# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Oh v. Fang,*
2023 BCSC 1042

Date: 20230619
Docket: M199589
Registry: Vancouver

Between:

**Jaekyung Oh**

Plaintiff

And:

**Yizheng Fang**

Defendant

- and -

Docket: M201443
Registry: Vancouver

Between:

**Jaekyung Oh**

Plaintiff

And:

**Nicole Gwendolyne Tomkins and**
**Sandra Jane Horton**

Defendants

Corrected Judgment: The text of the judgment was amended
at page 2 on June 20, 2023

Before: The Honourable Justice V. Jackson

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | M. Elliott<br>M. Burtini |
| Counsel for the Defendants: | M.A. McDonald<br>A. duPlessis |
| Place and Date of Trial: | Vancouver, B.C.<br>April 11-14, 25-28 and<br>November 16-17, 2022 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 19, 2023 |

# Table of Contents

## INTRODUCTION

[1] The plaintiff, Jaekyung Oh, was injured in two motor vehicle accidents. On August 19, 2016, she was driving into the parking lot of the Metrotown shopping centre in Burnaby, British Columbia, when the defendant Yizheng Fang made a sudden lane change and struck the driver side of the plaintiff's vehicle (the "First Collision"). On June 21, 2018, the plaintiff was driving northbound on Mariner Way in Coquitlam, B.C. when her vehicle was rear-ended by the vehicle belonging to the defendant Sandra Jane Horton which was being driven by the defendant Nicole Gwendolyne Tomkins (the "Second Collision").

[2] The defendants all admit liability and concede the collisions caused the plaintiff to sustain the following indivisible injuries and symptoms:

a) Chronic whiplash associated disorder;

b) Chronic mechanical spine pain;

c) Cervicogenic headaches;

d) Chronic myofascial pain syndrome;

e) Major depression with clinical features of Somatic Symptom Disorder;

f) Anxiety with driving phobia; and

g) Sleep disruption.

[3] However, the parties disagree about the degree of pain and impairment the plaintiff has been left with as a result of her injuries caused by the accidents. The trial focused on assessment of damages.

## CREDIBILITY AND RELIABILITY OF THE PLAINTIFF'S EVIDENCE

[4] The defendants submit the plaintiff is not a credible witness and point to inconsistencies in her testimony about the timing of problems in her relationship with

her husband, her work as a realtor with Bruce Kwon and Charles Nam, and when she had stopped working after the accidents.

[5] Reliability and credibility are related but distinct concepts: *Mather v. MacDonald*, 2016 BCSC 948 at para. 18, aff'd 2017 BCCA 323, citing *R. v. Perrone*, 2014 MBCA 74 at paras. 25–27. Credibility considers the truthfulness of a witness's testimony; reliability considers its accuracy: *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, 36623 (17 March 2016); *R. v. Morrissey*, 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.); *McCully v. Moss*, 2019 BCSC 81 at para. 68; *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 10. A witness whose evidence on a point is not credible cannot give reliable evidence on that point: *Morrissey* at 526.

[6] In a civil case, the starting point is often a presumption that a witness' evidence is truthful, but that presumption can be displaced: *Halteren v. Wilhelm*, 2000 BCCA 2 at para. 15, leave to appeal to SCC ref'd, 27786 (21 September 2000); *Hardychuk* at paras. 10–11. If a witness' evidence on a point is not credible, it follows it is also not reliable: *United States v. Bennett*, 2014 BCCA 145 at para. 23, citing *Morrissey* at 526. However, a sincere witness can be mistaken and therefore unreliable: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). Fairness generally requires a witness be given an opportunity to respond, directly, to a claim of deliberate untruthfulness before their credibility is successfully impeached: *Hardychuk* at para. 11, citing *R. v. Lyttle*, 2004 SCC 5; *Browne v. Dunn* (1893), 6 R. 67, 1893 CanLII 65 (FOREP) (U.K.H.L.).

[7] In assessing the credibility and reliability of a witness' testimony, relevant factors include whether they had an opportunity to observe the events and the context in which that opportunity arose (e.g. was it in the course of a traumatic or stressful event or a routine encounter?), the firmness of their memory, whether their evidence harmonizes with independent evidence the trier of fact accepts, whether their testimony given in direct and under cross-examination differs, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness

has a personal interest in the matter, and, with caution, their demeanour while giving evidence: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296; *Faryna* at 356–357; *Proctor v. Owen*, 2005 BCCA 538 at para. 7.

[8] The evidence of a witness must be assessed for its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable": *Faryna* at 357; *Gichuru v. Smith*, 2013 BCSC 895 at para. 130, aff'd 2014 BCCA 414.

