports provided to him. His opinion did not change from his review of the other reports.
- [58] Dr. Froh's opinion was that Ms. Hau had suffered a soft tissue injury to her cervical spine. He opined that her whiplash injury had resolved but she had been left with residual neck symptoms secondary to myofascial pain syndrome. She also suffered from initial cervicogenic headaches from the whiplash and now has infrequent residual headaches secondary to stress or residual myofascial pain syndrome. Her myofascial pain syndrome involves the trapezius muscles and, to a lesser extent, the levator scapulae and bilateral rhomboid muscles. He diagnosed Ms. Hau with mechanical lower back pain that is likely activity related.
- [59] His opinion was that the neck and lower back pain, as well as the plaintiff's headaches appear to be directly related to the accident. The myofascial pain syndrome was a flare-up of a pre-existing problem that she had due to her job as a hairstylist. The doctor noted that the symptoms pre-accident were "mild intermittent symptoms" and the accident resulted in a significant aggravation of the pre-existing symptoms.
- [60] On treatment, he recommended an assessment by a rehabilitation medicine specialist or a rheumatologist to see if Ms. Hau might benefit from some trigger point injections. On prognosis, he opined that she would likely experience ongoing intermittent myofascial pain syndrome.
- [61] During his testimony, he agreed that Ms. Hau meets the definition of having chronic pain, being pain that lasts longer than six months, and that the longer someone has ongoing pain, the less likely the pain is to resolve. His view was that Ms. Hau did a lot of rehabilitation and was doing all the right things to help herself get better.

- [62] Dr. Froh commented that Ms. Hau was a good historian. He felt she was truthful, accurate, and upfront and that he had no reason to disbelieve her. As he put it: "what I saw is what I thought was reality". In other words, he felt her description of her symptoms was consistent with his observations.
- [63] Ms. Hau was assessed by Louise Craig, physiotherapist, who prepared two reports and testified at the trial on behalf of the plaintiff. She prepared a functional capacity evaluation and cost of future care assessment dated November 1, 2019 based on her assessment of Ms. Hau on October 28, 2019. She also prepared an updated report dated March 11, 2020 based on her review of other reports provided to her. In her updated report, she provided some comments on additional costs of treatments.
- [64] The testing performed by Ms. Craig supported the assertion that Ms. Hau had limitations in her work as a hairstylist for sustained neck and upper back positions for constant reaching, and constant static standing demands. Ms. Craig's view was that Ms. Hau was no longer suited to full-time work as a hairstylist and part-time work was recommended.
- [65] Respecting future care, Ms. Craig made a number of recommendations based on her review of other reports, the clinical records of treating doctors and her own expertise. The particulars of her recommendations will be canvassed later in these reasons.
- [66] The defence raised the issue in their closing submissions that during the cross-examination of Ms. Craig, there were times she was evasive and would not concede simple questions as to her lack of knowledge of the plaintiff's current living arrangements and her need to take scheduled breaks. The further submission is that this expert strayed into being an advocate and therefore the weight given to her opinions should be reduced. Upon my review of the transcript, I do not agree with defence counsel's impression. I find that Ms. Craig was a fair, independent, objective expert upon whom I can rely.
- [67] None of the experts who testified had any concerns about Ms. Hau exaggerating her symptoms.
- [68] Ms. Hau has not been able to return to her past recreational activities in the same manner. She remains a fit, trim, and physically active person. She has had to change the type of her activities, but she still does yoga, hikes, and dances. She does these activities with an awareness of what her body can cope with and with modifications.
- [69] Based on the medical evidence, I find that Ms. Hau suffered soft tissue injuries to her neck, shoulders, and upper back. She also significantly aggravated a pre-existing condition in her right shoulder and trapezius. I accept that she suffered some mild low back and hip pain from the accident but I find that the main onset of those symptoms relate to an incident that occurred in May 2017 when she was moving a box. The evidence does not support that her low back and hip pain is causing any functional impairment at this time.

- [70] Ms. Hau's prognosis is uncertain. It appears that she will likely suffer from chronic neck and shoulder pain for the remainder of her life, although there remains the potential for some further recovery.
- [71] Ms. Hau has tried many different types of treatment and although they have assisted her, none of them has provided lasting relief.
- [72] Accordingly, I find on a balance of probabilities that as a result of the accident, Ms. Hau has experienced and will continue to suffer from chronic neck and shoulder pain with more significant flare-ups in the future.

Issue 2: What is the Appropriate Award of General Damages for Pain and Suffering?

- [73] Ms. Hau seeks an award of \$90,000. The defendants submit the appropriate award for general damages is \$35,000, taking into account her pre-existing condition.

Applicable Law

- [74] A plaintiff is entitled to reasonable damages for her pain and suffering. The plaintiff should be placed in the same position she would have been if the accident had not occurred, but not in a better position.
- [75] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.
- [76] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:
- [46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146 that influence an award of non-pecuniary damages includes:
- (a) age of the plaintiff;
 - (b) nature of the injury;
 - (c) severity and duration of pain;
 - (d) disability;
 - (e) emotional suffering; and
 - (f) loss or impairment of life;

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

- (g) Impairment of family, marital and social relationships;

- (h) impairment of physical and mental abilities;
- (i) loss of lifestyle; and
- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, 2005 BCCA 54).

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

[78] The long-standing approach to assessing injuries that depend on subjective reports of pain was discussed by McEachern C.J. in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) (recently quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, McEachern C.J. wrote:

In *Butler v. Blaylock*, [[1981] B.C.J. No. 31] decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[79] Recent judicial commentary cautions that more recent authority has recognized even minor motor vehicle accidents as capable of causing long-term and debilitating soft-tissue injuries: *Jenkins v. Irving*, 2020 BCSC 391 at paras. 100-104.

[80] Ms. Hau relies on *Carson v. Ehman*, 2019 BCSC 2120; *Blackman v. Dha*, 2015 BCSC 698; *Picton v. Fredericks*, 2016 BCSC 1470; and *Cummings v. Tellier*, 2019 BCSC 2067, to support the argument that the appropriate award for general damages is in the range of \$90,000. Ms. Hau submits that she has suffered more significant injuries than these plaintiffs have suffered. I find that the cases cited by Ms. Hau are comparable to the situation she faced.

[81] The defendants rely on *Pond v. Bucsis*, 2013 BCSC 2001; *Ahmadi v. West*, 2014 BCSC 2050; *Tisalona v. Easton*, 2015 BCSC 565; and *Sharma v. Bhullar*, 2020 BCSC 379, to support the argument that the appropriate award for general damages should be \$35,000. In my view, the nature of the injuries and the impact of the injuries in these cases were much less than the injuries and impact of the injuries on Ms. Hau, both in terms of severity and persistence of symptoms. Further, I note that the plaintiffs in these cases were older than Ms. Hau at the

time of their accidents: in Pond, 45 years old; in Ahmadi, 46 years old; and in Tisalona, 40 years old. Ms. Hua was 34 years old at the time of her accident.

