

CANADA / JUDGMENT

Roemer v. Shafi

2020 BCSC 1

COURT

Supreme Court of British Columbia

DECIDED

2 January 2020

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2020 BCSC 1 Roemer v. Shafi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roemer v. Shafi,

2020 BCSC 1

Date: 20200102

Docket: M185524

Registry: New Westminster

Between:

Erin Roemer

Plaintiff

And

Amir Shafi and Rizwan Shafi

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Plaintiff:

G.A. Smith

Counsel for the Defendants:

J.P. Lawrence and

J.L. Main

Place and Dates of Trial:

New Westminster, B.C.

September 23-27; 30, 2019

October 2, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 2, 2020

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I. Introduction and Issues

- [1] The plaintiff claims damages for personal injuries suffered in a motor vehicle accident that occurred December 28, 2015 (the "accident" or the "MVA"). The defendants admit liability.
- [2] The plaintiff alleges injuries generally as set out in the independent medical examination report of Dr. Rhonda Shuckett, a specialist in internal medicine and rheumatology, as follows:
1. headaches;
 2. neck injury;
 3. muscle spasm and myofascial pain of the left neck and shoulder girdle and scapular regions;
 4. numbness and tingling down the left arm, with elements of brachial plexus impingement and thoracic outlet syndrome; and
 5. left shoulder decreased range of mobility and impingement syndrome.
- [3] The defendants admit that the plaintiff suffered injuries in the accident. They say the injuries were moderate soft tissue injuries which have since resolved or become intermittent. The defendants contest the diagnosis of brachial plexus impingement and thoracic outlet syndrome (TOS).
- [4] The plaintiff also relies upon the medical legal opinion of her treating general practitioner, Dr. J. MacDonald.
- [5] The defendants rely on the independent medical examination opinions of Dr. Stephen Maloon, an orthopedic surgeon.
- [6] The damages claims requiring assessment are:
- 1) non-pecuniary damages;
 - 2) loss of future earning capacity;
 - 3) future cost of care; and
 - 4) loss of housekeeping capacity.

[7] The parties agree on an award for past loss of earnings in the sum of \$5000, and special damages in the amount of \$3720.

[8] In the areas where they differ, the positions of the parties are as follows:

Head of Damage

Plaintiff

Defendants

(1) Non-Pecuniary Loss:

\$110,000

\$60,000-\$70,000

(Less 20% for

failure to mitigate) =

\$48,000 - \$56,000

(2) Loss of Income Earning Capacity:

\$250,000

\$0, (or

alternatively \$25,000)

(3) Cost of Future Care:

\$28,000

\$12,000

(4) Loss of Homemaking Capacity:

\$25,000

\$0

II. Background

A. The Plaintiff

[9] When the accident occurred the plaintiff was 35 years of age. She was healthy and active. She was single, with no children. This has not changed. She was residing in the basement (or in other words, the lower floor suite) of her sister's residence in Abbotsford. She was working full-time as a receptionist with Andritz Automation Ltd. ("Andritz") in Richmond. She began working there in August 2012.

- [10] The plaintiff was born in Prince George, and moved to the Lower Mainland at about age 2. She has lived in British Columbia all of her life. She graduated from high school in 1998. She obtained some post-secondary education at Kwantlen College and University College of the Caribou (Kamloops) but did not complete any diploma programs. Prior to the accident, before working at Andritz, she had worked as a server at restaurants, in clerical or administrative capacities at car dealerships, and as an early childhood educator at daycare centres, among other jobs. She attended Langley College for early childhood education, and completed one year out of a three-year program.
- [11] Several months after the MVA, in August 2016 the plaintiff was promoted from her position as receptionist at Andritz to the position of accounts payable clerk. She has continued to work full-time as an accounts payable clerk at Andritz since then.

B. The Accident, and Treatment of Injuries

- [12] On December 28, 2015 the plaintiff was driving her 2005 Mazda 3 on Gladwin Road in Abbotsford. She estimates her speed at roughly 50 km/h, the speed limit in the area. Her vehicle was struck by a Ford Explorer SUV owned by the defendant Rizwan Shafi, and being driven by the defendant Amir Shafi. The Shafi vehicle turned left in front of the plaintiff's Mazda. The photographs in evidence show severe frontal damage to the Mazda, which was a write off. A bystander called 911 on her behalf. The police attended. Although the plaintiff was shaken and disoriented, she told the police she did not need an ambulance to take her to the hospital. She called her sister who came and picked her up about a half hour to an hour after the MVA. Initially she felt pain in her right leg, including ankle and calf. She does not complain of ongoing injury to these areas of her body.
- [13] She saw a general practitioner, Dr. MacDonald, at the Fraser Highway medical clinic, a walk-in clinic, the next day. She has continued to see Dr. MacDonald periodically since the MVA. She had no family doctor prior to the accident, and still does not have a family doctor. Dr. MacDonald has seen her only at the walk-in clinic. Her initial complaints were of pain in the neck, shoulders and legs. Dr. MacDonald noticed decreased range of motion of the cervical spine, tenderness in the right and left parascapular muscles, in the lower part of the upper back, in the pelvis and left ankle. His diagnosis was of a soft tissue injury (STI) of the cervical and thoracic spine. He prescribed an anti-inflammatory medication, Naproxen, and stretches.
- [14] The accident occurred when the plaintiff was off of work for the Christmas break.
- [15] The plaintiff returned to see Dr. MacDonald again about 10 days post-accident, on January 7, 2016. She had tried returning to work after missing two days, but was forced to leave due to a severe headache. She tried to return to work again two days later but again could not continue. Dr. MacDonald suggested physiotherapy and a gradual return to work at four hours a day. She began working again in mid-January on a reduced schedule. By early February she was prepared to attempt full-time work. She was having migraine headaches,

with continued neck and upper back pain. She began physiotherapy on January 18, 2016. She had 12 sessions of physiotherapy, ending March 23, 2016.