[9] The plaintiff argues her evidence should not be subject to an enhanced level of scrutiny simply because the bulk of her injuries are soft tissue injuries and her complaints are largely subjective. I agree the simple fact that the nature of a plaintiff's injuries produces little in the way of objective, observable, and physical evidence is not a basis to subject her testimony to a higher degree of skepticism: *Kallstrom v. Yip*, 2016 BCSC 829 at para. 335, citing *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 at para. 13, 1983 CarswellBC 2066 (C.A.); *Deol v. Sheikh*, 2016 BCSC 2404 at para. 111.

[10] One approach to assessing a witness' reliability and credibility is to consider their testimony on a "stand alone" basis first to consider whether their story is inherently believable: *Bradshaw* at para. 187. If it survives that assessment relatively intact, their testimony is then evaluated for its consistency with other witnesses' testimony and documentary evidence. Where competing versions of facts or events are presented, the Court must determine which version is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Bradshaw* at para. 187, citing *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.*, 12 Alta L.R. (3d) 298 at para. 13, 1993 CanLII 7140 (Q.B.).

[11] In my view, this is not a case where the plaintiff's evidence on all points should be rejected because she is not a credible witness. However, I find her testimony to be somewhat unreliable. Several experts who examined her and assessed her efforts and the reliability of her subjective reports during the

assessments noted she was not using full efforts, including Louise Craig, a physiotherapist called as part of the plaintiff's case to provide opinion evidence about the plaintiff's capacity to perform the work demands of a realtor. Ms. Craig conducted an abbreviated functional capacity evaluation of the plaintiff and observed the plaintiff was not using her full effort during various aspects of the testing.

[12] Although the dangers of relying solely upon in-court demeanor are well established, and I place relatively little weight on this factor in my analysis, I observed that the plaintiff shifted her position or stood up occasionally while testifying, but did not appear to be playing up her symptoms or limitations during the trial: *Faryna* at 356–358; *R. v. S.H.P-P.*, 2003 NSCA 53 at paras. 28–30. I acknowledge, as the defendants point out, that there were clear inconsistencies in the plaintiff's direct and cross-examination evidence with respect to the state of her marriage pre-and post-accidents. However, given the subject matter of that testimony, I am not persuaded that those inconsistencies warrant an overall tarnishing of the plaintiff's evidence with respect to her physical symptoms.

[13] Nonetheless, leaving aside those inconsistencies, the plaintiff's testimony about her work as a realtor, and in particular any decrease in her ability to work as a realtor as a result of the accidents, was very weak, to the point that I find it to be largely unreliable. It was internally inconsistent on important points, including the reasons why she left various real estate firms and joined others, and the nature and degree of her professional involvement and other financial dealings with another realtor and, at the time of trial, her boyfriend, Charles Nam. The plaintiff met Mr. Nam in 2013 when she took the course to become a licensed realtor. In other important areas she was unable, or unwilling, to provide detailed information, including the degree to which her hours were reduced after each of the accidents, or the effect COVID-19 had on her real estate practice during the initial months of the pandemic, when so many things changed so dramatically for so many industries. This is by no means a complete list of the frailties of the plaintiff's testimony related to her loss of earning capacity claim, but these examples are sufficient to demonstrate the reasons why I find her evidence on the issue to be unreliable.

[14] My findings and conclusions are informed by these reliability assessments.

## NON-PECUNIARY DAMAGES

[15] Non-pecuniary damages are awarded to compensate a plaintiff for their pain, suffering, loss of enjoyment of life, and loss of amenities: *Trites v. Penner*, 2010 BCSC 882 at para. 188. Damage awards should be fair and reasonable to both parties, and while the quantum of damages awarded in comparable cases are helpful, each case depends on its unique set of facts: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 261, 1978 CanLII 1; *Trites* at para. 189; *Fung v. Dhaliwal*, 2020 BCSC 279 at paras. 37–40.

[16] The parties agree non-pecuniary damages are to be assessed in accordance with the non-exhaustive list of factors articulated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC ref'd, 31373 (20 October 2006):

> (a) age of the plaintiff;
> (b) nature of the injury;
> (c) severity and duration of pain;
> (d) disability;
> (e) emotional suffering;
> (f) loss or impairment of life;
> (g) impairment of family, marital, and social relationships;
> (h) impairment of physical and mental abilities;
> (i) loss of lifestyle; and
> (j) the plaintiff's stoicism (as a factor that should not penalize the plaintiff).

[17] The plaintiff argues the injuries caused by the accidents also interfered with the plaintiff's ability to finally forge a vocational path of her own after a long life of assisting her family, at home and in the family business, and that this is an additional relevant factor I should take into account.