- [82] In Sharma, the plaintiff was 21 years old at the time of her first accident, and her injuries had mostly resolved at the time of the trial and she was left with some ongoing discomfort. This does not accord with the chronic and ongoing pain and stiffness that Ms. Hau testified to having. Of further note, the court found Ms. Sharma's evidence regarding the severity and frequency of her injuries, and pain symptoms, and her ability to function, as being exaggerated. This same finding has no application to Ms. Hau, as I have found she was a sincere, honest, and reliable witness. Ms. Hau did not exaggerate but was determined to carry on and try to get better.
- [83] While all of these cases are helpful to provide a general framework, as noted in Stapley at para. 45, the impact on Ms. Hau as an individual is the key.

Analysis

- [84] Ms. Hau suffered soft tissue injuries to her neck, shoulders, and to a much lesser extent, her lower back. She initially suffered from headaches but now only suffers from headaches a few times per month.
- [85] She did have a pre-existing problem with her right shoulder, right upper back, that would radiate into her right arm. This was a long-standing problem. It would flare up and cause her symptoms but with treatment, the symptoms would go away. Most importantly, the symptoms did not affect her ability to work; her evidence was that she had not missed any work in the two years prior to the accident, and her symptoms did not functionally impact her very physically active life.
- [86] She currently experiences constant discomfort with flare-ups of pain. It is the pain that disrupts her sleep and causes her to wake up. Prior to the accident, she had some difficulty sleeping due to stress on a few occasions. She has also had to decrease the hours she works and modify her recreational activities.
- [87] Lien Hau, her mother, testified to her daughter being in very good health prior to the accident. After the accident, her daughter would complain about being in pain and move as if she was uncomfortable. Since moving to Vancouver at the end of August 2017, she has provided some treatments to her daughter. While massaging her daughter she finds "very very tight muscles".
- [88] Erica Pang, her best friend, former roommate, and art business partner, testified that in 2019, while living together, Ms. Hau would come home exhausted from work and followed a routine of "self care" including yoga and stretching at the end of the night or early in the morning. Ms. Pang had Ms. Hau cut her hair. She testified to how Ms. Hau would have to take breaks during the cut.

- [89] Kris McGregor, a friend, first met Ms. Hau at yoga and a friendship unfolded. He has her cut his hair. He testified to the type of power yoga that Ms. Hau used to do prior to the accident without any difficulty. Before the accident, he described Ms. Hau as "always upbeat and happy" and had no issues when cutting his hair. After the accident, he testified to the difficulties he observed when she was cutting his hair when she would have to take little breaks and she appeared to be physically and emotionally strained.
- [90] Ella Lavaggi is one of Ms. Hau's former employees. She started working at the Chop Shop in April 2015. She testified that prior to the accident, Ms. Hau had a lot of energy and was able to manage a five-day work week while being fully booked and managing the salon. As she described it, Ms. Hau went from being a "powerhouse" to someone who required more time between clients, who struggled with pain, and who needed to take breaks.
- [91] Kirsten Hart, is also a former employee, testified to what she observed of Ms. Hau at the Chop Shop. Her evidence was that prior to the accident Ms. Hau was very determined, a hard worker, very passionate, and kind. After the accident, she observed Ms. Hau having a hard time maintaining her posture, she seemed very tired, physically and emotionally drained, and would have to sit down on a stool. She observed Ms. Hau crying after every appointment and having to self-massage her back. As Ms. Hart described it, Ms. Hau would have a brief moment when she would let go between clients and would go and put her head down.
- [92] Ms. Hart testified that she received about \$80 in gratuities per shift.
- [93] The defence submitted that since Ms. Hart admitted in cross-examination to inflating the amount of tips she received, that should taint the entirety of her testimony. I do not agree that this "error" should result in that outcome. I place no reliance on what Ms. Hart testified she earned in tips. The far more reliable evidence comes from Ms. Hau in that regard. I do not see this to be a basis on which to discount all of Ms. Hart's evidence.
- [94] What is most striking about this case is the consistency of the evidence amongst Ms. Hau, the lay witnesses, and the experts who testified.
- [95] I am prepared to accept Ms. Hau's evidence as a true reflection of what she experiences.
- [96] The accident has caused a significant change in Ms. Hau's ability to work full-time and participate to the same extent in her recreational activities. There is some support that she could have some degree of recovery, but the symptoms have lasted almost five years and as such there appears to be a significant possibility that she will continue to experience symptoms in the future.
- [97] I have reviewed the cases and in assessing the particular circumstances of this plaintiff, I am of the view that the appropriate award for non-pecuniary damages is \$75,000, taking into account that her pre-existing condition is also likely to flare-up in the future.

Issue 3: What is the appropriate award for past wage loss or income earning capacity?

Applicable Law

- [98] In *Karim v. Li*, 2015 BCSC 498 at paras. 130-133, Abrioux J. (as he then was) discussed the purpose and framework for determining the appropriate award for past loss of earning capacity and the task to award compensation for any pecuniary loss which has resulted from an inability to work.
- [99] 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: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [100] A number of cases set out that the exercise is not a mathematical formula: *Luck v. Shack*, 2019 BCSC 1172 at para. 170. When making this assessment, it is appropriate to consider the likelihood of hypothetical events in the same manner as when assessing future losses: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29.
- [101] In *Gao v. Dietrich*, 2018 BCCA 372, the court set out the appropriate methodology for assessing past losses:
- [34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.
- [35] In *Athey v. Leonati*, [1996] 3 S.C.R. 458, the Supreme Court of Canada addressed "the fundamental distinction between the way in which courts deal with alleged past events and the way in which courts deal with potential future or hypothetical events" (at para. 26). While past events must be proved on a balance of probabilities, hypothetical events and future events need not be proved on that standard.
- [36] A hypothetical or future event will be taken into consideration "as long as it is a real and substantial possibility and not mere speculation" (*Athey* at para. 27; see also *Rousta v. MacKay*, 2018 BCCA 29 at para. 17). Establishing a real and substantial possibility means that any employment loss must be shown to be realistic, having regard to what the plaintiff's circumstances would have been absent the injury: *Graydon v. Harris*, 2014 BCCA 412 at para. 27. There must be an evidentiary foundation to the plaintiff's claim: *Morlan v. Barrett*, 2012 BCCA 66 at para. 59.
- [37] If the plaintiff establishes a real and substantial possibility, then the court must weigh the hypothetical or future event according to its relative likelihood: *Athey* at para. 27. For example, "if there is a 30 percent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 percent of the anticipated extra damages to reflect that risk" (*Athey* at para. 27). In determining a fair and reasonable damage award, a court should make an assessment rather than a purely mathematical calculation: *Grewal v. Naumann*, 2017 BCCA 158 at para. 54.

