
CANADA / JUDGMENT

Kelly v. Kotz

2014 BCSC 244

COURT

Supreme Court of British Columbia

DECIDED

14 February 2014

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2014 BCSC 244 Kelly v. Kotz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kelly v. Kotz,

2014 BCSC 244

Date: 20140214

Docket: 48221

Registry: Vernon

Between:

Robyn Kelly

Plaintiff

And

Larry Kotz and Lorna Kotz

Defendants

Before: The Honourable Madam Justice Hyslop

Corrected Judgment: The text of the judgment was corrected at paragraph 143 and in the Summary on May 16, 2014

Reasons for Judgment

Counsel for the Plaintiff:

R.M. Moffat

Counsel for the Defendants:

K.N. Schymon

Place and Date of Trial:

Vernon, B.C.

October 1-4, 2013

Place and Date of Judgment:

Vernon, B.C.

February 14, 2014

INTRODUCTION

- [1] On April 15, 2009, the plaintiff left her employer's office at about noon to go to the gym for a workout. She was driving down 26th Street in Vernon, British Columbia, about a block from the office where she worked. A vehicle came from her left and out from a driveway and hit the left side of the plaintiff's car between the front and back doors (the "accident"). Prior to the impact, the plaintiff did not see the vehicle.
- [2] Liability is admitted by the defendants. It is not disputed that the female defendant was driving the car with the consent of the male defendant.
- [3] Upon impact, the plaintiff cannot recall what happened to her in the vehicle. The plaintiff and the female defendant exchanged information. The female defendant told the plaintiff that she did not see her.
- [4] The plaintiff said she was in shock, upset and crying. The plaintiff testified that she went back to the office and sat down for a few hours. She advised her spouse and her employer of the accident. She felt "shaky". From the office she reported the accident to her insurer. That day she left work early.
- [5] The plaintiff testified that as a result of the accident, she went home with a headache; she felt fuzzy and continued to feel shaky. She did not sleep that night.
- [6] Within two days of the accident, the plaintiff went to see her family doctor, Dr. Borchert. She testified that she complained to Dr. Borchert of constant headaches, neck and upper back pain. At the time she saw Dr. Borchert, she was taking Ibuprofen and Tylenol No. 3. She asked Dr. Borchert for a referral to a massage therapist, which she received.
- [7] The vehicle was repaired.

INJURIES

- [8] The plaintiff alleges in her notice of civil claim that the injuries that she suffered as a result of the accident are neck, upper back injuries and headaches. She claims that the headaches are now chronic. The plaintiff claims that she suffered hamstring tightness as a result of the accident, which in the plaintiff's written submissions are described as a "hamstring injury".

ISSUES

- [9] As a result of the accident, the plaintiff seeks the following heads of damages:

1. Non-pecuniary;
2. Past loss of housekeeping capacity;
3. Loss of future housekeeping capacity;
4. Cost of future care;
5. Loss of earning capacity; and
6. Special damages and pre-judgment interest on the special damages.

BACKGROUND

- [10] The plaintiff was 41 years old at the time of the accident. At the time of trial she was 46 years old. At the time of the accident, the plaintiff was a single mother of two children; a boy age 12 and a girl age 9. They resided in a townhouse in Vernon that the plaintiff owned. At the time of trial, she was residing with Richard, to whom she has been engaged since September of 2009. The plaintiff and Richard purchased a home in Coldstream, just outside Vernon. Until very recently, his children also resided with them.
- [11] Although born in Revelstoke, the plaintiff was brought up in Vancouver. She went to business school where she took a legal assistant course. Upon its completion, she worked in a law office in Richmond, and then one located in New Westminster.
- [12] In 1995, she moved to Vernon. While in Vernon, her children were born and the relationship with her common-law husband ended.
- [13] From 1995 to 2000, she worked for a lawyer. In 2000, until the summer of 2012, she worked for another lawyer, Mr. Crosby. Both lawyers were single practitioners and litigators. The plaintiff quit her position with Mr. Crosby when a conflict arose between the plaintiff and the lawyer's girlfriend who was brought into the office to work. This was confirmed by Mr. Crosby. Within two to three weeks of quitting her job, the plaintiff obtained employment as a legal assistant with a large law firm in Kelowna. She commutes daily, Monday through Friday, from Coldstream to Kelowna. Her hours of work are 8 a.m. to 4 p.m.

- [14] While working for Mr. Crosby, she and Mr. Crosby were the only people in the office. Her duties were not only secretarial, but accounting, managing the office and legal research. She worked independently. Mr. Crosby testified that he and the plaintiff worked as a "team". He testified that the plaintiff had a lot of direct contact with clients and that the plaintiff was required to work some nights and weekends, particularly when he was preparing for a trial. Mr. Crosby rated the plaintiff's work as excellent. He stated that looking back at the time the plaintiff worked for him, he was probably "under-manned". He stated that he now has two legal assistants doing the work the plaintiff did for him.
- [15] As a bonus, Mr. Crosby provided the plaintiff and her children with ski equipment and ski passes. There is no evidence as to whether Mr. Crosby provided medical and insurance plans.
- [16] While working for Mr. Crosby, the plaintiff may have called in sick for one day. She was away from work for a period of time for surgery in either 2005 or 2006. The plaintiff took no time off work, nor missed any days of work due to the accident, other than occasionally going home early.
- [17] In her present position, her responsibilities are not the same as those with Mr. Crosby. Her workload is less and the stress is "much less". The annual salaries paid by Mr. Crosby and the new firm for which she works are almost the same, except in her present position, the plaintiff receives coverage for extended medical and dental plans, and life and disability insurance plans. Registered Retirement Savings Plan contributions made by the plaintiff are matched by the law firm.
- [18] The plaintiff met Richard in September of 2007. They bought their house in Coldstream in the fall of 2009. The plaintiff sold her townhouse in 2010. Their house in Coldstream has six bedrooms and three bathrooms, and has a small yard. The children and adults are responsible for doing their own laundry. The children are responsible for the care of their bedrooms and their bathroom. A cleaning lady comes to the home weekly to clean bathrooms, the kitchen, and to do the heavier cleaning work. The cleaning lady is the same one employed by Richard when he lived alone with his children.
- [19] Richard is an information technology (IT) systems manager. He works for the Regional District in Kelowna. He commutes daily. The plaintiff and Richard often commute together when travelling to Kelowna. When Richard does not travel to Kelowna, the plaintiff will drive to Kelowna alone.
- [20] The plaintiff and Richard together share several outdoor recreational activities.