- [16] The plaintiff began active rehabilitation treatment with a kinesiologist in Surrey on May 16, 2016. The treatment concluded in July 2016 after 15 or 16 sessions. The plaintiff testified that the active rehabilitation treatment was difficult, and initially caused symptoms to worsen, but ultimately was helpful. The kinesiologist recommended another 10 to 12 sessions but the plaintiff decided that she could continue on her own.
- [17] When she saw Dr. MacDonald on May 19, 2016, she reported that she was functioning at about 65% of normal, in terms of housework, ability to exercise, and work capacity.
- [18] Since July 2016, she has had periodic (monthly) massage therapy sessions, and injections of cortisone with anaesthetic, by Dr. MacDonald, on three occasions: (1) September 14, 2017; (2) November 29, 2018; and (3) August 1, 2019.
- [19] When she saw Dr. MacDonald on October 13, 2016, she complained of neck and upper back pain, with numbness in the left hand, and decreased grip strength.
- [20] An X-ray of her cervical spine following a visit on August 14, 2017 was normal.
- [21] When she saw Dr. MacDonald on September 14, 2017, she continued to complain of neck pain, upper back pain, more on the left and the right, left arm tingling, all day, and weakness in her left hand.
- [22] In his testimony, Dr. MacDonald described the injections as parascapular trigger point injections. The injections are of a long lasting corticosteroid, Depo- Medrol, and a long-lasting local anaesthetic, Marcaine.
- [23] The injections provide temporary relief. Dr. MacDonald explained that the injections should not be done more than five times per year in the same location.
- [24] Dr. MacDonald provided a brief report dated October 23, 2017. He provided a follow-up report dated February 6, 2019, which was not served, and not adduced into evidence at trial. He testified by way of deposition evidence adduced at trial. The deposition took place shortly before trial, on September 11, 2019.
- [25] The defence did not seek an adverse inference relating to the failure to serve and adduce the subsequent report of Dr. MacDonald.
- [26] Dr. MacDonald makes no recommendations for further treatment.
- [27] Dr. Maloon suggests gentle home-based strengthening and stretching exercise program, but advised against ongoing passive therapeutic modalities.
- [28] In her May 23, 2018 report, Dr. Shuckett suggested intramuscular stimulation ("IMS") treatment by a physiotherapist. The plaintiff began this treatment in late August 2019. By the time of trial, she had undergone six or seven such treatments.

- [29] Dr. Shuckett also suggested that the plaintiff have further investigation by way of EMG nerve conduction studies and an MRI of the cervical spine and thoracic outlet on the left, and be referred to a thoracic outlet expert, Dr. A. Salvian. She also suggested that the plaintiff be referred to a pain clinic.
- [30] Dr. Shuckett agreed that ongoing trigger point injections would be useful. Dr. Shuckett recommended medications for control of symptoms.
- [31] However, in subsequent consultations by the plaintiff with Dr. MacDonald, he did not agree with Dr. Shuckett's suggestions for further treatment by way of the studies or the referral to a thoracic outlet expert, or the pain clinic. These suggestions of Dr. Shuckett have not been pursued.

C. The Plaintiff's Injuries

- [32] Based upon the medical evidence, and the plaintiff's testimony at trial, the plaintiff suffered from the following injuries sustained in the motor vehicle accident:
1. headaches, particularly migraine headaches;
 2. neck pain;
 3. left shoulder pain and dysfunction;
 4. left arm and hand - mostly numbness and tingling, down to the left hand, occasional spasm in the upper arm, decreased strength, feelings of weakness; and
 5. upper back and mid back achiness, particularly after long days at work, occurring several times per week.
- [33] In addition to the foregoing physical injuries, the plaintiff has other effects stemming from the accident, as follows:
1. mood effects - anxiety with driving, feelings of frustration due to chronic nature of her injuries, difficulty concentrating, and worries about her ability to sustain her work;
 2. difficulty sleeping; and
 3. fatigue.
- [34] The plaintiff suffered from occasional migraine headaches prior to the accident. These occurred approximately once per year prior to the accident. She had suffered from occasional migraines since she was a teenager. By "migraine headaches" she means migraine headaches that are so severe that they render her non-functional for the day.
- [35] She had no treatment for migraine headaches prior to the accident.

- [36] Following the accident, she had a migraine headache within the first week, and then had migraine headaches approximately two times a week, for the first two months. At times these headaches were so severe that she had difficulty getting out of bed, and would cause vomiting. Her migraine headaches improved during 2016, and have not really been an issue since early 2017. Since that time, she has had migraine headaches about once per year, which is similar to the frequency she experienced prior to the accident.
- [37] She also suffers from "regular" headaches. These are more frequent than they were prior to the accident. They occur when she feels stressed, or fatigued. She now has a "regular" headache about once per week. She will take a pain reliever (Advil) usually, and "push through" or carry on with her activities, in other words.
- [38] Complaints of neck pain are interrelated with her shoulder and arm complaints. She had soreness of the neck and upper back stiffness immediately following the accident. Her neck pain was severe in the immediate post-accident period. Her neck pain improved during 2016. By the time she saw Dr. Shuckett on April 6, 2018, she reported that her neck pain was less frequent, and less troublesome.
- [39] At trial, she reported that she had little in the way of neck pain over the preceding year, but her neck pain has recurred recently, and has become an almost daily problem. She describes it as an achy pain that she can work through, but also has pinching feelings that affect her concentration and ability to work. Her neck pain worsened after a recent "flare-up" of her neck, left shoulder, left arm and hand symptoms that occurred in July 2019.
- [40] She suffers from pinching, throbbing pain in the left shoulder and left shoulder blade and upper back areas. This complaint is interrelated with her neck and left arm problems. She has spasm in the left shoulder, and intense, pinching pain. Her shoulder pain has worsened over the last six months. Prior to that, the problem was variable. Over the past few months it has become constant. She said that currently the pinching pain in her shoulder gets so bad she has difficulty concentrating.
- [41] She suffers from numbness and tingling in the left arm and hand, and weakness. She feels decreased strength in her arm, and weakness in her left hand, from her wrist down to her hands and fingers. She told Dr. Shuckett on April 6, 2018 that she noticed the numbness down the arm about 10 months after the MVA. It came on insidiously. At that time she said that the numbness had subsided somewhat but still troubled her. At trial she testified that the numbness and tingling in her arm has been constant for the past few months, particularly since July 2019.
- [42] She suffers from achiness in the upper and mid back, several times per week. The condition is quite stable.
- [43] She finds massage is helpful. She started to receive the massage treatment in August 2016 and has continued on a regular basis since then.