- [38] In contrast, past events must be proved on the balance of probabilities, and once they are proved, they are treated as certainties: *Athey* at para. 28; *Rousta* at para. 17. A court's conclusion regarding past events cannot be weighted according to its likelihood or probability: *Athey* at para. 28.
- [39] The rationale for distinct standards of proof for past actual events and past hypothetical events was explained by Madam Justice Rowles in *Smith v. Knudsen*, 2004 BCCA 613 at para. 29:

What would have happened in the past but for the injury is no more "knowable" than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.

- [102] A plaintiff is not barred from claiming damages for income loss based upon evidence of unreported income so long as it has been proven to the satisfaction of the court: *Iannone v. Hoogenraad* (1992), 66 B.C.L.R. (2d) 106 (C.A.), leave to appeal to SCC refused, [1992] S.C.C.A. No. 185.

Plaintiff's Position

- [103] Ms. Hau seeks an award of past loss of earning capacity of \$75,000 based on her an absent accident scenario of her working as a hairstylist five days a week and earning commission and gratuities on her gross sales. In addition, she seeks the net income she would have earned as the owner of the Chop Shop after the date of its sale to the date of trial.

Defendants' Position

- [104] The defendants submit that the plaintiff was not able to provide a date of when she reduced her hours from five days per week to four days per week. She further does not know with any real certainty what she lost in earnings and income following the accident. The plaintiff agreed that since 2017, she has been devoting more time and energy to her artistic endeavors, and even if she was physically able to work the fifth day, she would have made the choice to keep the fifth day dedicated to her creative work.
- [105] The defendants argue that the plaintiff has not proven that the sale of the Chop Shop was related to the accident and as such any losses related to its sale are not compensable.
- [106] The defendants do acknowledge that the plaintiff may have taken some time off work and lost opportunities to work an additional shift on occasion. This loss can be compensated by awarding a net past income amount of \$7,500 after allowing income tax and source deductions as per the applicable legislation.

Analysis

- [107] There are four main issues to address:

- a. When did the plaintiff reduce her work week from five to four days?
- b. Was the reduction made so Ms. Hau could pursue her art endeavors?
- c. Was the reduction required due to her accident-related injuries? If so, what is the loss suffered?
- d. Was the sale of the Chop Shop causally related to her accident-related injuries? If so, what is the loss suffered?

When did the plaintiff reduce her work week from five to four days?

- [108] Prior to the accident, Ms. Hau worked five days a week, eight hours a day, and never required any time off work for health-related issues. In the spring of 2015, she decided to devote more time to hairstyling and passed over to Ms. Hart some of the managerial tasks. She testified that she had a full book of business at that time.
- [109] Ms. Hau testified that at some point she reduced her days from five days to four days a week. She was not clear when the reduction was made, since she tried various work schedules to try to accommodate her symptoms. She is certain by 2017 she had gone down to four days a week.
- [110] Ms. Hau was attending Dr. Faraday on a regular basis in 2017. The first reference in 2017 to a change in her working days is on the clinical visit on September 25, 2017 where Ms. Hau reports that she is doing hairdressing four to five days, and doing painting. On the clinical visit on January 10, 2018, the same note appears. It is not until the April 11, 2018 clinical note that records: "doing hairdressing 4 days/week".
- [111] Ms. Hau reported to Dr. Simonett on November 29, 2017 that she continued to work four to five days per week, but has fewer clients. Dr. Simonett testified that her understanding was that Ms. Hau reported to her she was working sometimes four and sometimes five days. Ms. Hau also reported that she finds she works slower if she is having reduced neck movement.
- [112] It appears that Ms. Hau did not finally reduce her hours to four days a week on a consistent basis until 2018 but may have been working four to five days throughout 2017.
- [113] I do not accept the plaintiff's position that for all of 2017 she was only working four days a week. The contemporaneous documents do not support this.

Was the reduction made so Ms. Hau could pursue her art endeavors?

- [114] The defence argues that Ms. Hau essentially chose to work four days so she could devote more time to her art. They advance the position that absent the accident, Ms. Hau would not work an additional day.

[115] I reject this submission. As she put it, art is a passion of hers but not a means to earn an income. Her true passion is hairstyling which in a way is another artistic expression for Ms. Hau. The photographs adduced into evidence of her hair tattooing support the very creative nature of this type of hair styling and her exceptional skills.

[116] The work ethic Ms. Hau has demonstrated since she was a young child supports that she would have continued working full-time in the career she loved and pursued her art on the side as a hobby. I am not persuaded that Ms. Hau has chosen to work four days a week so that on the fifth day she can pursue her art.

Was the reduction necessary due to her accident related injuries? If so, what is the loss suffered?

[117] The job of a hairstylist is a physical one requiring standing and working with one's arms held at shoulder level. The other hairstylists who testified confirm the physically demanding nature of this job. Ms. Hau attempted some accommodations by taking breaks, using a stool, taking longer with clients, and engaging in self-treatments, but she was not able to sustain the same number of hours. I accept her evidence that after four days of working, her body is inflamed and needs the fifth day off to help her heal.

[118] Her evidence of the difficulties she was experiencing is supported by the other witnesses who testified.

[119] It is further supported by the medical evidence and functional assessment. Dr. Faraday states in his March 7, 2020 report:

continues to work reduced hours and days as hairdresser and takes stretch breaks in between clients Given her injuries sustained in the motor vehicle accident, I would consider her ongoing reduced ability to work and her need to sell her hairdressing studio to be appropriate and related to the effects of the accident.

[120] Dr. Simonett writes in her February 25, 2020 report:

she continues to work four days a week, which is a reduction to her pre-MVC schedule. She does have variability on how many hours she works depending on number of clientele, but her maximum shift is seven hours a day. She feels "exhausted" by the end of her fourth day and reports that she is unable to progress to work five days a week.

Ms. Hau continues to be symptomatic over four years from her MVC. Prolonged pain symptoms are a poor prognostic factor for full recovery. She is likely re-aggravating her symptoms given the physical task associated with her work and I [do] anticipate that are limitations/challenges with improving ergonomics. She has not been able to progress her work up to five days a week and this has been further assessed in a Functional Capacity Evaluation. Based on the prolonged nature of her symptoms despite maintaining a relatively active lifestyle, the prognosis for full recovery is reduced, and she will likely require ongoing treatments to help manage her pain.