THE PLAINTIFF'S HEALTH BEFORE THE ACCIDENT

- [21] The plaintiff testified that before the accident she was "very healthy" and she had no known physical difficulties. She stated that she had no emotional problems.

[22] In 2001, the plaintiff attended and sought massage therapy for complaints for aching between the shoulder blades and headaches. The plaintiff signed a medical history form dated May 2, 2009, which stated, amongst other information the following:

between shoulder blade aches

headaches start in neck,

Bad posture at keyboard

[23] The plaintiff had six massage treatments between May 2001 and August 2006, about which she had forgotten. This is not a pre-existing condition as suggested by the defendants. This was not medical treatment for an injury that occurred or a chronic condition from which she suffered. It was a massage to make her feel better as a result of working at a computer.

[24] Dr. Borchert, the plaintiff's family doctor, confirmed that she was generally very healthy, and that prior to the accident she had no problems with headaches, neck and back pain.

RECREATIONAL ACTIVITIES PRIOR TO THE ACCIDENT AND AFTER THE ACCIDENT

[25] Prior to the accident, the plaintiff kept herself fit by regularly walking. She would get up in the morning at about 5:30 a.m. to walk for about 45 minutes, three or four times a week. She walked during the noon hour. She worked out at the gym three to four times a week to maintain fitness and to relieve stress as a result of her work. She also jogged from time to time, but this was not a favourite pastime of hers.

[26] Before the accident, the plaintiff skied downhill with her children almost every weekend during the ski season. Upon meeting Richard, he introduced her to snowboarding. She and one of her children took up snowboarding, which they participated in in the 2009/2010 winter season.

[27] The plaintiff pursued other recreational activities and, upon meeting Richard, pursued new ones. Neither the plaintiff nor Richard changed their patterns of recreational activities. Richard continued to pursue the activities in which he had always participated.

[28] The plaintiff and Richard hiked. Richard, who played squash at a high level, introduced the plaintiff to squash. The plaintiff stated that squash was demanding, and that she had no physical difficulties playing the game.

[29] The plaintiff stated that she was the one to organize family recreational activities and she was the "first one out the door." She testified that as a result of the accident, this is no longer the case. She stated that many of her recreational activities ended over time, stating that she did not wake up one morning and decide she could not pursue these activities.

- [30] The plaintiff claims that her recreational activities have been substantially curtailed. She now only walks and does light hiking with Richard. She stated that the accident ended her social activities. She would regularly play cards, host dinner parties and attended dinner parties at other people's homes. She testified that her headaches relating to the accident get in the way of pursuing these social activities. She stated that by the evening she is exhausted.
- [31] The plaintiff finds that, as a result of the accident, commuting to Kelowna is impossible. When Richard travelled to Brazil, she had to drive to and from Kelowna on her own. She had difficulty driving with her arms in front of her and, even as a passenger, she finds she is moved around and it is "just hell".
- [32] The plaintiff works at a computer all day. An occupational therapist came to Kelowna and made changes to her work station; these were to raise the monitor and the recommendation of a new chair, which she received. The plaintiff said that she has to continually remind herself of the posture that she is to adapt when in front of the computer.

HEALTH-RELATED EVENTS THAT OCCURRED AFTER THE ACCIDENT

- [33] After the accident, the plaintiff sought treatment for a left tight hamstring. On August 13, 2010, May 30, 2011 and July 28, 2011, she had massage treatment. The first treatment was for a tight hamstring, and the two subsequent appointments were not only for a hamstring, but sciatic pain down her leg. At trial, the plaintiff described her tight hamstring as an "annoyance".
- [34] The plaintiff stated that in the late spring of 2011, when she was gardening and upon bending over, she became incapacitated. She described the pain as an 8 to 9 out of 10, 10 being the worst. On July 14, 2011, the plaintiff saw Carey Jones, a physiotherapist, who described the plaintiff as presenting with "an acute and insidious onset of left sided buttock and posterior leg pain." On September 24, 2011, the plaintiff attended a walk-in clinic where she was treated by Dr. Remington. A CT scan and x-ray were ordered which revealed a herniation at the L5-S-1 of the lumbar spine. After its diagnosis, Mr. Jones treated the plaintiff during the summer and autumn of 2011. The plaintiff stated that Mr. Jones used traction which took the pain away.
- [35] The plaintiff sought the opinion of Dr. Brownlee as it relates to the injuries she suffered in the accident. His investigations involved ordering an MRI of the plaintiff's cervical spine; it revealed a herniated disc at the C6-7 level. At the C6-7 level, Dr. Brownlee found no instability was detected and there was no impingement of the spinal cord. Dr. Brownlee finds that this disc herniation is probably asymptomatic and an incidental finding "which is not uncommon." Dr. Brownlee concludes that the disc herniation in her neck and disc herniations in her lumbar spine are not a result of the accident.
- [36] The plaintiff is not making a claim for these conditions as opposed to hamstring tightness.

[37] In 2010, the plaintiff suffered an ankle injury when she slipped and fell on wet grass, pushing a dirt bike down a hill. There is no suggestion that this affected her injuries from the accident.

MEDICAL EVIDENCE

Dr. Borchert

[38] Dr. Borchert provided medical/legal letters dated June 24, 2011 and March 28, 2013. Dr. Borchert saw the plaintiff on April 20, 2009. The plaintiff described the accident to Dr. Borchert, which is consistent with her description of the accident at this trial. The plaintiff complained to Dr. Borchert of headaches, neck and upper back pain, which started the day following the accident. Upon examining her, Dr. Borchert found she was:

tender diffusely over her neck, her shoulder blades and upper back. There was good range of motion of her neck and examination of her arms was normal.

[39] Dr. Borchert recommended the application of ice and heat, taking Tylenol and Ibuprofen, and massage therapy. Dr. Borchert next saw the plaintiff on March 1 and 9, 2010. He describes the information that he obtained from her:

She was still experiencing pain in her neck and upper back which was associated with headaches. She had now been attending physiotherapy and massage therapy for some time. The physiotherapy was generally happening once per month. She was finding that her neck pain would flare-up when there were stresses at work. She had also tried yoga and stretching. Pain was experienced at work when sitting at a desk doing typing or computer work. She was still able to participate in full duties at work. I suggested that she continue with the physiotherapy as needed and continue her exercise and yoga.

[40] Dr. Borchert saw the plaintiff on June 3 and 16, and December 17, 2010. Referring to December 17, 2010, Dr. Borchert wrote:

She was still experiencing neck pains occasionally with activities such as tobagganing. Physiotherapy treatments were happening on an as needed basis and she felt her symptoms were gradually improving.