- [44] As she reported to Dr. Shuckett, her worst problem is in relation to the shoulder girdle on the left, and the numbness in the left arm.
- [45] As noted, her mood is affected. She feels frustrated due to the chronicity of her injuries. She has driving anxiety, and anxiety about her ability to do her work.
- [46] Although Dr. Shuckett mentions the plaintiff's statements regarding mood effects, she provided no opinion regarding mood or psychological issues, which I infer would not be within her area of specialty. The report of Dr. MacDonald and the report of Dr. Maloon do not discuss mood or psychological effects of the accident. There is no medical evidence of that kind. On the evidence as a whole, these appear to be lesser concerns for the plaintiff.
- [47] Although the plaintiff did not adduce evidence from corroborative witnesses, the plaintiff's testimony about her injuries is generally credible. Based upon her evidence, and the medical and other evidence that I will discuss, I accept that the injuries the plaintiff has complained of and that I have described above were suffered by her, and were caused by the motor vehicle accident.

D. Diagnosis, Prognosis and Treatment Recommendations

1. Medical Opinion Evidence

- [48] Dr. MacDonald diagnosed soft tissue injury of the cervical and thoracic spinal regions that caused an increase in the frequency of migraine headaches for a while. He also noted the plaintiff's complaints of neck pain, upper back pain, mostly on the left, numbness and tingling in the left arm, and in the left hand. These comments are contained in his October 23, 2017 medical-legal report. As noted, a subsequent report prepared by Dr. MacDonald dated February 6, 2019 was not adduced in evidence at trial.
- [49] The plaintiff was examined by Dr. Maloon September 26, 2018. He grouped the plaintiff's complaints into two areas: (1) numbness in the left arm and hand; and (2) left-sided neck and shoulder pain. Dr. Maloon diagnosed mild soft tissue strains to her neck and contusions to her chest wall and right leg. In his opinion, her ongoing symptoms are consistent with mild mechanical or activity related neck and upper back pain. In his view, these symptoms are common in the general population and are usually the result of wear and tear changes in the joints of the neck and back. He suggested home-based strengthening and stretching exercise programs, and avoidance of ongoing passive therapeutic modalities.
- [50] Dr. Shuckett diagnosed the following injuries caused by the accident:
1. migraine headaches, and cervicogenic headaches;
 2. neck injury, most likely musculoligamentous;
 3. muscle spasm and myofascial pain of the left neck and shoulder girdle region and the scapular region;

4. numbness and tingling down the left arm; and
 5. left shoulder mild decreased range of mobility, and impingement syndrome.
- [51] Dr. Shuckett's description of the plaintiff's injuries is somewhat more detailed and specific than that of Dr. MacDonald, but is not fundamentally at odds with the opinion of Dr. MacDonald, as I perceive it.
- [52] In relation to her numbness and tingling in the left arm, Dr. Shuckett noted "an element of brachial plexus impingement and thoracic outlet syndrome", although she said that she could not "rule out that some of her numbness could be cervical radiculopathy". As noted previously, she suggested the possibility of EMG nerve conduction studies by a neurologist, as well as an MRI of her cervical spine, and an MRI of the left thoracic outlet. In addition she suggested she should be referred, ideally, to Dr. A. Salvian, a vascular surgeon who is a thoracic outlet expert.
- [53] While Dr. Shuckett's report suggests the possibility of the diagnosis of thoracic outlet syndrome, in her testimony at trial she went somewhat further, and stated that in her opinion, the plaintiff has thoracic outlet syndrome.
- [54] However, Dr. MacDonald saw the plaintiff subsequently. He had the benefit of reviewing Dr. Shuckett's report. He has the advantage of having seen her on multiple occasions. After consultation with the plaintiff, he chose not to refer the plaintiff for further studies for investigation of possible TOS. Dr. MacDonald did not agree with the diagnosis of possible or actual thoracic outlet syndrome.
- [55] Dr. Shuckett recommended trigger point injections for her shoulder, and Dr. MacDonald has provided these treatments on three occasions.
- [56] Dr. Shuckett also suggested intramuscular stimulation or IMS treatment with a physiotherapist. As noted, the plaintiff has begun this treatment in late August 2019, shortly before the trial.
- [57] There is no recent prognosis from Dr. MacDonald. In his 2017 report he said that due to the gap in visits from the plaintiff from October 2016 to August 2017 he presumed that there had been an easing of symptoms, with a recent flare-up. He suggested that having a sitting job with a lot of computer and telephone work would be an aggravating factor, and that she could have future recurrences due to job ergonomics.
- [58] In Dr. Shuckett's view, as of April 2018, her pain was quite chronic, and "she may very well have attained maximum medical improvement". Also "it may very well be that she is left with residua of the symptoms in the longer-term future". In her report she added, "I expect her to continue to sustain her work". At trial, she continued to express that opinion, subject to such accommodations as may be required.

[59] In the opinion of Dr. Shuckett, her current and ongoing symptoms stem from the MVA. As noted, in Dr. Maloon's opinion, while she sustained injuries in the accident, her ongoing symptoms are more likely the result of underlying conditions, rather than injury sustained in the motor vehicle accident. I consider this less likely than the interpretation of Dr. Shuckett. I accept the plaintiff's evidence and description of the onset of her current complaints. Given the fact that she did not have these complaints previously, it is more likely that her complaints are caused by the MVA injuries.