[121] The Functional Capacity Evaluation of Ms. Craig confirmed that Ms. Hau did not meet all the physical demands of a hairstylist in that: "Ms. Hau is limited for work as a Hairstylist by the sustained neck and upper back positions required, the requirement for constant reaching and the constant static standing demands". Ms. Craig goes on to opine that:

Ms. Hau is no longer suited to full-time work as a Hairstylist and part-time work is recommended for this type of work. Based on this assessment Ms. Hau is better suited to 5 to 6 hour days, rather than 8 hour days, four days per week, with a break day recommended after two consecutive days. Reduced exposure to the sustained neck and upper back positioning, reaching and standing is expected to assist Ms. Hau in better managing her pain and allow her to work within her residual limitations.

[122] Dr. Froh was of the opinion that the reduction in hours was appropriate given her job and her significant neck and trapezius symptoms.

[123] I accept that Ms. Hau reduced the hours she works to four days a week as a result of the injuries suffered in the accident and the residual impact of those injuries on her ability to work full-time as a hairstylist. I conclude that her decision to reduce to four days a week was a reasonable decision.

[124] The defence submits that there is no cogent evidence to establish the necessary evidentiary foundation for the quantum of the plaintiff's claim.

[125] I agree that the quantification of the loss is more difficult to assess since no evidence was led on the average income Ms. Hau earned on a daily basis, after deducting expenses. However, my view is that if one is working one day less a week in a service industry, such as hairstyling, that supports a real and substantial loss of earnings. This is not speculation but a reality. I further accept the evidence that Ms. Hau is a very skilled hairstylist who has had no difficulty in building up and maintaining a book of business. The evidence supports that if she was able to work the fifth day, there would be clientele available to her.

[126] The plaintiff submits that a method of assessing the loss is to look at what Ms. Hau earned in 2016 when she was working five days per week. Her income was \$35,961, representing 50% of her gross sales of \$71,922. In 2016, Ms. Hau did not declare her gratuities but testified that they were between 10-20% of her gross sales. Taking her gross sales at \$71,922 and applying an 18% commission, she would have earned gratuities in the range of \$12,946.

[127] I am not convinced that the evidence adduced at the trial supports the assumption of an 18% commission. Ms. Hau testified that she started reporting her gratuities in 2018 and 2019. The evidence is that in 2018 her income was \$32,927. Using the plaintiff's loss of gratuities methodology, she would have had gross sales of \$65,854, being double her income. Using the 18% figure for gratuities, that would result in the amount of \$11,853 as being earned. The evidence is that she reported in 2018 gratuities of \$8,623, more in the range of 14%. If the same analysis is done for 2019, she earned income of \$27,442, this represents gross sales of \$54,884. Using the 18% figure, this represents an amount of \$9,879.

The evidence is that she reported in 2019 gratuities of \$8,537, so more in the range of 15-16%. Ms. Hau did testify that there was a few hundred dollars in gratuities that she may not have declared in 2018.

[128] This raises a concern that the approach taken by the plaintiff on the loss of gratuities overstates her loss.

[129] In addition, I have concerns with only using the 2016 data for the past net income. As the defendants point out, 2016 was her highest income earned.

[130] Her T1 income from Ms. Hau's tax returns show:

Year

Total Income

2012

\$22,585

2013

\$27,373

2014

\$24,725

2015

\$27,733

2016

\$35,961

2017

\$28,091

2018

\$32,927

2019

\$27,442

[131] If the average earnings over 2014, 2015 and 2016, when Ms. Hau was working full-time, is calculated, her average earnings would be \$29,473. Using the same methodology, her gross income would be \$58,946, round up to \$60,000. If a 15% commission is used, her gratuities would be \$9,000. This results in an income of approximately \$39,000 per year.

- [132] If those numbers are used as a potential means of assessing the plaintiff's past wage loss then her loss would amount to approximately \$22,000 in earnings and no real losses in gratuities.
- [133] This analysis supports the assertion that the amount being claimed by the plaintiff for past wage loss, for this component of the loss is overstated. It is also not reliable to suggest that in the first six months of 2020, the plaintiff would have earned \$17,980 without the accident. In the plaintiff's closing submissions, her actual earnings in 2020 were not used. Instead, the number is based on the average of Ms. Hau's 2018 and 2019 T4 income and prorating for six months. It is not clear to me why this approach was used since she should know how much she has earned over the past six months in 2020. One cannot ignore the impact the COVID-19 crisis has had on all businesses. Ms. Hau reported to Dr. Faraday on May 29, 2020 that she had been off work for a few months due to COVID-19 and had just resumed working. Any loss related to the COVID-19 crisis would still have occurred but for the accident, and is therefore not compensable.
- [134] On the other hand, I am of the view a loss of \$22,000 would not fairly compensate this plaintiff since her evidence was in 2016 she had increased her prices so the income earned in 2014 and 2015 would not reflect those increased prices.
- [135] Taking all of the considerations, including the statutory deductions into account, I assess her loss for the time away from hairstyling after the accident to date of trial as \$25,000.

Was the sale of the Chop Shop causally related to her accident-related injuries? If so, what is the loss suffered?

- [136] Turing now to the second aspect of the past wage loss claim advanced which is the loss of the net income from the Chop Shop. Ms. Hau testified that her plan was to continue running the Chop Shop into the future and perhaps even expand it.
- [137] The defendants claim that Ms. Hau was not able to say what actual impact the accident had on her decision to sell. Mr. McGregor testified as to his belief she would have sold the business regardless of the accident, but that she sold it sooner than she otherwise would have because of her chronic pain.
- [138] With respect to Mr. McGregor's evidence, this statement was not explored further in his testimony. It is not clear to me when the plaintiff may have made this statement to Mr. McGregor or the nature of that conversation.
- [139] Ms. Hau's evidence on selling the Chop Shop was as follows:

I sold the Chop Shop at that time because I felt like it was getting [to be] too much, just overall with my own health and it just became too much and I wasn't enjoying it like I used to and I really just wanted to focus on hairstyling.

When I say "my own health" it's just my physical ability and my emotional ability from--partly due to the accident, because it was--yeah my body was hurting a lot. Emotionally it was very challenging from all the challenges that I had from the car accident. It played a part.

[140] Her evidence at trial was consistent with what she told Dr. Faraday on October 17, 2018 as reflected in his clinical note of that date which reads: "to sell her shop last year b/c of decreased ability to handle work and managerial duties due to her injuries". He reports the same information in his reports dated December 18, 2018 and March 7, 2020.

[141] She advised Dr. Simonett on November 29, 2017 that she found owning the shop too stressful to continue juggling with self-care, attending her rehabilitation appointments, running the salon as well as childcare.

[142] Ms. Hau reported the same reasons to Ms. Craig during her interview on October 28, 2019 in which she stated:

She states her decision to give up her salon was multifactorial and in part related to the collision and the impact of her injuries on her ability to work but also because she was taking care of her partner's autistic child.

[143] I find that, but for the accident, Ms. Hau would not have sold the Chop Shop in the summer of 2017 but would have continued to operate it for some period of time. I accept for the calculation of the past wage loss, she would have still been operating the Chop Shop as of the date of trial.