**What was the plaintiff's condition before the accidents?**

[18] The plaintiff was born in 1968 and was 54 at the time of the trial. After graduating from university in Seoul, South Korea, in 1994 the plaintiff immigrated to Canada with her husband and eldest daughter, who was about two years old at the time. Her second daughter was born in Canada a year after the family immigrated.

[19] Before the accidents the plaintiff's life was full of activity. She worked in the family's restaurant business, volunteered at her daughters' private school, did all the cooking for the family, cleaned the house and kept it organized, and drove the children to all their activities. She was the children's primary caregiver. She was physically fit, involved in her church, did yoga, and enjoyed socializing, hiking, and walking with her friends.

[20] Over the years the plaintiff had various jobs or home-based business ventures including taking in several homestay students. She enjoyed working and earning money. In January 2014, the plaintiff became a licensed realtor and began building her client base. According to the plaintiff, her work as a realtor involved both assisting clients who were listing properties, as well as clients who were buying properties. Both involved some physical work, including driving clients around in order to show them different properties, either to buy or as comparables to list their property, walking around with clients to see various properties, on occasion even assisting clients to stage their properties in preparation for sale, doing paper and computer work, and placing signs around an area in preparation for open houses. Her hours were not fixed and there was no set schedule of when she was in and out of the office. According to the plaintiff, confidence and the ability to present professionally, as well as maintaining current knowledge, were all important aspects of the work of a realtor.

[21] The plaintiff was easily able to fulfill all aspects of her busy personal and professional life without pain or physical limitation. Although she had sustained injuries to her neck, shoulders, and upper back in a motor vehicle accident in 2013, those symptoms were short-lived and had fully resolved prior to the first collision.

**What was the plaintiff's condition after the accidents?**

[22] In the first collision, the plaintiff hurt her head, neck, shoulders, and lower back. She was quite shaken up because of her head being shaken around by the impact of the collision and found herself feeling quite "down" when she got home. The pain was significant on the first day and although the pain lessened in the subsequent days, weeks, and months, her injuries had an impact on her daily life. The breakfasts that she would make her family were less elaborate because she found driving around to get all of the groceries more difficult because of pain in her body. Preparation of food was hard, especially making batches of kimchi which required standing for extensive periods of time. She found vacuuming to be very hard and painful because the vacuum cleaner was so heavy, and she also had difficulty doing laundry. Her flower bed gardens, which previously had been well-kept, became very messy as she could not provide the necessary upkeep due to pain caused by her injuries. As well, window cleaning and other outdoor gardening were things that she could not do. She also could not lift heavy items, and even going up and down stairs was difficult because of intensive pain in her lower back and headaches. She stopped going to church and prayer group because she found it difficult to be in one position for the duration of the sessions, which spanned more than three hours. She also stopped hiking and yoga, and even stopped spending time with their friends because her headaches made being around them too difficult. According to the plaintiff, her husband was not supportive in the face of her injuries and the symptoms she was experiencing. However, the plaintiff acknowledged in cross-examination that she and her husband had been discussing divorce prior to the First Collision.

[23] As time moved on, the plaintiff's headaches began to improve, and on some days she had no headache pain at all. Her neck pain and lower back pain also began to improve and had almost returned to normal. She was able to sit at a computer for two to three hours and walk for about 30 minutes at a time. With extensive physiotherapy and chiropractic and kinesiology treatments, as well as at-home exercises she was taught by her physiotherapist and kinesiologist, which she

did at home four times per week as instructed, the plaintiff's physical condition was improving. Right up until the time of the Second Collision, the plaintiff was confident that she was going to get back to her previous physical condition.

[24] The plaintiff testified that she recalled the "huge impact" of the Second Collision. She was so startled that she vomited in the car after the impact. A paramedic got into the back seat and instructed her not to move her head. She was taken by ambulance to the hospital. She had hit her head on the headrest in the course of the collision, which caused her an immediate headache. She also felt immediate pain in her neck, shoulder, arm, upper back, hip, and lower back. After the Second Collision, she experienced severe anxiety while driving, especially if she had a passenger. She began to have trouble sleeping because of the pain she was experienced generally, and in particular the headaches.

[25] The plaintiff has attended at hundreds of appointments for massage therapy, physiotherapy, kinesiology, and other treatments all aimed at improving, or at least reducing, her physical pain. Because she had made strides with treatments after the First Collision, she hoped it would be the same after the Second Collision, but after many appointments without much relief from her pain symptoms, she began to lose hope that she would improve. Once again, she decreased the amount of time she was spending with friends. It was again hard for her to go to church, and she decreased her volunteer activities with the church as well. All of that left her feeling very sad.