[41] On February 10, 2011, Dr. Borchert saw her and she reported to Dr. Borchert:

She was experiencing headaches at the front and back of her head. She had had to miss some work due to the headaches. Stiffness in her neck and upper back had been present for some time, fairly persistently with occasional exacerbations. She was generally attending physiotherapy monthly and continuing with stretching and yoga. Pains were again worse after prolonged sitting or after work. On examination she was tender above her shoulder blades bilaterally.

[42] On June 20, 2011, Dr. Borchert saw the plaintiff and states that:

She was still experiencing tightness in her back at work when sitting at the desk. She had some bilateral neck pain and pain over the back of her head and upper back. Headaches were occurring once or twice per week.

- [43] He notes that the plaintiff has attended twelve massage therapy treatments, has attended physiotherapy during the first year on average of every two weeks and, at the time of seeing her, it was every two months.
- [44] Dr. Borchert concludes that the plaintiff's complaints of headaches, neck and back pain, are directly related to the accident and that she will continue to have these symptoms for the next two years. He refers to the plaintiff's recreational activities as being curtailed from concern on the part of the plaintiff that she would re-injure her neck and back. He noted that she rarely skis.
- [45] In Dr. Borchert's medical/legal letter dated March 28, 2013, he refers to the plaintiff developing left leg and hip pain in the summer of 2011. On March 27, 2013, he confirmed in response to questions posed to the plaintiff by him that there were no problems with her low back or leg following the accident.
- [46] Dr. Borchert refers to the plaintiff's CT scan of her lower back which showed the disc prolapse. He confirms that the symptoms were almost completely resolved with traction and time. He states that these symptoms are unrelated to the accident.
- [47] On March 27, 2013, the plaintiff told Dr. Borchert that she was having headaches daily and "she was continuing to have neck pains bilaterally which radiated into her upper back." On examination of the plaintiff, Dr. Borchert found there was some mild limitation in her neck extension. There was also some mild tenderness over her neck muscles. At that visit, the plaintiff told Dr. Borchert she was still unable to downhill ski and has not done so for the past two years, and unable to do routine physical household activities without pain, but that she was able to perform them. He also opined that as a result of the accident she would be more prone to re-injure her neck and upper back.
- [48] Dr. Borchert was cross-examined on his clinical records. He acknowledged that on September 7, 2011, the plaintiff told him that for the last six weeks she had a pain in her hip, but there was no injury. The plaintiff told him that she played squash regularly.
- [49] In an office visit - September 30, 2011 - the plaintiff went to her doctor's office as she was having "back and calf pain." Dr. Borchert's clinical notes state:

Left buttock pain on and off for two years. Also hip pain. Patient was involved in a motor vehicle accident in April 2009. She has been unable to play squash or other sports since July. She is experiencing pain in her left calf and ankle. She also has pain when she gets out of the car. Physical therapist has been wondering about a disc prolapse.

Physical examination: straight leg raising to 45 degrees bilaterally with pain in the buttock area. Pain also radiated to the left calf.

- [50] On October 21, 2011, Dr. Borchert saw the plaintiff. His clinical records note that the CT scan showed a disc protrusion at the L5-S1 which mildly compresses the S1 nerve root. Dr. Borchert observes that the plaintiff has some symptoms in her legs, but no sign of weakness.
- [51] On May 8, 2012, the plaintiff returned to see Dr. Borchert. At that time, she complained of headaches and neck pain, particularly when she is driving. The plaintiff reported that she had seen a neurosurgeon in Kamloops which had been arranged by her lawyer. She told her doctor that the MRI showed a central disc herniation to the C6-7 of her spine.
- [52] On March 27, 2013, in preparation of a medical/legal report, the plaintiff saw Dr. Borchert for purposes of updating the accident-related injuries. In his medical notes for that date, he summarizes his clinical notes on previous visits with the plaintiff. There is no dispute as to the truth of the information contained in Dr. Borchert's notes, except the plaintiff's evidence is that she missed no work as a result of the accident.

Dr. Brownlee

- [53] Dr. Brownlee was retained by the plaintiff's counsel to do an independent examination and to report to the court. Dr. Brownlee is a neurosurgeon. He states that not only did the plaintiff have pain in her upper back, neck and headaches, but she also has pain in her shoulders. These symptoms, he states, have existed since the accident. At the time that Dr. Brownlee assessed the plaintiff, she had headaches and upper back pain. Dr. Brownlee states that as a result of the accident, the plaintiff has not been able to return to activities since the accident, including those activities she took up prior to the accident with Richard. In examining the plaintiff, Dr. Brownlee found that the plaintiff had:

- normal motor power in all muscle groups in her upper and lower extremities;
- straight leg raising to the leg was restricted to 80 degrees with pain radiated just below the knee, suggesting some nerve root tension and left hamstring tension;
- symmetrically normal reflexes in her arms and legs;
- sensory examination is normal;
- gait was normal with no restrictions;
- range of motion to her neck was normal, though she moved slowly and apprehensively, experienced pain with flexion to her neck:

especially extension for her neck and can flex to touch her toes and she experienced tension in her left hamstring.

- [54] Dr. Brownlee was aware that the plaintiff developed sciatic-type pain in her buttocks in the summer of 2011. He was also aware of the results of the CT scan.

[55] Dr. Brownlee concluded that the plaintiff's ongoing neck pain and headaches may arise from the facet joints in her neck, and that most of her pain is probably muscle or ligament related.

[56] The plaintiff told Dr. Brownlee that she attended physiotherapy and massage therapy for the treatment of her neck and upper back pain; that the symptoms gradually improved, "but never completely resolved." He concluded that as a result of the accident, that the plaintiff suffered soft tissue injuries to her neck and upper back which he says is the source of her pain. He stated that the muscles and ligaments may be the source of pain when the muscle tension responds to the pain when the spine is straightened which often will cause headaches. He stated that:

The source of her pain is probably related to the muscles, ligaments and other soft tissue elements in her neck and upper back. The facet joints, which are small synovial joints in the spine, are a common source of chronic neck pain following injuries.

[57] He further opines that people such as the plaintiff who develop chronic pain, that there is an emotional component to the injuries. Examples are depression, fear of re-injury and "catastrophization". He recommends not only a physical rehabilitation program, but also a psychological evaluation and counselling. He recommends that the plaintiff "return to as many normal, pre-accident activities that she can even if she experiences some associated pain."

[58] Dr. Brownlee states the plaintiff's experience of intermittent episodes of pain in the left buttock, which the plaintiff identified as "hamstring tightness," began in the summer of 2009. Earlier in his report, he states:

Approximately 6 weeks after the motor vehicle accident, she travelled with her family to Disneyland and experienced an increase in the pain in her left hamstring.