[60] I accept the diagnosis and prognosis of Dr. Shuckett, as described above, with the exception of the diagnosis of thoracic outlet syndrome. As noted, her medical/legal report suggested only the possibility of thoracic outlet syndrome and suggested further investigation. Dr. MacDonald does not agree with the diagnosis, and he has seen her regularly. I am not persuaded that the diagnosis of TOS has been established.

[61] However, as there is no particular treatment plan or further investigation planned for or in relation to TOS, whether she has an actual diagnosis of TOS or not does not make a great deal of difference to the assessment of damages in this case.

2. Functional Capacity Assessments

[62] Russell McNeil, an occupational therapist and work capacity evaluator, provided opinions regarding functional capacity and care recommendations.

[63] The plaintiff was assessed April 8, November 18, and November 19, 2016. The November 18, 2016 evaluation was conducted at her place of work, Andritz, in relation to her work as an accounts payable clerk. The report also refers to an assessment on April 26, 2016 at her office, but at that time she was still working as a receptionist.

[64] Mr. McNeil assessed the plaintiff in follow-up on October 20, 2018.

[65] In Mr. McNeil's opinion, the plaintiff demonstrated the capacity to perform activities that require light level strength, and occupations that fall within the sedentary physical demand characteristics, with some restrictions. Work as a receptionist or accounts payable clerk would be considered sedentary.

[66] Mr. McNeil noted some restrictions in her range of motion, but sufficient functional mobility of the cervical and lumbar spine for daily activities. He found sufficient range of motion of the shoulders for daily activities. He noted that her grip strength in both hands was below average for women of her age. He noted weakness, compared to women of her age, in her left shoulder, right shoulder, and elbows. The left side upper extremity was notably weaker than the right side. The plaintiff is right hand dominant, but Mr. McNeil denied that this accounted for the discrepancy in strength.

[67] He noted restrictions in her tolerance to perform vertical reaching, horizontal reaching, and sustained positioning such as bending, stooping, crouching and kneeling. Overall, he noted restrictions in her tolerance for sustained and repetitive spinal positioning, thus adversely

affecting her capacity to maintain a productive work pace. He suggested she will require accommodation such as changes in position to manage persistent pain. She had restrictions in sitting tolerance, but no restriction in standing tolerance. There were no problems of walking and climbing. He suggested that if she is able to move and stretch, combined with walking about, she would be able to manage standing on a frequent basis throughout the day.

- [68] Overall, in his opinion the plaintiff could work full or part-time as a receptionist or accounts payable clerk, with accommodations to account for limitations of stamina, such as prolonged sitting or prolonged static positioning of her arms and spine.
- [69] In his opinion the plaintiff does not have the capacity to perform the physical demands of childcare work on a full-time basis at a competitively employable pace. He noted it was possible that with accommodations she could be able to manage the work as a childcare worker on a part-time basis.
- [70] He made a number of recommendations for homemaking assistive devices and ergonomic devices for work, such as the high-back ergonomic chair, an electric ergonomic sit or stand height adjustable desk, an adjustable computer monitor arm, and others.
- [71] There were only slight changes in her condition between the assessments conducted during 2016 and the assessment conducted in 2018. He noted some decline in range of motion in her neck, as well as her right shoulder. Her grip strength remained similar, as did the strength in both shoulders and elbows.

E. The Defendants' Failure to Mitigate Argument

- [72] In order to establish that recovery should be denied because some part of the plaintiff's personal injury loss was avoidable had the plaintiff undergone recommended medical treatment, the defence must establish:
- (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and
 - (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably: *Chiu v. Chiu*, 2002 BCCA 618, at para. 57.
- [73] In order to meet the second part of the test, the defendants must, first, establish a real and substantial possibility that any part of the losses could have been avoided. If that is established, the court will assess the degree of probability that the loss or some part thereof would have been avoided, and assess damages accordingly: *Forghani-Esfahani v. Lester*, 2019 BCSC 332, at paragraphs 57 - 69.
- [74] The defendants contend that the plaintiff failed to mitigate her losses in failing to:
1. seek medical assistance if she was suffering ongoing pain or restrictions;
 2. attend for further recommended active rehabilitation sessions;

3. attend for any further testing/referrals as recommended by Dr. Shuckett;
 4. attend further physiotherapy as recommended by Dr. Shuckett; and
 5. bring to her employer the first medical note of Dr. MacDonald regarding working from home.
- [75] I do not accept that the defendants have established a basis to reduce the plaintiff's loss for failure to mitigate.
- [76] In relation to the first matter, the defendants contend that in this case the plaintiff's failure was in not seeking sufficient medical attention for her complaints. They point to her relatively infrequent visits to see Dr. MacDonald, or other medical treatment providers. In fact, she saw Dr. MacDonald or another doctor at the clinic or another clinic on approximately 12 occasions, beginning with the day after the MVA, and continuing to August 2019. Given the nature of her injuries, this does not seem unreasonable. More importantly, there is no evidence that, had she sought further medical treatment, there would or possibly could have been a material benefit. More generally, I am not persuaded that she did not seek and obtain appropriate medical advice and treatment, given the nature of her injuries. She appropriately relied upon the advice of Dr. MacDonald.
- [77] She attended 15 or 16 active rehabilitation sessions with a kinesiologist in 2016. She did not pursue further active rehabilitation of this type, though an additional 10-12 sessions were recommended by the kinesiologist. She had difficulty attending the sessions while continuing to work full-time. She acknowledged that she could have managed to attend. She testified that she felt she could exercise on her own. It is not clear to what extent she followed through with this.
- [78] As noted, the plaintiff discussed Dr. Shuckett's recommendations with Dr. MacDonald. He did not agree that the further investigations of the type suggested by Dr. Shuckett were warranted. The plaintiff recently began physiotherapy as suggested by Dr. Shuckett. The defence expert, Dr. Maloon, did not suggest that this or any other medical treatment was needed.
- [79] I will refer to the matter of Dr. MacDonald's suggestion that the plaintiff be permitted to work from home part time, below. On the evidence I am unable to conclude that had she raised this with her employer earlier than she did, the employer would have allowed it, or that her condition would have been materially improved.
- [80] The difficulty with the defence position generally is that there is no medical evidence supporting the second aspect of the test. There is no opinion evidence to the effect that treatment not undertaken would have been beneficial. There is in my view no evidence from which this could be inferred. The contention that the plaintiff would have or could have benefitted from treatment that she did not undertake is essentially speculative. Therefore, the argument of the defendants fails.