[26] The plaintiff testified that her current condition has left her with some degree of headache at all times, her neck hurts sometimes, she experiences shoulder pain especially when she is sleeping, and her lower back and tailbone pain make it difficult for her to sit or drive for too long and shoulder checks while driving are also difficult. However, she does continue to drive. Her lower back and tailbone pain is worse in the morning, but improves later in the day as she often takes some pain medication. When the plaintiff does not sleep because of the pain, she feels depressed because it reminds her of her limitations. According to the plaintiff, her

headaches are her most significant symptom. She continues to undergo physiotherapy, kinesiology, massage therapy, and acupuncture, and she sees a counsellor. She continues to do stretching and light exercise at home.

[27] The plaintiff continues to have some pain in her lower back that makes it difficult for her to sit. She also continues to sleep poorly because of her headaches and neck and back pain, and she has to move around a lot to get comfortable. Her prognosis is poor and the medical evidence supports the conclusion that these conditions are chronic, meaning they have persisted for more than six months although they can fluctuate in their intensity. I find there is potential for some improvement if her psychological conditions can be aided through counselling, as supported by the opinion evidence of Dr. Shaohua Lu, a psychiatrist who testified as part of the plaintiff's case.

[28] The plaintiff finds many heavy cleaning activities painful, particularly vacuuming, mopping the floor, cleaning the windows, dusting cabinets, and washing heavy laundry loads such as duvets. However, since these tasks must be done, and she gets some help from her daughter who lives with her, she does do them, but with discomfort. She also prefers to avoid cooking and orders in frequently all because of her lower back and neck pain, as well as pain in her hip and tailbone area.

[29] The plaintiff's injuries have not prevented her from forming and maintaining personal relationships. Although the plaintiff could not recall exactly when their relationship started, at the time of trial she was in a relationship with Mr. Nam, and testified she thought the relationship had been ongoing for about a year.

[30] One of the plaintiff's daughters testified at trial. However, she could offer little in the way of evidence about the impact of the injuries caused by the accidents on her mother's work as a realtor. This witness did not appear to have a strong memory of many issues, perhaps because of the passage of time.

[31] The plaintiff also continues to be able to enjoy travelling despite her injuries, taking lengthy flights and driving trips since the accidents. Her friend, Yeongmi Park, testified that she and the plaintiff visit and socialize the same amount now as before the accidents, and always have except during the COVID-19 pandemic. However, Ms. Park's evidence was partisan, as she would not agree the plaintiff's condition improved after the First Collision, or that the plaintiff has been able to travel since the Second Collision. She could recall facts about the plaintiff's injuries that assisted the plaintiff's case, but not facts that suggested the plaintiff's condition had improved, even where the plaintiff herself had conceded this was the case. I accordingly view her evidence as somewhat unreliable.

[32] Dr. Aaron MacInnes was qualified to provide opinion evidence about anesthesiology and chronic pain. He assessed the plaintiff in November 2021 and noted her cervical, thoracic, and lumbar spine and shoulder range of motion were all within normal limits, although increased pain was reported along with movement of her cervical and lumbar spine.

**What is a fair and reasonable award for the plaintiff's non-pecuniary damages?**

[33] The plaintiff argues non-pecuniary damages should be awarded in the range of $200,000, relying on the following cases:

a) *Craven v. Brar*, 2022 BCSC 291 ($170,000; $177,489 adjusted for inflation);

b) *Bieling v. Morris*, 2021 BCSC 1905 ($165,000; $183,934 adjusted for inflation);

c) *Beaudoin v. Adams*, 2021 BCSC 414 ($200,000; $222,950 adjusted for inflation);

d) *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 ($180,000; $219,423 adjusted for inflation); and

e) *Felix v. Hearne*, 2011 BCSC 1236 ($200,000; $261,101 adjusted for inflation).

[34] In *Craven*, the injuries caused by the accident had a much more significant impact on the plaintiff than in the case before me. Ms. Craven had been a committed dancer who competed internationally and taught dance, and the dance community had been a "significant part of her social network"; her injuries "shattered" that aspect of her life: para. 108. The same can be said of *Bieling*, which involved a plaintiff whose injuries were likely to cause constant, debilitating pain for the remainder of her life and had interfered with some of her most precious relationships and activities: para. 41. In *Beaudoin*, the plaintiff's injuries included two fractured vertebrae in her neck which necessitated treatment that was painful and caused her to suffer anxiety and panic attacks; she later developed an addiction to narcotic painkillers: paras. 14, 29. In *Pololos*, the subject accident caused psychological injuries that gave rise to a set of self-perceptions and disability convictions that significantly impaired the plaintiff's functionality: para. 93. The accident in *Felix* was much more significant than the accidents in this case. The plaintiff was injured when her boyfriend grabbed the steering wheel, causing the vehicle to leave the highway and overturn, killing him in the process: para. 1. In addition, Ms. Felix's injuries, which included a concussion, injuries to her neck, back, elbow, wrist, pelvis, and left knee, as well as ligament tears on her left rotator cuff and her left ankle, and damage to the cartilage in her left wrist and ulnar nerve, left her with panic attacks and rendered her unable to participate in recreational sports to the same degree, around which much of her social and family life had revolved. The accident also left her with psychological injuries that impacted her ability to maintain personal relationships: paras. 8, 9, 24.