Dr. Rocheleau

[59] On February 13, 2013, Dr. Rocheleau examined the plaintiff at the request of the defendants. Dr. Rocheleau is a specialist in the field of Physical Medicine and Rehabilitation. He provided an independent medical report dated March 13, 2013. He was cross-examined on this report.

[60] The plaintiff identified to Dr. Rocheleau the areas of her body that concerned her. They are headaches, neck pain, upper back pain, low back pain, and pain into the left leg. In reporting her pain scores to Dr. Rocheleau he found them low, but the plaintiff advised him that in the past she had high ones. He concludes that the plaintiff's:

ongoing symptoms in this area are related to a "whiplash" type phenomenon that has occurred to the supportive structures of the neck and upper back that occurred at the time of the accident.

- [61] Dr. Rocheleau examined the plaintiff and found in the supine position, in a straight leg raise, she was limited to 70 degrees of hamstring tightness on the right; she was almost the same in straight leg rising on the left, "although she develops some hamstring discomfort posteriorly towards the maximum range." In addition, Dr. Rocheleau found that she was "tender to palpation over the mid-cervical masses."
- [62] As to pursuing her previous recreational activities, Dr. Rocheleau concludes that she may return to some of these activities on a limited basis. Those limitations would be to those activities that involve a high degree of physical strain pounding or vibration.
- [63] He states that whether the headaches relate to the possible disc injury at C6-7 and/or to the injuries to her neck is a "moot point." He further concludes that it is also probable that the "ongoing irritation" in her neck "is a significant contributing factor to her recurring problems with headache."

OTHER TREATMENT PROVIDERS

Sarah Robson

- [64] Sarah Robson provided 12 massage therapy treatments to the plaintiff between April 21 and October 1, 2009. At her first appointment, the plaintiff reported to Ms. Robson that after the accident she had headaches, burning, aching and tightness "from between her scapulae, up to the neck and including her upper shoulders." The symptoms increased in severity after the accident. In assessing range of motion on the plaintiff's cervical spine, Ms. Robson found a slight decrease in range of motion to the plaintiff's left by about 5 to 10 degrees. Ms. Robson observed that the plaintiff's range of motion was within normal limits, except for the left of her neck. Ms. Robson noted more tightness in the left side of her neck than her right. Ms. Robson reported that the plaintiff, by her fourth massage treatment, reported to her improvement and some of that improvement was maintained until the next appointment. Despite setbacks, Ms. Robson observed that her muscles and tissues "seemed to release faster and be more responsive to the treatments."
- [65] Ms. Robson concluded that massage therapy provided to the plaintiff only short-term relief.

Carey Jones

- [66] Mr. Jones assessed the plaintiff on June 18, 2009. He observed increased muscle tone in the scapula and the rhomboid muscles and he found that movement in her cervical spine was limited with pain into left rotation with some pain at the end of range to the right. He also found palpable trigger points in some muscles coming down the neck and into the shoulder.

[67] Between June 23 and December 2, the plaintiff had 15 treatments with Mr. Jones. During this time, Mr. Jones stated that the plaintiff responded well to the treatment, "making reasonably steady physical progress" despite setbacks. He states that after each of these setbacks the plaintiff responded well to "manual mobilisation." In his letter dated May 25, 2013, he writes, "On December 2, 2009 Mrs. Kelly reported to be doing well. The cervical movement was full and pain-free."

[68] On July 14, 2011, the plaintiff came to Mr. Jones' clinic "with acute and insidious onset of left buttock and posterior leg pain." Mr. Jones treated the plaintiff for this problem, as well as her neck problems. This symptom was diagnosed as the L5-S1 disc herniation which I referred to earlier.

[69] The plaintiff attended her last appointment with Mr. Jones in May of 2012. At that time, Mr. Jones became aware of the plaintiff's C6-7 herniation. In assessing her neck problems on that date, Mr. Jones states:

Physically cervical movement was 'stiff' at end ranges and there was segmental restriction in the upper thoracic and low cervical spine. There was associated myofascial tightness and palpable trigger points.

[70] He found these to be consistent with her previous complaints relating to her neck.

Heather Taylor

[71] Heather Taylor, a massage therapist, treated the plaintiff on one occasion in November of 2003 for general discomfort in her neck and shoulder region. The plaintiff sought treatment from Ms. Taylor on June 4, 2012 for ongoing problems relating to the accident. The first treatment was on June 30, 2012. Ms. Taylor treated the plaintiff 18 times.

[72] During the time that Ms. Taylor saw the plaintiff, the plaintiff complained of headaches four to seven times a week, and severe headaches with nausea three to four times a month; neck and upper back pain; tightness in the left posterior thigh; and occasional tightness in the low back. Ms. Taylor treated the plaintiff for these complaints. Ms. Taylor stated that she believed the plaintiff made progress and that she responded to the treatments with some setbacks. Ms. Taylor concludes that the plaintiff's alignment has improved, but her movement through her pelvis is "problematic".

Allison Coupe

[73] Allison Coupe is a physiotherapist who provided eight acupuncture treatments to the plaintiff between March 20 and June 7, 2012. During these treatments, she also received physiotherapy treatments. The plaintiff told Ms. Coupe that after some of her treatments her symptoms decreased.

FUNCTIONAL CAPACITY EVALUATION

[74] Mr. Gilbert Lapurga prepared a Functional Capacity Evaluation report dated June 17, 2013. On June 1, 2013, he performed tests on the plaintiff. In addition, he prepared a Cost of Future Care Assessment of the plaintiff in a report dated June 24, 2013. Mr. Lapurga is of the opinion that the plaintiff is employable on a full-time basis, with potential to work in a "Sedentary to Medium (lower range)" strength occupation. He caveats this statement with a proviso that she will not be able to access all occupations within those categories because of strength and positional limitations. He lists those restrictions as:

- Lifting between waist and above shoulder levels to maximum of light strength level (18 pounds)
- Sitting is limited to occasional frequency
- Sustained mid level reaching is limited to occasional frequency
- Sustained elevated reaching is limited to occasional frequency
- Standing is limited to occasional frequency

[75] Mr. Lapurga defines "employable" as:

The worker meets most of the requirements of work within specific work categories; but has limitations which restrict access to the full range of occupations that the worker would have otherwise been qualified to perform. The worker may require a sympathetic employer, modified work hours or environmental/ergonomic changes.

[76] Mr. Lapurga states the following:

I am recommending that she continue with her current employer, as well as continue with her established physical program and therapies to manage her ongoing symptoms. I agree with Dr. Brownlee (report dated April 19, 2012) who has recommended that "Ms. Kelly should resume her regular exercise program three to four days per week".