F. Loss of Income Earning Capacity

1. Legal Principles

[81] I adopt the summary of the applicable legal principles I set out in *Sendher v. Wong*, 2014 BCSC 140 [Sendher], at paras. 158-163 (pre-trial loss) and 171-177 (future loss):

[158] The award for past loss of earning capacity is based on the value of the work that the plaintiff would have performed but for her accident injuries. The award is properly characterized as a loss of earning capacity: *Bradley v. Bath*, 2010 BCCA 10 (CanLII) at paras. 31-32; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 (CanLII), at para. 153; *X. v. Y.*, 2011 BCSC 944 (CanLII), at para. 185.

[159] The plaintiff need not establish the actual loss of earnings on a balance of probabilities. What would have happened prior to the trial but for the accident injuries is hypothetical, just the same as what may happen in the future, after the trial.

[160] In *Smith v. Knudsen*, 2004 BCCA 613 (CanLII), at para. 29, Rowles J.A. stated:

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.

[161] However the plaintiff must establish on a balance of probabilities that there is a causal connection between the accident injuries and the pecuniary loss claimed; mere speculation is insufficient: *Smith v. Knudsen* para. 36; *Athey*, at para. 27; *Perren v. Lalari*, 2010 BCCA 140 (CanLII), at para. 32; *Falati v. Smith*, 2010 BCSC 465 (CanLII), at para. 41, *aff'd* 2011 BCCA 45 (CanLII).

[162] Just as in the case of the assessment of future loss of earning capacity, in the case of past loss of earning capacity, if the plaintiff establishes a real and substantial likelihood of the pecuniary loss asserted, the assessment of damages to be awarded as compensation depends upon an assessment of the degree of likelihood of the particular loss, combined with an assessment of the value of the loss.

[163] In cases where it is appropriate to proceed with an assessment of the value of the loss, s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, stipulates that a person who suffers loss of income is only entitled to recover the net income amount as damages: *X. v. Y.*, at para. 187; *Lines*, at paras. 152-186.

...

- [171] The Court's essential task is to compare the likely future of the plaintiff's working life if the accident had not happened with the plaintiff's likely future working life after the accident: Gregory, at para. 32. Insofar as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines, at para. 185.
- [Emphasis added.]
- [172] The appropriate means of assessment will vary from case to case: Brown v. Golaiy (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353; Pallos v. Insurance Corp. of British Columbia (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260; Pett v. Pett, 2009 BCCA 232 (CanLII).
- [173] The assessment of damages is a matter of judgment, not calculation: Rosvold v. Dunlop, 2001 BCCA 1 (CanLII), at para. 18.
- [174] There are two possible approaches to assessment of loss of future earning capacity: the "earnings approach" from Pallos and the "capital asset approach" in Brown. Both approaches are correct and will be more or less appropriate depending on whether the loss in question can be quantified in a measurable way: Perren v. Lalari, 2010 BCCA 140 (CanLII), at para. 12.
- [175] 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; Gilbert, [[2011] B.C.J. No. 1931] at para. 233.
- [176] The capital asset approach involves considering factors such as whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to herself as a person capable of earning income in a competitive labour market: Brown; Gilbert, at para. 233.
- [177] The principles that apply in assessing loss of future earning capacity were summarized by Low J.A. in Reilly v. Lynn, 2003 BCCA 49 (CanLII), at para. 101:
- [101] The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: Athey v. Leonati, supra, at para. 27, Steenblok v. Funk (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: Milina v. Bartsch (1985), 1985 CanLII 179 (BC SC), 49

B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 (CanLII) at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 1995 CanLII 1971 (BC CA), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch*, supra, at 79. ...

[Emphasis added.]

[82] In *Bhatti (Litigation Guardian of) v. Ethier*, 2018 BCSC 1779 [Bhatti], I added:

[54] 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: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49, citing *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[55] As I will explain, in this case the capital asset approach is applicable. The following comments of Savage J.A. in *Villing v. Husseni*, 2016 BCCA 422 are relevant:

18 Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:

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

[Emphasis added.]

19 In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:

- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and

- (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

20 The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

2. Past Loss of Earning Capacity

[83] As noted, the parties agreed on an award of \$5,000 for past loss of income. The plaintiff returned to work on a graduated basis in January to March 2016. The defendants concede that the plaintiff missed one week from work in March, 2018, and days on various other occasions. There is no evidence of an actual loss of income. I understand that the agreement relates to the lost value of personal flex days the plaintiff would have been able to utilize for other purposes.

3. Loss of Future Earning Capacity

[84] The plaintiff advances two scenarios supporting a loss of earnings or earning capacity.

[85] First, she contends that as a result of her injuries she is at risk of losing her present employment at Andritz, and could end up in a lower paying position elsewhere. She contends that in her employment as accounts payable clerk at Andritz, she is paid more than average for an accounts payable clerk. She contends that if she were to lose her present employment, and work elsewhere at a more typical rate of income, she would earn \$162,000 less, over the remainder of her working life.

[86] Second, she contends that due to the accident injuries she has an increased risk of unemployment, or of being limited to reduced working hours. As an example of how this loss could be assessed, she suggests that if she were required to work one day less per week over the balance of her expected working life, the loss would be \$185,000 [20% of lifetime earnings].

[87] The plaintiff contends that the two scenarios are both applicable. These estimates of loss [\$162,000 plus \$185,000] add to \$347,000. Plaintiff contends that, taking into account contingencies, including the uncertainty of these losses, an award for loss of earning capacity should be made in the amount of \$250,000.