[35] The defendant submits non-pecuniary damages should be assessed at $85,000. The defendant referred me to the following cases with respect to non-pecuniary damages:

a) *Suri v. Johal*, 2019 BCSC 703 ($75,000; $86,250 adjusted for inflation);

b) *Rix v. Koch*, 2020 BCSC 1976 ($80,000; $92,203 adjusted for inflation); and

c) *Curpen v. Burns*, 2021 BCSC 685 ($95,000; $105,901 adjusted for inflation).

[36] In *Suri*, the 56 year-old plaintiff's injuries consisted of neck and back pain and headaches, but the Court found her depression was not caused by the accident: paras. 197, 198, 207. Similarly in *Rix*, the plaintiff's injuries were limited to soft tissue injuries and headaches: para. 102.

[37] In my view, *Curpen* is the best comparator for the plaintiff's injuries and the impact on her life. In *Curpen* the Court found the accidents had caused the 45 year-old plaintiff soft tissue injuries to her neck, upper back, lower back, and glutes, and left her with sleep disturbance, anxiety, and depression: para. 102.

[38] Where a plaintiff suffers a true loss of housekeeping capacity because their injury would render a reasonable person in that plaintiff's circumstances unable to perform usual and necessary household work, that loss may be compensated by a pecuniary damages award, whereas where a plaintiff suffers a loss more in the nature of a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award: *Kim v. Lin*, 2018 BCCA 77 at para. 33. I find the plaintiff's injuries result in her experiencing pain when she does some housekeeping activities. In my view, that impact is appropriately taken into account in the assessment of general damages rather than a pecuniary award, and I have done so.

[39] Taking into account all of the evidence, the relevant factors, and the cases to which the parties referred me, as well as both counsel's submissions, in my view, a fair and reasonable award for non-pecuniary damages in this case is $120,000.

## PECUNIARY DAMAGES

### Loss of earning capacity

#### *Applicable legal principles*

[40] Both past and future loss of earning capacity claims involve the consideration of hypothetical events as well as positive and negative contingencies: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 33; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at paras. 92–93; *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45; *Cook v. Symons*, 2014 BCSC 1781 at para. 218.

[41] In considering past loss, the Court is to examine the plaintiff's actual post-accident working life and determine what their past working life following the accident would have been but for the accident.

[42] When considering future loss of earning capacity, the Court determines a plaintiff's future earning trajectory in their current state and compares it to what they would have earned but for the accident

[43] The relevant hypothetical, past or future, will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Kim v. Morier*, 2014 BCCA 63 at para. 8; *Luck v. Shack*, 2019 BCSC 1172 at para. 170; *Gao v. Dietrich*, 2018 BCCA 372 at para. 34. These possibilities are to be given weight according to the percentage chance they would have happened or will happen: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 9.

[44] In determining past loss of earning capacity, a plaintiff is only entitled to recover the net amount of their damages: *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, s. 98; *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at paras. 152–186, leave to appeal to SCC ref'd, 33155 (29 October 2009); *Luck* at para. 171.

[45] The analytical approach to assessing loss of future earning capacity was summarized by Justice Coval in *Kinakin v. Nguyen*, 2023 BCSC 94:

> [117] In its trio of 2021 decisions, the Court of Appeal emphasized that assessment of future financial losses should adjust for the likelihood of the relevant contingencies established in the evidence: *Dornan v. Silva*, 2021 BCCA 228 paras. 160-161; *Rab v. Prescott*, 2021 BCCA 345, para. 47; *Lo v. Vos*, 2021 BCCA 421, paras. 71-74.
>
> [118] *Rab* (para. 47) provides a three-step process to assess these losses:
>
> (1) Does the evidence disclose a potential future event that could lead to a loss of capacity?
>
> (2) Does the evidence disclose a real and substantial possibility that the future event will cause a financial loss to the plaintiff? And
>
> (3) What is the value of that possible future loss, given the relative likelihood of it occurring?
>
> [119] As a fourth step, the court must assess whether, all things considered, the damage award is fair and reasonable to both parties, *Lo*, para. 117.