NON-PECUNIARY DAMAGES

[77] Non-pecuniary damages are awarded to compensate an injured person for pain and suffering, loss of enjoyment of life, and inconvenience. In such an assessment, the amount ought to be fair and reasonable to both the plaintiff and the defendant. Fairness and reasonableness is measured against similar cases. However, in the end, each case has its own unique facts. The assessment of such an amount is based on the individual experience of each plaintiff and the consequences of the injuries to that person.

[78] In assessing the amount for non-pecuniary damages, I have considered the factors in *Stapley v. Hajslet*, 2006 BCCA 34.

[79] The plaintiff seeks \$85,000.00 to satisfy non-pecuniary damages. She relies on the following cases in which the following amounts were assessed:

Guthrie v. Narayan, 2012 BCSC 734

\$65,000.00

Morlan v. Barrett, 2010 BCSC 1767

\$125,000.00

White v. Gehricke, 2013 BCSC 377

\$85,000.00

[80] The defendants argue that non-pecuniary damages for the plaintiff ought to be assessed at \$35,000.00. They rely on the following cases in which the following amounts were assessed:

Hill v. Durham, 2009 BCSC 1480

\$25,000.00 (back injury)

\$15,000.00 (knee injury)

Bulatovic v. Siebert, 2013 BCSC 240

\$40,000.00

Duifhuis v. Bloom, 2013 BCSC 1180

\$35,000.00

Colibao Chingcuangco v. Herback, 2013 BCSC 268

\$65,000.00

[81] In Guthrie, the plaintiff, age 26 at trial, suffered neck and back injuries. She was incapacitated the day after the accident. She was away from work for a period of two months and then entered a graduated back-to-work program. Upon returning to work, the plaintiff could not meet all the requirements of her employment. The plaintiff was diagnosed with chronic neck and shoulder pain. At the time of trial, the court found that the limitations that the plaintiff suffered would continue indefinitely. The injuries affected all facets of her life.

[82] In Morlan, the court concluded that the plaintiff's pain developed into fibromyalgia. This interfered with the plaintiff's employment requiring her to seek and take a less demanding job so as to reduce a three-hour commute to a twenty-minute commute. She also had to sell her house so as to move into a smaller home with fewer steps.

[83] The court found that the change in her job was less rewarding which reflected in the award for non-pecuniary damages. The court found that the plaintiff's energy level was reduced. The condition that the plaintiff developed in this case is not the condition that the plaintiff developed in the Morlan case, nor was the plaintiff in this case required to quit her job and move into a different home. I do not find this case helpful.

- [84] White was a complicated case that involved, not only two motor vehicle accidents that occurred within 20 days of each other, but also a slip and fall accident. The court was to assess the injuries arising from the two motor vehicle accidents. The plaintiff was not seeking damages for the slip and fall accident, but she continued to have lingering injuries and pain from that event. Her injuries in the motor vehicle accidents were neck, shoulder, back and arm pain. In addition, she suffered a labral tear in her hip which caused pain and affected her range of motion. At the time of trial, she was age 33 and was not able to perform all her tasks at work. Prior to the accident, she had an additional source of income which eventually ended because she could not perform the tasks. The injuries affected her employment considerably.
- [85] In Hill, the plaintiff, age 44, was very active. She suffered a moderate soft tissue injury to her back described by the court as "problematic almost four years after the accident." She suffered a knee injury which was "less painful but is likely to last longer" than her back problem. The plaintiff had significant pain for six months. Despite that she was able to work. She had a pre-existing shoulder and some knee problems. The court found that she was stoic and devoted to her work. Her condition improved, but its resolution was uncertain.
- [86] In Bulatovic, the plaintiff, age 56, was a pedestrian when she was hit by a car. She had headaches and a right shoulder injury. Her hip and leg pain resolved. She was away from work for various periods of time as a result of the accident. She had improved by 60 to 70 percent at the time of trial, but was left with neck and shoulder pain, and headaches. Her family life had been negatively affected. She could no longer participate in recreational activities that she did before the accident.
- [87] In Duifhuis, the plaintiff was age 76 and had degenerative disc disease. The accident aggravated the disc disease. I am of the view that there is little that can be compared to this case and it is not helpful.
- [88] As a result of a motor vehicle accident, the plaintiff in Colibao Chingcuangco, suffered bruises from a seatbelt which were resolved in two to three months. She also developed neck and lower back pain and headaches. These symptoms were aggravated by long periods of sitting. The plaintiff was away from work as a result of the accident for a period of two weeks. When she returned to work she returned only half time. She gave up her Saturday job. Her goal was to train as a psychiatric nurse. Psychologically, she was unable to drive for a period of seven months after the accident. At the time of trial, her headaches were infrequent. Some of her problems have resolved and she had flare ups of her symptoms. The court found that it is reasonable to expect that she would be fully recovered within five years.
- [89] The plaintiff's injuries; her neck, upper back and headaches are clearly related to each other. Her hamstring tightness injury is quite separate.
- [90] The plaintiff's notice of civil claim does not plead the hamstring injury.

[91] Dr. Brownlee states in his report:

2. Mrs. Kelly had some left hamstring tightness that was noted after the accident, but no lower back pain. She developed severe sciatic type of pain in the summer of 2011 which consisted of pain in the left buttock with radiation into the hamstring and calf of her left leg. She had a CT scan of her Lumbar spine which showed a small disc herniation on the left at L5S1 which was probably the cause of her pain. This pain has significantly improved.

[92] He further comments on this alleged injury by stating the following:

Ms. Kelly experienced intermittent episodes of pain in the left buttock and hamstring which began in the summer of 2009 while doing some gardening. Massage therapy identified hamstring tightness and the treatment aggravated her pain. She had never had similar pain prior to her accident. It is my opinion that the pain and stiffness was probably due to a soft tissue injury caused by the motor vehicle accident which was mild compared to her other symptoms.

[93] It must be determined whether this was caused by the accident. The "but for" test in *Athey v. Leonati*, [1996] 3 S.C.R. 458 is applied. The court must be careful not to conclude that the injuries occurred based only upon the consideration of the plaintiff's condition prior to the accident and her condition after the accident. In my view, this is how Dr. Brownlee concluded that the plaintiff suffered a hamstring tightness injury in the accident based on what the plaintiff told him.

[94] There is other evidence to support the argument that the hamstring tightness was not caused as a result of the accident. Dr. Borchert, in his medical/legal report dated March 28, 2013, stated:

When I questioned her in the office on March 27, 2013, she stated that there were no problems with her lower back or left leg following the motor vehicle accident.