[88] The defence argues that the plaintiff has not established that there is a real and substantial possibility of a loss of income in the future. Alternatively, the defence contends that only a relatively modest award of \$25,000 ought to be made.

[89] The plaintiff's income has in fact steadily risen in each year following the accident. As noted, at the time of the MVA, she was employed with Andritz as a receptionist. The evidence is that the job duties as a receptionist at Andritz are not demanding. In fact, the position of receptionist has often remained open and unfilled. Modern communications technology and changing business practices have reduced the need for a receptionist.

- [90] Effective August 30, 2016 the plaintiff was promoted to her current position of accounts payable clerk. That job is much more demanding than the plaintiff's former work as a receptionist. Upon assuming her new position, she received an immediate 5% increase in pay. Since then, her raises have generally been in line with or slightly above the rate of inflation. She has also had a modest bonus in each year. In 2015 (the MVA occurred at the end of that calendar year) she earned \$45,337. In 2018 she earned \$53,579. Her pay is expected to increase for 2019, and she is likely to receive a bonus.
- [91] The plaintiff argues, on the basis of economic evidence presented through an economist, Mr. S. Pivnenko, that in her work as an accounts payable clerk at Andritz, the plaintiff earns more than an average accounts payable clerk. The evidence is that she earns pay equivalent to approximately 75th percentile earnings for accounts payable clerks within her age group. Her pay exceeds the occupational average for her age peers by about 11%. Mr. Pivnenko calculates her lifetime income at this higher rate, net of all labour market contingencies such as unemployment, part-time work and retirement, at \$924,646.
- [92] The plaintiff argues that if her income is reduced over her lifetime by 13%, (thus, closer to the average earnings for her position) she would earn \$802,406, a loss of about \$122,000, on an equivalent arithmetic basis. The plaintiff calculates that the potential loss rises to \$162,000 if the value of expected benefits and bonuses at Andritz is taken into account.
- [93] The initial question is whether the plaintiff has established that her accident injuries have caused a real and substantial possibility that she could lose her position at Andritz. I do not accept that she has done so.
- [94] The medical evidence indicates that she is capable of continuing in her present job, with accommodations as may be necessary. The nature of her work allows her to make the accommodations necessary for her to do the work, such as moving about from time to time, alternating between sitting and standing, and using a sit/stand desk. (She could use a better sit/stand desk and other ergonomic aids, as will be discussed below).
- [95] The plain fact is that she has continued in her present work as an accounts payable clerk for the past three years.
- [96] The plaintiff reports to Mr. G. Peters, the Director of Finance. Mr. Peters testified. He struck me as a straightforward and articulate witness. He is directly responsible for a small group of employees working in the finance department, including the plaintiff. He hired the plaintiff as a receptionist in August 2012. She applied to Andritz as a result of the fact that her father has worked there for many years. Her father is currently employed with Andritz as a Senior Project Manager. Her father encouraged her to apply. Nonetheless, Mr. Peters stresses that he hired Ms. Roemer and promoted her to accounts payable clerk on the basis of merit, not nepotism.

- [97] As an accounts payable clerk, the plaintiff is responsible for receiving invoices that require payment, processing invoices for approval, processing cheques for payment, communicating with vendors, making travel arrangements for employees, and dealing with travel expenses for employees. There is significant keyboarding work, using a computer and keyboard, in performing such tasks as reviewing expense claims, arranging for travel, and so on. The plaintiff works approximately 30 feet away from the office of Mr. Peters. He sees her face-to-face throughout each working day. He is in a good position to observe her work. He has no awareness of any difficulties she is having with the work, beyond the complaints that she has told him about, such as pain, numbness in her arm, and sleep difficulties.
- [98] Mr. Peters testified that Andritz is supportive of its employees and will do what it can to accommodate disability. She is a valuable employee. His main concern is with respect to tardiness, and with respect to unscheduled, that is unplanned, absences from work. Tardiness and unscheduled absences have been a problem for the plaintiff since before the accident. It has grown worse over time, he testified.
- [99] Although her unscheduled absences have led Mr. Peters to consider letting her go ("the thought has crossed my mind"), he has not actually warned her about this. He has simply reminded her of the importance of reliability in attendance and work hours.
- [100] Recently [August 2019] the plaintiff approached Mr. Peters to discuss the possibility that she might work one day per week from home, as suggested by Dr. MacDonald. Mr. Peters is sceptical as to whether that would be practical, given the nature of her job duties. However he has not refused to consider this. No decision has yet been made. The plaintiff was asked to prepare a plan for how this would work, and has not yet done so.
- [101] The request to consider working one day per week from home arises due to a medical note from Dr. MacDonald in which Dr. MacDonald suggested that she would benefit from working from home at least one day a week to help her post MVA problems. As the defendants note, Dr. MacDonald provided a similar note in November 2018, which the plaintiff did not bring to the attention of Mr. Peters.
- [102] However a major reason for the recommendation from Dr. MacDonald is the plaintiff's long commute, from her residence in Abbotsford to her work in Richmond. As Dr. MacDonald explained in his deposition, she spends about an hour-and-a-half commuting each way, and then spends the rest of her day in front of a computer. If she had time off, some of her problems would be improved, he states.
- [103] In my view the concern about the plaintiff's long commute is a matter that is within her own control. Her job at Andritz is valuable to her. She could consider moving to a location near her work. A few months before the MVA she had been residing in Coquitlam, with a partner. When the relationship ended she moved to Abbotsford. She testified that has considering moving closer to work, but she cannot afford other comparable accommodation. Her sister charges reduced rent, in exchange for child care assistance for the plaintiff's niece and nephew.