[46] A plaintiff can attempt to prove their loss of earning capacity claim through an earnings approach, whereby the Court compares what the plaintiff probably would have earned but for the injuries caused by the accident, with what they will probably earn given their current injured condition, or through a capital asset approach: *Siu v. Clapper*, 2020 BCSC 944 at para. 60; *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

***Past loss of earning capacity***

[47] The plaintiff seeks damages of $382,397 for her net past loss of earning capacity. The plaintiff's position is based on two points: first, that the plaintiff has been incapable of working full-time as a realtor since the First Collision, and second, that the evidence supports the likelihood that but for the accidents her gross commissions would have increased by 20 percent a year, starting from her 2015 gross commissions of $78,916, until it reached between $200,000 and $300,000 per year.

[48] In my view, there are several problems with the plaintiff's proposed analysis.

[49] I will deal first with the premise that the plaintiff has been incapable of working full-time as a realtor since the First Collision.

[50] The plaintiff relies on the opinion evidence of Louise Craig. I find Ms. Craig's opinion to be of minimal assistance. Although her report attaches significant extracts from the medical documentation she reviewed, and extensive self-reported information from the plaintiff, her opinion is contained in barely more than a page of the entire report and is expressed in the form conclusions without explanation. Examples include "Ms. Oh does not demonstrate the capacity to meet the physical demands of her pre-collision occupation as a [r]ealtor", "[i]t is unlikely that Ms. Oh will be successful in a return to work at this time", and "[b]ased on the findings of this assessment Ms. Oh is likely at or close to maximum physical rehabilitation". The analysis explaining how Mr. Craig's observations of the plaintiff's physical performance informs those conclusions is largely absent and does not assist me as the trier of fact.

[51] In addition, although Ms. Craig was of the opinion the plaintiff was not competitively employable as a realtor at the time she assessed her in December 2021, the fact is that the plaintiff was working as a realtor at that time, albeit not full-time according to her testimony. Ms. Craig observed that the plaintiff was capable of sedentary physical strength demands, had satisfactory fine manual dexterity, is able to reach at all levels, can balance, negotiate stairs using a handrail, and is able to assume all body positions, and stand and walk for short durations. However, she did note that extended periods of sitting increased her neck and back stiffness. The plaintiff was also observed during the assessment process to be able to sit for extended periods of time. Dr. Mark Trump, an orthopedic surgeon called by the defendants, is of the opinion that the plaintiff's condition was such that she was capable of working as a realtor full-time if she applied herself to an appropriate home therapeutic exercise program.

[52] While Dr. MacInnes was of the opinion that the plaintiff "is likely able to participate in part time work to allow her to optimally manage her chronic pain symptoms", he is not able to opine on the plaintiff's ability to perform the tasks associated with being a realtor. He acknowledged such an opinion was beyond his expertise in his report and had suggested the plaintiff would benefit from a functional

capacity evaluation to determine her abilities and limitations with respect to her chronic pain symptoms.

[53] Similarly, while Dr. Lu was of the opinion the plaintiff "will likely have some functional disability related to her pain indefinitely", he was unable to quantify the degree of that disability, or its impact on her ability to work or her earning capacity. Dr. Lu also observed that the plaintiff has not had consistent psychological treatment or medication to treat her depression, which was mutually aggravating along with her chronic pain. In his view at least 36 months of treatment would likely be necessary given the chronicity of her mood symptoms, but he was of the opinion this would assist the plaintiff in coping with her chronic pain.

[54] I acknowledge the plaintiff's family physician, Dr. Gurdeep Parhar, is of the opinion there are certain physical actions the plaintiff should avoid. However, the evidence does not satisfy me that the plaintiff's work as a realtor is dependent on those movements. Further, the plaintiff acknowledged that her work as a realtor provides her with significant flexibility to change her position and take breaks as necessary. I also observe that the plaintiff has demonstrated an ability to travel for extended periods, by car and by plane, both of which would require extensive sitting, during the various vacations she has taken since the accidents.

[55] The evidence satisfied me that the plaintiff is able to do all of the physical activities associated with her job as a realtor. According to Ms. Park, a friend and client of the plaintiff, she continued to use the plaintiff for several real estate transactions after the Second Collision.

[56] While there is some evidence from the plaintiff that she reduced her hours after the First Collision, that evidence is vague and lacks detail about the degree to which her ability to work was impaired by her injuries caused by the accidents. Although the plaintiff testified that she did not work for a period of time after the First Collision, she was unable to provide details with respect to the decrease in her work. Neither Mr. Nam nor the plaintiff's daughter Anita, who both testified at trial, were able to provide any more detail on this important point. The plaintiff conceded that by

the end of 2017 or early 2018, both being before the Second Collision, she was "pretty much" back to working as she had been before the First Collision. There is simply an insufficient evidentiary basis to warrant such a finding. A drop in her income in and of itself is insufficient.