[95] This response, I believe, is directed to the question asked by the plaintiff's counsel in a letter dated March 21, 2013, directed to Dr. Borchert, which stated:

8. One of the issues in this proceeding will be whether or not Ms. Kelly's low back and leg symptoms are or are not casually related to the April 15, [2009] MVA alone or in combination with other causes. If you feel confident to opine on this issue, please do so.

[96] At no time prior to 2011, did the plaintiff complain to Dr. Borchert about hamstring tightness. In fact, in 2011, the plaintiff was found to have a condition a lot more serious than hamstring tightness, and that was the herniation at the L5-S1 of her lumbar spine.

[97] The first time that the plaintiff mentioned hamstring tightness to any of her healthcare providers was to Sarah Robson on August 13, 2010, when she was treated for hamstring tightness, not only on that occasion, but two subsequent occasions in 2011.

[98] Mr. Jones testified that the plaintiff did not complain of hamstring tightness or pain in her hip while he was solely treating her for headaches, back and neck injuries.

[99] I conclude the plaintiff did not suffer an injury which has been described as "hamstring tightness" in the accident.

HEADACHES, NECK AND UPPER BACK INJURY

[100] I do find that in the accident the plaintiff suffered neck and upper back injuries, and that headaches are a symptom of those injuries.

[101] Within a few days of the accident, Dr. Borchert examined the plaintiff. He found that the plaintiff was tender all over her neck, shoulder blades and upper back. She was experiencing headaches. At that time, she had a good range of motion. A little over two years later, the plaintiff's complaints were the same, except she experienced headaches once or twice a week. Her complaints as to stiffness related to complaints working at her desk. When the plaintiff saw Dr. Borchert almost four years after the accident (March 27, 2013), she claimed she had headaches daily. On examination of the plaintiff by Dr. Borchert, he found some limitation in neck extension and mild tenderness over the neck muscles.

[102] While being treated by a massage therapist and physiotherapist, the plaintiff's symptoms reduced over time. This is confirmed by Mr. Jones, when the plaintiff reported to him on December 2, 2009 and January 5, 2010 that she was doing well. He found that cervical movement was pain-free with some segmental restrictions. Mr. Jones found, on January 5, 2010, she was the same except with some additional segmental restrictions. Between February 16, 2010 and April 5, 2012, the plaintiff had eight separate treatments "for exacerbation of fairly consistent symptoms of upper thoracic/lower cervical tightness and pain."

[103] Mr. Jones noted in his report that the trend in the treatment of the plaintiff was less intervention.

[104] The plaintiff described her symptoms by the end of September 2009 as having constant headaches for three or four months which came from the back of her neck. She described the muscles at the side of her neck feeling as if they were popping out and the muscles in her shoulder felt tight and knotted.

[105] She stated that six months after the accident there were days that she felt normal, though there were times that the headaches got worse as to severity and duration and affected her level of concentration. These descriptions are consistent with her reporting to Sarah Robson and Carey Jones.

[106] When Dr. Brownlee saw the plaintiff, she had normal range of motion and some pain with flexion, particularly with the extension of her neck. The plaintiff told Dr. Brownlee that her symptoms gradually improved, but never resolved themselves completely.

[107] Dr. Rocheleau, in his examination of the plaintiff, found that the plaintiff had "full range of motion in her shoulders." He also found:

Active neck range of motion is good and passively, she has full range when assessed in the supine position in terms of rotation to the left and right and lateral flexion to the left and right.

No spasm or guarding was identified in the cervical region. However, she was tender to palpation over the mid-cervical masses (C3, 4, 5) bilaterally, slightly more so on the right than the left.

Scalenes assessment was normal and she was non-tender in the posterior triangle over the muscles in this region.

The C7-T1 area of her spine is prominent. Palpation of the region was however non-painful today and again no muscle guarding or spasm was identified. Same was true for the interscapular/rhomboids area, although this is a region that does apparently cause her symptoms at times.

Findings

- [108] The plaintiff's symptoms of her injuries arose almost immediately after the accident. She saw her family doctor and then took a course of therapies which included massage and physiotherapy. She also enrolled and took exercise programs which included Pilates and yoga.
- [109] These various therapies provided relief and improvement, but from time to time she suffered setbacks. To add to her difficulties, the plaintiff encountered a sciatic condition which involved a disc protrusion at the L5-S1 which prevented her from playing squash.
- [110] The plaintiff continues to have treatment from her massage therapist once every two weeks.
- [111] She testified that as a result of her injuries, she initially had difficulty sleeping and would get up at 3 or 4 a.m. to go to the La-Z-Boy and watch TV in the hope of obtaining more sleep. As time went on, she would intermittently wake up during the night.
- [112] The plaintiff finds driving in a car on a rough road painful for her neck. She experienced this as a passenger, on rough gravel roads when she travelled for family related dirt bike activities.
- [113] She has attempted to ski and snowboard, but is afraid of injuring herself. She last jogged in the spring of 2010, but found that it created neck pain; power walking exacerbated her symptoms. Her injuries have affected some of the plaintiff's everyday activities. She can continue to do her housework, but has some discomfort in those activities. However, she did play squash until the summer of 2011. She stated this to Dr. Borchert and Richard confirmed this.
- [114] The plaintiff dislikes having to spend two hours, five days a week, travelling to Kelowna for her work. This lengthens her day and causes her to be tired out in the evenings. In addition, she travels to Kelowna to see her elderly father.

[115] Ideally, the plaintiff would like to work in Vernon, however, she is unable to command the salary she is presently being paid. She also stated that she would like to work three or four days a week. However, the evidence before me from Mr. Lapurga and Dr. Rocheleau is that she can continue with her present employment. The plaintiff has missed no work as a result of her injuries. I accept that, as a result of the sympathetic employer, Mr. Crosby, she was able to take breaks to stretch and lie down on the floor, which helped her continue her work. Dr. Rocheleau describes the plaintiff's condition as chronic, seeing little chance of improvement.

[116] Dr. Rocheleau does not foreclose the plaintiff participating in recreational activities. He states:

4. Future recreational activities:

Ms. Kelly has experienced some interference with her ability to participate in more aggressive forms of recreation such as downhill skiing, snowboarding or dirt biking/off-roading. If she can improve on her current situation with some of these strategies outlined above, it may be possible to return to some of these activities at least on a limited basis. However, this is a possibility only and it is more probable that she will remain limited and restricted in terms of her recreational activities in the future to those which do not involve [a] high degree of physical strain, pounding or vibration.

[117] Based on Dr. Rocheleau's opinion, the plaintiff could continue pursuing walking, hiking and gym workouts.