- [104] I am not persuaded that the plaintiff cannot afford to live closer to her work, although the accommodation might not be fully comparable. Clearly, many people do, on similar or lesser incomes. She also enjoys residing close to her sister and her sister's family, and her own friends in Abbotsford. This is a decision the plaintiff is free to make, but the defendants are not responsible for the consequences.
- [105] The plaintiff's work has considerable flexibility. She has 15 flex days per year which she has the discretion to take for any personal purpose, with reasonable notice. She has 10 paid sick days per annum. Her work hours are flexible as well. Normal working hours are from 8 AM to 5 PM, but Mr. Peters allows flexibility of at least one hour leeway in each direction. Indeed, one of his employees works from 6:30 AM to 3:30 PM. The plaintiff's work is generally 40 hours per week, with little need for overtime. Mr. Peters testified that if she wished, she could arrive at 9 AM, and work through lunch. His main concern is that the plaintiff get her work done, and be reliably present at the place of work.
- [106] The plaintiff drives to work alone in her own vehicle. There is also no indication in the evidence that the plaintiff has considered adjusting her work hours in order to lessen her commuting difficulties.
- [107] Overall, it is clear to me that the plaintiff's employer is tolerant, and accommodating. The plaintiff's injuries do not prevent her from doing her work and fulfilling all of the requirements of her employment.
- [108] Even without the accident, the plaintiff faces the risk that she could lose her current job for any number of reasons and could suffer a reduction in pay if she fails to obtain other work that is as remunerative. Her burden is to establish that the accident injuries have caused a real and substantial possibility of these circumstances occurring. She has not done this. I therefore reject that the plaintiff has established a real and substantial possibility of loss of earning capacity arising from the accident injuries, on the first scenario she advances.
- [109] As just noted, there is more generally a likelihood that her employment with Andritz will terminate at some point in time. I am satisfied that the plaintiff's accident injuries have resulted in a real and substantial possibility of an increased risk of unemployment, generally, and could limit her tolerance for working full-time, with occasional overtime. Most employees are required to work overtime at least occasionally. The medical evidence is that she can continue to sustain her work, with some concessions, and accommodations. A vocational rehabilitation consultant, Ms. R. Sandhu, opines that her occupational durability is at risk and that the need for suitable accommodation reduces her competitive employability. Continuation of her symptoms could lead to absenteeism, and reduced job performance. She could find it difficult to secure similar accommodations with another employer.
- [110] The economist Mr. Pivnenko adds that limitations of the kind identified by Ms. Sandhu may change the kind of work that is done, may increase the frequency of job changes, may increase the time spent between jobs searching for new work, and may reduce hours of

work done when employed. Persons with functional limitations may not be able to work overtime hours or on weekends, and may require accommodations. This may narrow the scope of potential jobs available, resulting in the possibility of below average wages or increased chances of unemployment.

- [111] Ms. Roemer has limited employment skills. She has no formal training. She has not shown an ability to complete formal programs of education in the past, as Ms. Sandhu noted in her report. I accept that her limited skills combined with her accident injuries have rendered her more vulnerable to unemployment in the future. In addition, although it was unlikely that she would do so, her accident injuries would prevent her from returning to work she had done in the past, such as childcare worker or restaurant server.
- [112] The loss must be assessed on the capital asset approach. In the circumstances of this case. In relation to the factors identified in Brown, as set out above, the plaintiff has been rendered less capable overall from earning income from all types of employment, is less marketable or attractive as an employee to potential employers, and has lost the ability to take advantage of all job opportunities which might otherwise have been open to her.
- [113] However, the risk may never materialize, or may materialize only well into the future. I am satisfied that her current work at Andritz is not in jeopardy and that she has the ability to rectify those matters that are causing concern to Mr. Peters. The plaintiff's reference to a potential loss of \$185,000 assumes that a loss of 20% of her expected lifetime earnings will in fact occur, beginning immediately. This puts the potential loss too high.
- [114] Although the prognosis is not positive, there remains a possibility that her physical condition will improve over time. This is another factor driving the assessment lower.
- [115] For these reasons, the suggested loss as submitted on behalf of the plaintiff must be substantially discounted. As noted, the plaintiff suggests that the risk of increased unemployment and/or reduced hours if postulated on the basis of loss of one working day per week over the balance of her expected work life is equivalent to a loss of \$185,000. A 40% chance of that loss occurring would be \$74,000. In my view, having in mind the range of possible routes by which the plaintiff could lose employment income in future due to her accident injuries, as identified by Ms. Sandhu and Mr. Pivnenko, this figure is a somewhat low estimate of her loss.
- [116] The assessment is necessarily somewhat arbitrary, particularly in the circumstances of this case. In my view, \$90,000 represents adequate compensation for the plaintiff's future loss of earning capacity.

G. Non-Pecuniary Loss - Assessment

1. Legal Principles

- [117] I adopt the summary of legal principles I set out in Gillam v. Wiebe, 2013 BCSC 565, at paragraphs 68-147.

2. Assessment - Non-Pecuniary Loss

[118] As noted, the plaintiff submits that the range of damage for non-pecuniary loss is \$90,000-\$130,000, and seeks an award of \$110,000.

[119] The defendants submit that the appropriate range for non-pecuniary damages, inclusive of any housekeeping impairment, is between \$60,000 and \$70,000.

[120] As noted previously (para. 47) I accept the injuries the plaintiff has complained of and that I described in these reasons for judgment were suffered and were caused by the accident.

[121] I accept the opinion of Dr. Shuckett that the plaintiff's pain is quite chronic and she "may very well have obtained maximum medical improvement" and "it may very well be that she is left with residua of the symptoms in the longer-term future". In short, the prognosis is generally negative.

[122] The plaintiff was previously healthy and active. She was active in activities such as riding a Seadoo, tubing, and other active sports activities, particularly at her parents' recreational property located on the lake at Penticton. She used to exercise regularly, run, attend the gym, ride bicycles and snowboard. She played actively with her family members such as her niece and nephew. She now avoids vigorous exercises. She no longer runs. She avoids some social and recreational activities. Domestically, she avoids heavy cleaning activities such as cleaning the bathtub or shower. She does other domestic duties carefully, in moderation. In summary, her injuries have significantly curtailed her family, social, recreational and leisure activities. Her injuries cause pain and discomfort at work.