[144] The average net income earned from the Chop Shop from 2012 to 2017 is \$4,482 per year. The plaintiff submits that the average income earned should not be used but the sum of \$11,360 should be used as the net income loss since that was the amount of net income earned by the Chop Shop in 2017. She suggests that this was the minimum she would have expected to earn from the business on an annual basis going forward. In my view, an amount of \$8,000 to \$10,000 would be fair and reasonable to both parties.

[145] I reiterate my comment on the impact of COVID-19, that in the first six months of 2020 it is highly unlikely that the Chop Shop would have generated a net income of \$6,000 as proposed by the plaintiff.

[146] As such, I estimate that the net loss of income from selling the Chop Shop amounted to \$25,000 as of the date of trial.

[147] I award for past loss of earning capacity the sum of \$50,000.

Issue 4: What is the appropriate award for future loss of income earning capacity?

Applicable Law

- [148] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by her injuries; and, if so, (2) what compensation should be awarded for the resulting harm that will accrue over time?
- [149] The decision in *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, provides an excellent summary of the applicable leading principles on the assessment of loss of future earning capacity:
- [133] The relevant legal principles are well-established:
- a) To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant's negligence; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185, leave to appeal ref'd [2009] S.C.C.A. No. 197;
 - b) The central task of the Court is to compare the likely future of the plaintiff's working life if the Accident had not occurred with the plaintiff's likely future working life after the Accident; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32;
 - c) The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18;
 - d) The two possible approaches to assessment of loss of future earning capacity are the "earnings approach" and the "capital asset approach"; *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 at para. 7 (S.C.); and *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12;
 - e) Under either approach, the plaintiff must prove that there is a "real and substantial possibility" of various future events leading to an income loss; *Perren* at para. 33;
 - f) The earnings approach will be more appropriate when the loss is more easily measurable; *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 64. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; *Jurczak v. Mauro*, 2013 BCCA 507 at paras. 36-37.
 - g) When relying on an "earnings approach", the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; *Rosvold* at para. 11.
- [150] Also, in *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48-49, the Court of Appeal provided a summary on the assessment of loss of future earning capacity and the application of a "real and substantial possibility" principle:
- [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.
- [151] The use of female statistics has been commented on in a number of recent authorities. In *Jamal v. Kemery-Higgins*, 2017 BCSC 213, the discriminatory nature of such was commented on:
- [96] The proper labour market contingencies and multiplier to be applied was also the subject of legal argument. Counsel for Ms. Jamal took issue with [] Ms. Grogan's analysis relating to future loss of earnings capacity to the extent that it relied on female statistics which they submit are unreliable and discriminatory. Counsel refer to the following reasons of Madam Justice Saunders in *Terracciano (Guardian ad litem of) v. Etheridge*, [1997] B.C.J. No. 1051 in this regard:
78. In 1991, in *Tucker v. Asleson*, [1991] B.C.J. No. 954, (25 April 1991), Vancouver B871616 (B.C.S.C.) Mr. Justice Finch accepted "as a starting point, that the measure of the plaintiff's earning capacity should not be limited by statistics based upon her sex." In the recent decision *[B.I.Z.] v. Sams*, [1997] B.C.J. No. 783, (24 March 1997), Kamloops 18872 (B.C.S.C.), Mr. Justice Hunter accepted the observation that average earnings differentials now between males and females with college or university education are not explained by gender but by different behaviour in the labour market.
79. In this case the statistics of average female earnings were pressed on the Court by the defendants as the best predictor of Ms. Terracciano's future at the time of the injury.
80. Apart from the fact that these statistics perpetuate historical inequality between men and women in average earning ability, and that they have hidden in them serious discounts for lower and sporadic participation in the labour market which are duplicated by many of the negative contingencies used by economists to massage the numbers downward, such statistics may provide little assistance in predicting the future of a particular female plaintiff: *Tucker*, *supra*, and *[B.I.Z.]*, *supra*.
81. Indeed, it may be as inappropriately discriminatory to discount an award solely on statistics framed on gender as it would be to discount an award on considerations of race or ethnic origin. I am doubtful of the propriety, today, of this Court basing an award of damages on a class characteristic such as gender, instead of individual characteristics or considerations related to behaviour: *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114.

[Emphasis added (in Jamal)]

[97] Counsel for Ms. Jamal also relied on the decision of in *J. D. v. Chandra*, 2014 BCSC 466, aff'd 2015 BCCA 131, wherein Griffin J. reasons as follows in assessing the plaintiff's loss of earning capacity:

190. In considering an appropriate assessment, I have considered that the statistics used by the plaintiff are a very conservative starting point, taking into account potential negative contingencies, for two reasons.

191. The plaintiff has put forward a table of historical average earnings of females which is lower than males, presumably based on a number of factors including time off work to have children but also presumably based on historical discrimination, the latter of which may hopefully decrease in the future. The tables thus might undervalue future female lawyers' incomes.

[98] Along a similar vein, in *Crimeni v. Chandra*, 2015 BCCA 131, Willcock J.A. reasons as follows in regard to the use of gender-specific historical income figures:

[23] Experts are frequently asked to estimate the income losses by using gender-specific historical income figures. Such figures may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings. However, there is authority for the proposition that the use of female earning statistics may incorporate gender bias into the assessment of damages. There is also authority for taking judicial notice of convergence in gender incomes: *Steinebach v. O'Brien*, 2011 BCCA 302.

[152] The same sentiments were echoed by MacDonald J. recently in *Luck* (*Luck v. Shack*, 2019 BCSC 1172) at paras. 199-201.

Plaintiff's Position

[153] Ms. Hau is advancing a claim for loss of future earning capacity on the basis that, but for the accident, she would have continued working five days per week and eight hours per day until age 70. In addition, she claims she would have continued to own her hair salon for the remainder of her working life.

[154] The plaintiff claims that the appropriate approach is the earnings approach using the actuarial multiplier. She emphasized the following factors:

- Ms. Hau's work history and career plans are relatively clear;
- She has demonstrated a greater attachment to work than the average worker;
- She plans to work as long as she can;
- Her type of work does not lend itself to part-time work;
- She is very talented at her job;

- She has never been out of the work force involuntarily; and
- The use of the actuarial multiplier will give the court more flexibility.

[155] If the economic multiplier is used, the plaintiff argues that the male statistics would be more appropriate for the following reasons:

- The plaintiff testified that she had no definitive plans with regards to family or children;
- There is no reason to believe that her future employment would track a pattern of the average female; and
- Using the female statistics will incorporate historical and ongoing discrimination.