[118] Dr. Brownlee sees matters somewhat differently and believes that there is an emotional and psychological component to her injuries. He believes that with a physical rehabilitation program and some counselling, the plaintiff could make further strides. He found that the plaintiff was afraid to participate in her pre-accident activities for fear of re-injuring herself. He too, as with Dr. Borchert, states that the plaintiff is at risk of future exacerbations of her pain condition if she experiences another injury. Despite this, he recommends that she return to as many pre-accident activities as she can, "even if she experiences some associated pain".

[119] The plaintiff's recreational and social activities were reduced as a result of the accident, and were further reduced with the onset of the sciatic pain and subsequent diagnosis. That condition is almost completely resolved as it relates to pain

[120] I accept that Richard enjoys the outdoors and participates in a number of activities, some of which the plaintiff can no longer participate. I find that this can be difficult for their relationship. I accept that the injuries, and in particular the headaches, have made her irritable and impatient with her children.

[121] Richard proposed to the plaintiff by placing an engagement ring on a rock ledge. The plaintiff went up to the ledge to pick up the ring. It was not clear as to how it was that she got up there. This was a one-time event. This event is of no significance in determining the plaintiff's physical abilities or her damages.

[122] I conclude that the plaintiff's symptoms have improved as she described to Dr. Brownlee and will continue to improve.

[123] In assessing non-pecuniary damages, I considered the plaintiff's special circumstances and the case law cited to me by both plaintiff and defendants.

[124] I award \$45,000.00 for non-pecuniary damages.

PAST LOSS OF HOUSEKEEPING CAPACITY

[125] In her examination for discovery, the plaintiff stated that after the accident she could not keep up with all of the housekeeping in her townhouse as she did prior to the accident. She hired a housekeeper to come in and clean "just to get me back to kind of a normal situation in my house so that I could try to upkeep it." I conclude that the plaintiff was able to keep up with her housekeeping in her townhouse. I conclude that the plaintiff had little or no loss of housekeeping capacity.

SPECIAL DAMAGES

[126] The plaintiff seeks approximately \$20,000.00 for special damages. The basis of the plaintiff's claim is the various therapies: massage, physiotherapy and acupuncture that the plaintiff received from the date of the accident until the date of trial at approximately \$500.00 per month.

[127] The defendant states special damages should be allowed at \$8,499.06, which is inclusive of the one-time charge of \$172.45 for the cleaning of the plaintiff's townhouse after the accident. The defendants did not show exactly how they calculated this amount.

[128] The defendants argue that the plaintiff has provided no explanation as to why she required ongoing private Pilates lessons as well as classes and the use of services of a kinesiologist. This, the defendant says, is excessive and the defendants ought not to bear this cost.

[129] The defendants state that some therapy the plaintiff received was a result of her condition at the L5-S1 of her spine, for which the defendants are not responsible. The only therapist to provide treatment for this injury was Mr. Jones. Mr. Jones' evidence was that he provided the plaintiff with 14 therapy sessions related to the L5-S1 condition. There were two sessions that related both to the plaintiff's injuries in the accident and the L5-S1 condition, which I will not try to divide. Mr. Jones provided 30 treatments. Fourteen treatments were related to the L5-S1, which is \$770.00. This leaves the amount of \$880.00 for Mr. Jones' services to the plaintiff for the injuries as a result of the accident.

[130] The defendants are correct; there was no explanation by the plaintiff as to why some Pilates classes had to be private and her need to hire a kinesiologist. At the same time, the plaintiff's pursuit of exercise was reasonable given that Dr. Brownlee's recommendations are for the plaintiff to pursue exercise and her previous recreational pursuits. I am prepared to allow the following special damages. The Welcome Back MRI expense ought to be included when assessing the plaintiff's costs. These are the special damages:

House cleaning account

\$172.45

Physiotherapy with Mr. Jones

\$880.00

Exercise Program

\$280.00

Yoga

\$120.00

Abs Class

\$29.00

Mileage

\$916.50

½ Pilates

\$1,246.86

Acupuncture

\$520.00

Massage Therapy

\$1,750.00

Miscellaneous Expenses:

bean bag - \$26.27

bosu ball - \$120.00

rubber exercise bands - \$30.00

Tylenol and Ibuprofen - \$450.00

\$626.27

Total:

\$6,541.08

[131] I award the plaintiff \$6,541.08 for special damages. There will be interest on that amount pursuant to the Court Order Interest Act, R.S.B.C. 1996 c. 79.

FUTURE CARE COSTS

[132] The plaintiff seeks \$101,983.00 for future care costs.

[133] The defendants limit future care costs to the biochemical treatments recommended by Dr. Brownlee and the cost of medications respectively at \$6,600.00 and \$1,000.00.

The Law

[134] In assessing future care costs, it must relate to the needs of the plaintiff so as to preserve and promote the plaintiff's health.

[135] The test for allowing future care costs is:

- 1) each future care item must be independently assessed;
- 2) each item must be medically justified; and
- 3) the claims must be reasonable.

Gregory v. ICBC, 2011 BCCA 144 and Aberdeen v. Zanatta, 2008 BCCA 420.

[136] Medically justified, is not so narrow as to be confined to the advice of a medical doctor, but includes other healthcare professionals. The cost of future care should be fair to both parties.

[137] Dr. Brownlee recommends that the plaintiff engage in a multi-disciplinary therapy to address the plaintiff's physical and emotional symptoms. Its cost in Kamloops is \$5,000.00 to \$12,000.00. In Kelowna, its cost is \$105.00 per session. The plaintiff seeks \$10,000.00.

[138] The plaintiff testified that she would be interested in pursuing this program, but felt that she would need some time off work. I agree that this would be necessary. The amount of her loss of wages was not addressed. Dr. Brownlee states that the program would take three months and, upon its completion, there would be an ongoing maintenance therapy by physiotherapy and massage therapy at least once a month for a period of twelve months.

[139] He also recommends the plaintiff could receive block injections administered by an anaesthetist to determine the source of the plaintiff's pain. If the pain can be located then the plaintiff could have a facet joint rhizotomy to provide relief from the pain which can be repeated in the event the pain reoccurs. This cost is \$600.00 to \$1,500.00 - average \$1,150.00. Dr. Brownlee estimates that the cost of the rhizotomies are \$3,500.00.

[140] Dr. Rocheleau recommended injections of botulism toxin for the plaintiff's headaches which could provide relief for as long as two to three years with no need to take medication. The plaintiff was hesitant as to whether she would pursue this treatment. Given the treatment that she pursued prior to trial of physiotherapy, massage therapy, yoga and other active therapies, I conclude she would not.