[123] The plaintiff cites the following authorities:

1. Kam v. Van Keith, 2015 BCSC 1519 (\$125,000).
2. Gillam v. Wiebe, 2013 BCSC 565 [Gillam] (\$90,000).
3. Sharma v. MacDonald, 2017 BCSC 2121 (\$100,000).
4. Moreira v. Chrichton, 2018 BCSC 1281 (\$130,000).

[124] The defendant cites the following authorities:

1. Lowe v. Johnson, 2019 BCSC 1283 (\$60,000).
2. Bove v. Wilson, 2016 BCSC 1620 [Bove] (\$60,000).
3. McKay v. Powell, 2012 BCSC 1935 [McKay] (\$65,000).
4. Crevier v. Thompson, 2015 BCSC 1552 (\$65,000).
5. Rabiei v. Oster, 2019 BCSC 733 [Rabiei] (\$70,000).

[125] Of the plaintiff's authorities, the most similar case is my decision in Gillam. The award in that case for non-pecuniary loss was \$90,000. The decision was rendered more than six years ago, so some allowance for inflation should be made. On the other hand, the consequences to the plaintiff in that case were more severe than those in the case at bar.

[126] In addition, in Gillam, the plaintiff had a daughter with special needs and the plaintiff's injuries affected her ability to look after her daughter.

[127] Of the defendant's authorities, the most similar cases are Bove, McKay and Rabiei. The range of damages in these cases is \$60,000-\$70,000.

[128] Bearing these authorities in mind, in my view an appropriate assessment for the plaintiff's non-pecuniary loss in the circumstances of this case is \$80,000.

[129] As I will explain below, this assessment includes consideration of her loss of housekeeping capacity.

H. Loss of Housekeeping Capacity

1. Legal Principles

[130] As I noted in *Firman v. Asadi*, 2019 BCSC 270, at para. 235, the court has discretion whether to address a claim for loss of housekeeping capacity as part of the non-pecuniary loss or as a segregated pecuniary head of damage. In *Riley v. Ritsco*, 2018 BCCA 366, at para. 100, Groberman J.A. added:

[101] It is now well-established that where a plaintiff's injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non pecuniary damages.

[102] I acknowledge what was said in *Kroeker* about segregated non-pecuniary awards "where the special facts of a case" warrant them. In my view, however, segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff's lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.

[131] Likewise, in *Kim v. Lin*, 2018 BCCA 77, Bauman C.J.B.C. held as follows:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a

pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

2. Assessment - Loss of Housekeeping Capacity

[132] The plaintiff resides alone. As noted, she resides in the basement suite of her sister's residence. She has no responsibility for yard work. If she were to move, I infer that she would likely live in another residence that would also not require yard work. She has no dependants to look after (although she babysits her niece and nephew), and is therefore not required to do housekeeping for others. She has not incurred any expense for assistance in housekeeping. She is able to manage her own personal housekeeping duties, with limitations.

[133] Mr. McNeil's testing indicates that the plaintiff is slightly restricted for some household chores such as washing dishes, loading the dishwasher, shopping, and vacuuming, and moderately restricted for heavier work such as cleaning bathrooms, and severely restricted for washing floors.

[134] The plaintiff submits that an award of \$25,000 for loss of homemaking capacity should be made. Given the nature of the evidence in this case, no separate pecuniary award for loss of homemaking capacity is warranted. The plaintiff's restrictions and difficulties in relation to housekeeping is an appropriate factor to consider within the assessment of her non-pecuniary loss, which I have done.

I. Costs of Future Care

1. Legal Principles

[135] I adopt the statement of legal principles regarding costs of future care as set out in Sendher at paras. 192-195.

[136] A concise recent summary is set out in Gao v. Dietrich, 2018 BCCA 372 at paras. 68-70.

2. Assessment - Costs of Future Care

[137] The plaintiff claims:

1. \$1000 per year for massage therapy treatment, projected over the course of her working life - \$20,000; and
2. \$8,291 for various items as set out in the cost of care report of Mr. Pivnenko. These items are for homemaking assistive devices, and ergonomic devices relating to her work.

- [138] The defendants contend that the award for cost of future care should be in the range of \$1500-\$2500. They disagree that the home making assistive devices are required, but agree to some of the ergonomic items for work: (1) ergonomic sit/stand height adjustable desk, (2) height adjustable keyboard tray, and (3) anti-fatigue mat. These add to approximately \$1,200.
- [139] In my view the evidence amply supports the need for the very modest homemaking assistive devices and ergonomic devices that are recommended by Mr. McNeil. Therefore the claim is allowed in the sum set out in the report of Mr. Pivnenko, \$8,291.
- [140] The evidence does not support that the ongoing massage therapy is of significant therapeutic benefit. Dr. Shuckett recommended physiotherapy treatment [IMS] which the plaintiff is undergoing. She did not recommend massage therapy. Dr. Maloon advises against ongoing passive therapeutic modalities.
- [141] In her report, based upon her assessment of April 16, 2018, Dr. Shuckett noted only that "she goes for massage therapy every month and finds it helpful". She provided no further comment upon the therapeutic benefit of ongoing massage therapy, and makes no such recommendation.

J. Special Damages

- [142] The parties have agreed to special damages in the amount of \$3,720.

III. Conclusion and summary

- [143] In summary, the plaintiff's loss is assessed as follows:

1. Past loss of earning capacity:

\$5,000

2. Future loss of earning capacity:

\$90,000

3. Non-pecuniary loss:

\$80,000

4. Costs of future care:

\$8,291

5. Special Damages

\$3,720

TOTAL

\$187,011

[144] Subject to any relevant offers to settle in accordance with the Supreme Court Civil Rules, the plaintiff is entitled to costs of the proceedings.

"Verhoeven J."

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Prepared on 25 October 2026 · Esheria