[156] The plaintiff submits that in respect to the loss of work as a hair stylist, two potential scenarios are put forward:

- a. Ms. Hau would have achieved gross sales of \$75,000 per year, paid herself a 50% commission and earned 18% gratuities for a total of \$51,000 per year. She will miss one day a week for the remainder of her working life so her annual loss would be \$10,200 (or 20% of \$51,000). The ongoing loss of \$10,200 to age 70 is \$255,785.
- b. Using the same annual income of \$51,000, the lump sum of that income to age 70 is \$1,278,927. Since Ms. Hau will miss not only one day a week, she will also be less productive doing the days she works and since she is also disabled from sedentary-type jobs, her overall diminishment of her capital asset is 25%, which represents a loss of \$319,731.

[157] The plaintiff submits that in respect to the loss of net income from the Chop Shop since the decision to sell was in large part attributed to her ongoing accident-related injuries, symptoms, and limitations, she should be entitled to some compensation for the loss of her net income. The last fiscal year that Ms. Hau owned the Chop Shop was 2017 and the salon earned \$11,360 in net income. She suggests the following scenarios:

- a. She would have continued to own the salon until retirement at age 70, which results in a loss to her of \$284,874;
- b. She would have continued to own the salon for a further 20 years, which results in a loss to her of \$194,324; or
- c. She would have continued to own the salon for a further 10 years, which results in a loss to her of \$105,102.

[158] The plaintiff argues that the above scenarios include many contingencies in favour of the defendants in that:

- The gross sales is restricted to \$75,000;
- Her net income would not exceed more than \$37,500;

- She will continue to work four days a week without restricting her hours further, when she is currently working beyond her capacity; and
- She would not have earned more than \$11,360 in net income from the Chop Shop, absent the accident.

[159] The plaintiff submits that her loss from hairstyling should be at least \$275,000 and the loss related to the ownership of Chop Shop at \$100,000. The total loss of future income earnings should be at least \$375,000.

Defendants' Position

- [160] The defendants' position is that the plaintiff chose to work the one day less as a hairstylist so that she could focus on her other creative endeavors. They further submit that she has failed to consider more sedentary occupations for which she may be better suited. Finally, she did not have any set retirement age in mind and is unsure as to her future plans relating to a family.
- [161] The defendants argue that the sale of the Chop Shop was not related to the accident-related injuries and, as such, no future income losses arise from this sale.
- [162] The defendants suggest that, taking into account all of the evidence, the facts, and various contingencies at play, that a global assessment should be made of \$25,000 as a fair and reasonable amount for the loss of future earning capacity.

Analysis

- [163] Ms. Hau had an impressive work history. She has always worked; even when travelling abroad she sought out employment. She was able to impress the original owners of the Chop Shop such that she was selected to open a franchise a little over a year after graduating from John Casablancas.
- [164] The evidence of her former co-workers support her unique skills as a hairstylist and her passion for her job.
- [165] The photographs of the examples of hair tattooing and dying supports that Ms. Hau is more than a hairstylist; she incorporates her artistic talents into her work. One could say that some of the more technical work she does is equivalent to a work of art.
- [166] I have already accepted Ms. Hau's evidence that at the end of the fourth day of working she is physically exhausted and is not capable of working a fifth day at hairstyling. All of the evidence supports that hairstyling is a physically demanding job, requiring hours of standing and holding one's arms up.
- [167] The medical evidence further supports that Ms. Hau is limited from working five days a week.

[168] I accept that Ms. Hau would have continued working five days per week at approximately eight hours a day, but for the accident. I do not accept that she would have continued working at this very physically demanding profession full-time until age 70. Ms. Hau experienced chronic right shoulder issues prior to the accident as a result of working as a server in the past which were further aggravated by her work as a hairstylist. There is no evidence that her pre-existing chronic right shoulder issues would have resolved.

[169] There remains the possibility of further improvement as Dr. Froh stated in his report dated December 6, 2019:

This patient may have some permanent myofascial pain syndrome symptoms. I note that she did have intermittent symptoms that she required treatment for prior to the MVA because of her profession. I suspect that because of her job, these intermittent myofascial pain syndrome symptoms may become less frequent when her present flare-up resolves. I suspect over time that her symptoms may become less frequent and back to the frequency and severity that she had prior to the MVA.

[170] In assessing Ms. Hau's future loss, I need to consider which is the appropriate approach, the earnings approach or capital asset approach.

[171] The earnings approach involves a form of math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos v. Insurance Company of British Columbia*, 100 B.C.L.R. (2d) 260 at para. 43; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233.

[172] The capital asset approach, on the other hand, involves considering factors such as: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[173] The capital asset approach is more useful when the loss is not easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at paras. 11, 32. Although the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.

[174] In my view, the earning approach should be used but not based on the numbers presented by the plaintiff. If I use the same assumptions as used for the assessment of her past wage loss, her average income, including tips, would have been \$39,000 and her loss of one day would equate to \$7,800 per year (or 20% of \$39,000). The ongoing loss of \$7,800 per year to the following ages is:

- a. To age 70 is \$195,600 using the actuarial multiplier of 25,077;
- b. To age 65 is \$170,235 using the actuarial multiplier of 22,477; and
- c. To age 60 is \$149,806 using the actuarial multiplier of 19,206.

[175] I have used Mr. Benning's actuarial multiplier throughout these reasons. Mr. Hildebrand, the expert economist for the defence, testified that the actuarial multipliers were virtually the same.

[176] Taking into account the physically demanding nature of hairstyling and this plaintiff's pre-existing chronic right shoulder condition, I conclude it is more likely than not that she will retire by age 60. In my view, a fair and reasonable calculation of her future loss of income earning capacity related to her loss of one day of work per week is \$150,000. This is using a lower net income figure than proposed by the plaintiff but it is also assuming that she will continue to be impaired from work until she retires. As noted by Dr. Froh, there still may be some future recovery. It further factors in the potential that this plaintiff may earn some residual income from her talented art creations or in painting murals.

[177] Ms. Hau's future loss relating to the sale of the Chop Shop is difficult to assess. At the time of the accident, she was working full-time at her own salon. She had recently chosen to pull back from some of the managerial duties of the salon and focus back on hairstyling.

[178] Ms. Hau's evidence supported that she did not enjoy the managerial aspects of running a salon and found it stressful. She testified the business was "not the most enjoyable". I conclude that Ms. Hau would have likely sold her salon so she could focus on her passion, which was hairstyling, and not the business of running a salon. It is difficult to assess when that sale would have taken place but a reasonable assumption would have been within 10 years from the time of the accident. That would take us to 2025, and a further five-year loss of net income.

[179] As I have pointed out, the net income figure used by the plaintiff at \$11,360 may be high. If this number is used with the actuarial multiplier of 5,727, representing a five-year loss, it results in approximately a \$65,000 loss. In my view, the loss is less than that amount.

[180] In my view, a fairer and more reasonable amount for this loss would be \$50,000. Bearing in mind the applicable principles in light of the evidence and weighing the pertinent contingencies, I conclude that the sum of \$200,000 is the present value of a fair and reasonable measure of Ms. Hau's future loss of earning capacity. This number includes both her reduction in working hours and the premature sale of her business.