[141] Dr. Rocheleau also recommended Pilates, a specified kind called Iyengar, at a cost of \$12.00 per session.

[142] I find that, despite the accident, the plaintiff would have had a gym pass. Massage therapy and physiotherapy has reached its maximum effect and she can still continue to benefit from the exercises she learned from these therapies and perform them on her own.

[143] I award the following for cost of future care:

a)

Intensive rehabilitation program:

\$10,000.00

b)

Diagnostic facet joint blocks:

\$1,150.00

c)

Therapeutic yoga (the Iyengar - 20 sessions):

\$240.00

d)

Medication:

\$1,500.00

e)

Physiotherapy and massage therapy for one year following the rehabilitation program as recommended by Dr. Brownlee:

\$1,500.00

f)

Rhizotomy surgery

\$3,500.00

TOTAL:

\$17,890.00

LOSS OF FUTURE HOUSEKEEPING CAPACITY

[144] The plaintiff is seeking an award of \$20,000.00 for loss of future housekeeping capacity. Dr. Rocheleau states that the plaintiff reported "mild restriction" as it relates to her homemaking activities. This is confirmed by the plaintiff's evidence. Dr. Rocheleau stated that:

5. Future homemaking capacity:

Ms. Kelly reports mild restriction in relation to her usual home activities. These primarily involve repetitive upper body twisting or overhead activities. It is probable that she will remain restricted in the future from doing this type of activity on a repetitive or frequent basis. As such, I would recommend some assistance with the deeper aspect of household seasonal cleaning (spring and fall) which usually entail scrubbing floors, cleaning rugs, washing walls and windows, etc. She would also be advised to avoid the heavier aspects of household maintenance such as shovelling snow or heavier yard work/landscaping and unusual tasks such as cleaning gutters.

[145] In *Westbroek v. Brizuela*, 2014 BCCA 48, Madam Justice Garson stated:

[74] In *O'Connell v. Yung*, 2012 BCCA 57 at paras. 59–68, this Court clarified that homemaking costs, properly considered, are awarded for loss of capacity and are distinct from possible future cost of care claims. An award ordered for homemaking is for the value of the work that would have been done by the plaintiff but which he or she is incapable of performing because of the injuries at issue. The plaintiff has lost an asset: his or her ability to perform household tasks that would have been of value to him or herself as well as others in the family unit but for the accident. This is different from future care costs where what is being compensated is the value of services that are reasonably expected to be rendered to the plaintiff rather than by the plaintiff.

[76] As noted in *O'Connell* damages for loss of capacity to complete homemaking tasks are not dependent upon whether replacement costs are actually incurred because what is being compensated is the loss of capacity itself. In contrast, damages for future cost of care are "directly related to the expenses that may reasonably be expected to be required" (*O'Connell* at para. 67) and cannot be awarded should no such reasonable expectation of an actual future expense be found. In the instant case, the evidence supports an award for the loss of capacity to perform certain homemaking tasks; however, I agree that this award should be approached conservatively.

[146] I conclude that the plaintiff has suffered a loss of future housekeeping capacity. I award \$1,500.00.

LOSS OF EARNING CAPACITY

- [147] The plaintiff argues that the plaintiff's loss of earning capacity must be assessed as a capital asset. The plaintiff argues that her pain and headache pattern is draining on her, both physically and emotionally. She argues that she cannot endure her daily commute to Kelowna so she will seek work in Vernon on a part-time basis three to four days per week. She claims her work productivity has been impacted by the injuries she suffered in the accident, all of which will result in a reduction of her annual salary.
- [148] The defendants argue that the plaintiff lost no time from work and she has never sought to change careers or worked in any other careers.
- [149] The plaintiff continued to work with Mr. Crosby three years after the accident, and quit her employment with him for reasons not related to the accident.
- [150] Although the plaintiff was not away from work as a result of her injuries, this does not preclude an award of damages for loss of earning capacity: *Morgan v. Galbraith*, 2013 BCCA 305.
- [151] When considering a loss of earning capacity, a court must first determine whether the plaintiff has proved a real and substantial possibility that the plaintiff's earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 and *Morgan*.
- [152] Should the court find that the plaintiff has discharged the burden, then the court assesses those damages. When considering the amount to be awarded, the earnings approach may be considered which is a quantification based on lifetime earnings or the capital asset approach based on the factors found in *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353.
- [153] In *Morgan*, Garson J.A. stated:
- [156] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.
- [154] Mr. Lapurga, in his Functional Evaluation report, stated the plaintiff was capable of completing full-time work in sedentary to medium (lower range) categories, with restrictions. It was not demonstrated by the plaintiff that the restrictions referred to by Mr. Lapurga were a requirement of her employment, nor that there was a real possibility that the plaintiff would turn to employment requiring the physical abilities that Mr. Lapurga stated from which the plaintiff is restricted.

- [155] Dr. Rocheleau stated that, "I would not expect any major interference with her ability to work."
- [156] On March 28, 2013, Dr. Borchert expected the plaintiff to have symptoms for the next one to two years.
- [157] Further, there is no medical evidence before me confirming that there is real and substantial possibility that the plaintiff's earning capacity has been impaired.
- [158] The plaintiff continued to work for three years after the accident in a position that was more stressful than her present position, where her present responsibilities are less.
- [159] The plaintiff testified that when she accepted the position in Kelowna she was on probation for a period of time. She stated that the probation period "came and went". She testified that her boss likes her; he is happy with her work and there have been no complaints. She stated that she likes her work.
- [160] The plaintiff has not met the burden by proving there is a real and substantial possibility that her earning capacity is impaired. I dismiss the plaintiff's claim for damages for loss of earning capacity.

COSTS

- [161] This trial was heard pursuant to Rule 15-1 of the Supreme Court Civil Rules - fast track litigation. The plaintiff will have her costs of \$11,000.00 as fixed by Rule 15-1(15)(c) of the Civil Rules, together with all reasonable disbursements and taxes.

SUMMARY

a)

Non-pecuniary damages:

\$45,000.00

b)

Special damages:

\$6,541.08

c)

d)

Future care costs:

Past loss of housekeeping capacity:

\$17,890.00

0

e)

Loss of future housekeeping capacity:

\$1,500.00

f)

Loss of earning capacity:

0

g)

Costs (plus reasonable disbursements and taxes)

\$11,000.00

Total:

\$81,931.08

[162] I would ask that counsel arrange to address me on the matter of the plaintiff's loss of earnings as a result of taking the rehabilitation program as recommended by Dr. Brownlee.

"H.C. Hyslop J."

HYSLOP J.

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