[57] The plaintiff testified about her symptoms after the Second Collision, namely that she was not able to drive a lot because it was painful to sit, she was anxious when driving, she found it difficult to place signage and to take clients to view numerous properties in one day, and her headaches caused her to sleep poorly, which left her feeling tired. However, again, the plaintiff was unable to provide detail with respect to any changes in her work pattern after the Second Collision as a result of those symptoms. Although she testified that she reduced her hours from full-time to "lots less hours" she was unable to provide greater specificity. However, the defendants concede there has been some impact on the plaintiff's ability to work since the Second Collision.

[58] The plaintiff estimated that at the time of the trial she was working about two hours per day, and some days not at all. However, I have concerns about the reliability of her evidence on this point, and about her evidence overall regarding the impact her injuries have had on her ability to work. Several of the experts who assessed the plaintiff for the purpose of providing expert opinion at this trial noted the plaintiff was not using full effort during testing. Dr. Trump also observed that her "significant muscular development" was consistent with someone who was physically active and was of the opinion that the plaintiff was capable of doing any physical activity. Although the plaintiff testified that she finds it hard to focus because of her headaches, she appeared to have no difficulty maintaining her concentration while testifying over the course of the trial. Similarly, although she shifted and stood up on occasion while giving her evidence, this was very minimal.

[59] There are other significant frailties with the plaintiff's loss of past earning capacity claim. The plaintiff acknowledged during cross-examination that she had told her family physician, Dr. Parhar, that she had not missed any time from work

following the Second Collision. Those reports were confirmed in Dr. Parhar's clinical notes of the plaintiff's visits in May 2019, July 2019, and August 2019, in which the plaintiff is noted to have reported that she was working full-time as a realtor but was finding it difficult to drive for long distances. However, in May 2020 (shortly after the eruption of one of the most acute phases of the COVID-19 pandemic) the plaintiff reported to Dr. Parhar that she was unable to work, yet there was no accompanying change in her symptoms.

[60] In addition, the plaintiff gave inconsistent evidence about the reasons that she left Sutton West Coast ("Sutton") to move to New Coast Realty for approximately five months in 2017 or 2018. Initially she said she did not know why she moved there, but during her cross-examination she conceded at least part of the reason was because she had a conflict with a colleague, Bruce Kwon. She also conceded she went back to Sutton after Mr. Nam had dissolved his business relationship with Mr. Kwon. The plaintiff also did not disclose during her direct examination that her changes in brokerage firms dovetailed Mr. Nam's changes in brokerage firms.

[61] Most significantly with respect to the plaintiff's credibility regarding her earning capacity, the plaintiff testified that Mr. Nam only became involved in her deals when negotiations were aggressive, and that this was not common. However, commission documents tendered as part of the evidence at trial reflects that Mr. Nam was involved in all but four of her 65 deals between 2015 and the trial. That evidence, which I find persuasive, is inconsistent with the plaintiff's evidence that she only involved Mr. Nam to close deals where the negotiations were aggressive. Further, the degree of Mr. Nam's involvement in the plaintiff's deals is inconsistent with the plaintiff's evidence at her discovery during which she had testified said she had done all the work on those files, and that Mr. Nam had not been involved. The plaintiff's testimony that Mr. Nam was only doing 10 percent of the work on her files is also inconsistent with him receiving 40 percent of the commissions, which the plaintiff testified was the arrangement.

[62] The plaintiff also failed to reasonably concede the inconsistencies between her evidence at trial and her affidavit evidence filed in her family law case about matters involving her work with Mr. Nam and Mr. Kwon.

[63] I also heard evidence of personal loans totaling more than $170,000 by Mr. Nam to the plaintiff, well before the time the plaintiff testified their personal relationship had begun. The plaintiff and Mr. Nam gave inconsistent evidence about whether this money had been repaid. There was also a $100,000 financial investment the plaintiff made in Alberta in 2017, to a friend of, and on the advice of, Mr. Nam, although the plaintiff had testified during her direct examination that she could not recall who had advised her to make the investment.

[64] The inconsistencies in the evidence surrounding these financial interactions connecting the plaintiff and Mr. Nam, and the plaintiff's lack of candour in disclosing them during her direct examination, leads me to have significant concerns about the reliability of the plaintiff's evidence and the evidence of Mr. Nam with respect to their professional dealings, and in particular about the plaintiff's role in earning of professional income throughout their professional and personal relationship.