Issue 5: Should the award for past and future wage loss be reduced due to any failure by Ms. Hau to mitigate her loss?

[181] I do not accept the defendants' submissions that Ms. Hau should be pursuing an alternative sedentary occupation. Ms. Hau was trained for and has been employed as a hairstylist for almost a decade. She is passionate about her work. She would have to retrain to work in

some type of office position and she may well still face restrictions if she had to sit or keyboard for many hours. This type of submission would be reasonable if Ms. Hau was unable to continue working as a hairstylist and hence she would be required to mitigate her loss to try to find alternative employment that she could perform. That is not the case here.

[182] I conclude there is not a basis that supports a failure to mitigate for Ms. Hau not pursuing some type of sedentary job when she has only reduced her hours by one day a week. I am not satisfied that it would be reasonable for Ms. Hau to abandon her passion and job for which she has proven to be uniquely qualified to do and be required to retrain for some type of sedentary job which she may also face challenges performing. Ms. Craig testified that Ms. Hau is unlikely to meet the physical demands of more sedentary positions such as banking or insurance clerk, customer service representative for a financial institution, and data entry clerks.

[183] There is no basis to reduce Ms. Hau's past and future loss of earning capacity due to a failure to mitigate.

Issue 6: What is the appropriate award for the cost of future care?

[184] Ms. Hau advances a claim for future care costs of \$86,419 and then a reduction of 10% for her pre-existing condition for a total claim of \$77,777.10 under this head of damages. This is based on a report by Ms. Craig who provided an opinion that Ms. Hau required various ongoing therapies, medications, some equipment, heavier seasonal household cleaning, a gym pass, and an ergonomic assessment of the work place.

[185] The defendants submit that an amount of \$10,000 is an appropriate award for future care costs.

Applicable Law

[186] 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 insofar as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.

[187] Cost of future care is established if there is a medical justification for the claim, and the claim is reasonable: *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 42; *Milina* at 84; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63.

[188] Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in the future. If a plaintiff has not used a particular item or service in the past,

it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services are reasonably expected to be required and likely to be incurred, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

- [189] In *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135 at para. 13, the court noted that common sense should inform awards of cost of future care, quoting *Travis v. Kwon*, 2009 BCSC 63:
- [109] Claims for damages for cost of future care have grown exponentially following the decisions of the Supreme Court of Canada in the trilogy of decisions usually cited under *Andrews v. Grand & Toy, Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577.
- [110] While such claims are no longer confined to catastrophic injury cases, it is useful from time to time to remind oneself that damages for future care grew out of catastrophic injuries and were intended to ensure, so far as possible, that a catastrophically injured plaintiff could live as complete and independent a life as was reasonably attainable through an award of damages.
- [111] This is worth mentioning because the passage of time has led to claims for items such as, in this case, the present value of the future cost of a long-handed duster, long-handed scrubber, and replacement heads for the scrubber, in cases where injuries are nowhere near catastrophic in nature or result.

Analysis

Professional and Support Services

- [190] A claim is made for physiotherapy, including intramuscular stimulation (IMS) for four to eight sessions as treatment for flare-ups in her condition for the rest of her life based on the recommendations of Dr. Faraday and Ms. Craig.
- [191] Dr. Faraday's opinion was that to deal with acute exacerbations of pain in the future, the plaintiff would need four visits over two weeks and a short period of time away from work. Clearly, his opinion is that these exacerbations would be triggered by her physical demands as a hairstylist. As such, it does not make sense that a claim should be advanced for the rest of the plaintiff's life. Once she has retired from hairstyling, then the exacerbations should significantly disappear.
- [192] Ms. Craig also referenced a report of Dr. Martin in support of this recommendation. This was a CL19 medical report prepared by Dr. Martin on February 29, 2016, less than one year after the accident. It appears that Dr. Martin, a doctor at the walk-in clinic, may have only seen Ms. Hau on the one occasion to complete the CL19. I give no weight to a report prepared in early 2016 by a doctor who had limited interaction with the plaintiff.

- [193] Dr. Simonett reported in her report dated February 25, 2020 that Ms. Hau had tried physiotherapy with IMS and reported that she had benefitted. She does not specifically recommend the continuation of this therapy.
- [194] In my view, the most reliable evidence is that of Dr. Faraday who has been treating the plaintiff since April 2016. I accept that Ms. Hau will have exacerbation of her symptoms requiring four visits per year to a physiotherapist during her working life, which I have determined to be approximately when she is 60. The costs of four visits per year is \$320 and using Mr. Benning's multiplier to age 60 of 18,826, amounts to a present value of \$6,025. I again have used Mr. Benning's multipliers since Mr. Hildebrand testified that he had no issue with Mr. Benning's cost of future care multipliers.
- [195] The plaintiff also seeks 12 kinesiology sessions at an additional one-time cost of \$638. This is based on Dr. Faraday's recommendation in his report dated March 7, 2020 in which he notes that Ms. Hau would benefit from regular active exercise. He comments that it has been a few years since she has participated in an active rehabilitation program and so he recommended that another course of active rehabilitation would assist.
- [196] As previously noted, Ms. Hau is very proactive with her health and with her adaptation to her exercise regime. She has adjusted the type of yoga she is doing as well as her dance. She is very active in that she continues to do a variety of activities. She is fit and trim. I am not convinced that this is a cost that the defendants should bear.
- [197] The plaintiff also seeks 12 sessions on an annual basis of massage therapy and chiropractor for treatment for ongoing neck and lower back pain for the rest of her life at a present value amount of \$27,078 using the midpoint range of costs. Dr. Faraday states in his report dated March 7, 2020:
- Ms. Hau continues to rely on monthly massage therapy and acupuncture treatments to help relieve her pain symptoms. Although massage therapy and acupuncture provides only temporary relief of her pain symptoms, if the judicious intermittent use of massage therapy and acupuncture allows her to remain at work and be productive, then on-going provision of message therapy and acupuncture once per month would be a reasonable treatment (similar to the use of pain medication) to help relieve her pain.
- [198] It is clear that Dr. Faraday is trying this treatment to help Ms. Hau remain working, and it would not be for the rest of her life.
- [199] If these treatments were limited to her estimated working life to age 60, the costs of 12 sessions per year at \$889, using a multiplier of 18,826, amounts to a present value of \$16,736.
- [200] Ms. Hau seeks the cost of a gym membership for the rest of her life. The present value of that is \$13,016.

- [201] Dr. Faraday further notes in his report dated March 7, 2020, that after Ms. Hau has participated in a course of active rehabilitation, she would benefit from a gym pass to assist with this exercise program.
- [202] Ms. Hau has not joined a gym since the accident. While she was living in the condo with her ex-partner, she had access to a gym. She testified that she would use the gym to work out on the treadmill and to use weights.
- [203] It is clear to me that Ms. Hau has been able to maintain her fitness level with the various yoga, dance, and hiking activities she participates in. I am not convinced that it is appropriate that the defendants fund a membership in a gym for the rest of her life.
- [204] Ms. Craig included a cost for an ergonomic assessment at the plaintiff's work place based on the recommendation by Dr. Simonett. Dr. Simonett testified that she did not expect that any ergonomic improvements could be achieved due to the nature of hairdressing work. I do not see the need to fund for such an assessment.

Medications

- [205] Ms. Hau does not like to use medication. She will use Robaxacet as needed to assist with pain management. She will also use melatonin to assist her with sleep disruption. Ms. Craig has recommended funding for a total of 152 pills combined of Robaxacet and Advil a year and almost daily use of melatonin for the rest of the plaintiff's life. This amounts to a present value claim of \$1,853.
- [206] It makes the most sense to me that Ms. Hau may need to use some supplementary pain medication during episodes of acute flare-ups, which will occur during her working life. She reported to Dr. Simonett on February 11, 2020, that she takes Robaxacet as needed and estimates once every few months.
- [207] Ms. Hau has taken melatonin as recommended by Dr. Faraday to assist in her sleep regime. Mr. Craig has recommended funding for 360 pills, meaning almost every night of the year. Ms. Hau told Dr. Simonett she takes melatonin as needed and explained that "she tries not to take anything".
- [208] It is appropriate to significantly discount the medication costs presented by the plaintiff since, on her own evidence, she is using a much-reduced amount of medication and her flare-ups are unlikely to continue after she stops working.
- [209] In my view, an appropriate amount for medication costs would be \$500.

Seasonal Cleaning

- [210] The claim advanced is for heavier seasonal cleaning twice a year for eight hours each time throughout her life. This recommendation is made by Ms. Craig on the basis that Ms. Hau would need assistance for heavier and seasonal cleaning, such as moving furniture, washing walls/windows/blinds, cleaning cupboards, and moving heavier storage boxes.
- [211] Ms. Hau's evidence is that she is able to do all housekeeping but she is slower at carrying out those tasks. She did not provide any evidence that she had difficulty with the items Ms. Craig has listed or that she has performed any of those tasks since the accident. Ms. Hau has moved a number of times since the accident when she moved away from her ex-partner and lived with a friend, then her parents, and finally into a small studio apartment. She gave no evidence about what assistance she needed when moving.
- [212] Dr. Simonett was of the opinion that Ms. Hau was independent in completing her house chores.
- [213] Ms. Craig assessed that Ms. Hau had the capacity for low to mid-range physical strength demands (lifting, carrying, pushing and pulling in the range of 30 to 40 pounds). Ms. Hau noted that she has some limitation with vacuuming, mopping and cleaning the bathroom. She has never hired anyone to assist her with any household chores. I do note the fact that Ms. Hau has not paid for any housekeeping in the past does not preclude her from advancing such a claim: *Westbroek v. Brizuela*, 2014 BCCA 48 at para. 74.
- [214] That said, I am not convinced that this award should be made on the evidence before me. It is not clear that this plaintiff would require 16 hours of heavier seasonal assistance at a cost of \$600 per year. The plaintiff had a pre-existing chronic right shoulder condition, which may well have restricted her ability to wash walls, blinds, and move heavy furniture, regardless of the accident.
- [215] I am not convinced that any award should be made for seasonal heavier housekeeping.

Equipment

- [216] Dr. Simonett notes that Ms. Hau may benefit from hiking poles. It appears that Ms. Hau has at least tried hiking the Grouse Grind since the accident and has been able to go on other hikes. I see no justification for having the defendants pay for a set of hiking poles.
- [217] Ms. Craig recommends a body pillow to assist Ms. Hau in supportive sleep positioning. Ms. Hau gave evidence that she wakes up at night due to pain and discomfort since the accident. It seems reasonable to me that some funding be provided for a body pillow up until the time the plaintiff retires from work. I find an award of \$2,000 would be appropriate.

- [218] Dr. Faraday recommended the use of a TENS machine for pain management on an as-needed basis. Ms. Hau has already purchased the machine. Ms. Craig gave evidence that the self-adhesive pads have to be replaced once a month. It is not clear to me how many times you can use the pads before they need to be replaced. Ms. Hau testified that she uses the Chi machine and the TENS machine a few times a week.
- [219] I am not convinced that this plaintiff's amount of TENS use would require the replacement of the self-adhesive pads every month nor that the defendants should be funding this use for the rest of the plaintiff's life.
- [220] I would assess an appropriate amount for the costs associated for the TENS machine at \$4,300.
- [221] Overall, the amount of the award for future care items amounts to \$29,525. The plaintiff agrees that she would have required some intermittent treatment due to the pre-existing right trapezius/upper back condition. As such, the plaintiff submits that a 10% reduction should be applied to the cost of future care award. I do not believe that a global reduction to the number I have assessed would be appropriate but there should be some reduction. In my view the appropriate amount to be award should be \$28,000.

Issue 7: What amount should be awarded for special damages?

- [222] 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 is grounded in 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.
- [223] Ms. Hau incurred costs and mileage to attend various therapies. The amount claimed is \$6,384.74.
- [224] The defendants submit that Ms. Hau would have needed some treatment in any event to address her pre-existing condition. The defendants submit the appropriate figure should be \$5,000.
- [225] I agree that prior to the accident Ms. Hau had been actively seeking treatment from a chiropractor, acupuncturist, and massage therapist. These treatments were far more regular after the accident. I anticipate that Ms. Hau would have sought some treatments, but for the accident, in the same manner as she had before. In my view, a minor reduction of the special damages claim is warranted. I award the amount of \$5,600 for special damages.

Conclusion

- [226] In summary, Ms. Hau is entitled to the following damages:

a.

Non-pecuniary damages:

\$75,000

b.

Past earning capacity loss:

\$50,000

c.

Future earning capacity loss:

\$200,000

d.

Cost of future care:

\$28,000

e.

Special damages

\$5,600

TOTAL

\$358,600

[227] It is not clear to me if any adjustments have to be made to account for any advances to the plaintiff and any interest owed on the past wage loss and special damages. I will leave it for the parties to work out those issues.

[228] If the parties are not able to agree on costs, the plaintiff is at liberty to submit written submissions within 60 days from the date of these reasons. The defendants are to submit written submissions within 15 days of the receipt of the plaintiff's submissions. Any reply submissions must be submitted within ten days.

[229] I also would like to thank both counsel for their efficiency in the presentation of the evidence and submissions, their adaptability in light of the new COVID-19 modifications, and although it is not quite business as normal in trials, it is business that is "nearly normal".

"Forth J."

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