[65] I conclude the plaintiff's work as a realtor has been consistently intertwined with Mr. Nam's efforts since she became a realtor. Unfortunately that leaves me with very little evidence upon which to assess what impact the plaintiff's injuries have had on her income-earning ability.

[66] Turning to the plaintiff's argument that the evidence establishes it was a real and substantial possibility that but for the accidents her income would have increased at the rate she suggests, in my view, there are again significant problems with her analysis.

[67] First, I find her approach to assessing her loss does not adequately account for an increase in business expenses that would likely be associated with working full-time. There was a paucity of evidence about what the plaintiff's actual business expenses were. While some business expenses may be fixed (e.g. liability

insurance), others are not (e.g. gas and other vehicle expenses that would arise from increased amounts of driving). In 2015 her gross business (realtor) income was $78,916 and her net (realtor) business income was $39,322, which means her business expenses equated to approximately 50 percent of her gross income. The plaintiff's approach to her loss of earning capacity claim was premised on expenses being 30 percent of her gross revenues.

[68] Second, although the plaintiff characterizes 2015 as the plaintiff's "first full year" as a realtor, it was her second year in the industry. The plaintiff became a licensed realtor in January 2014. The plaintiff began her career with Sutton, but was there for less than a month before moving to Royal Pacific Realty, where she stayed for little less than a year. At that stage she as working about six hours per day, six or seven days per week. She earned $35,000 net in commissions in 2014 and $39,322 in 2015, an increase of only 12 percent. Even assuming her net income would have increased at a higher rate after her first two years as a realtor, the 20 percent rate suggested by the plaintiff is arbitrary and not anchored in the evidence. In my view, annual increases between the Second Collision and the time of trial of no more than 15 percent would have been a real and substantial possibility.

[69] The plaintiff relies heavily on the commissions earned by Mr. Nam and other realtors at Sutton as comparators and argues the income range she proposes would have been reasonably attainable for the plaintiff, either through an increase in the number of deals, or an assumed steady increase in the prices of real property in the Lower Mainland.

[70] However, I agree with the defendants that Mr. Nam is not an apt comparator. Although Mr. Nam and the plaintiff are contemporaries as realtors, with Mr. Nam having one more year of experience, unlike Mr. Nam, the plaintiff has never been a solo, full-fledged independent realtor, but instead has consistently relied on Mr. Nam since at least 2015, well before the accidents. The plaintiff left Royal Pacific Realty in January 2015 at the suggestion of Mr. Nam, who was also working at Sutton. According to the plaintiff's evidence she did "pretty good" at Sutton in her first year

there. According to the agreed statement of facts, her gross (realtor) business income was approximately $79,000 and her net (realtor) business income was $39,000.

[71] For example, while the plaintiff testified she worked 6–7 hours per day when she was starting out, Mr. Nam testified he worked much longer hours in the early stages of his career, upwards of 8–12 hours per day, with weekends being even busier. He also testified he was a better negotiator than the plaintiff. His evidence was that he was involved in all the plaintiff's deals. Mr. Nam had 30 deals in his first year; the plaintiff only had 12, and all involved Mr. Nam.

[72] Mr. Nam's evidence about the difference between the number of deals the plaintiff brought in before the First Collision is not consistent with the other evidence regarding her commissions, which shows a steady number of deals before and after the accidents. I find his evidence on that point to be unreliable. I also do not consider Mr. Nam to be an impartial witness. He is the plaintiff's boyfriend, and did not respond to requests by a representative of the defendants to be interviewed about his evidence and was evasive about refusing to do so.

[73] From January 2015 until the First Collision in August 2016, the plaintiff continued to work at Sutton and increased her hours to be working approximately 50 hours per week. At Sutton, the plaintiff worked with Charles Nam and Bruce Kwon, who worked with Mr. Nam. The plaintiff and Mr. Nam had an arrangement whereby they split commissions 60/40, with the plaintiff keeping 60 percent of the commissions from her clients and Mr. Nam receiving 40 percent of the commissions. The plaintiff testified this split of commissions was because he was "very good at aggressive negotiations". However, the plaintiff received no commission for work she did assisting Mr. Nam with his clients, even though she estimated about 10 percent of all the work she did was for his clients. In her view this was work that was worth doing because it helped her build a good relationship with other agents and was "good business".

[74] Jordan Sutton, another Lower Mainland realtor, also testified as part of the plaintiff's case. He became a realtor around the same time as the plaintiff, with 2014 being his first year. In his first year he earned $120,000 in gross commissions. By the plaintiff's second year, she earned less than $80,000 in gross commissions. Mr. Sutton works as part of a large, multicultural team of realtors, and has a business degree. In his first year as a realtor he earned significantly more than the plaintiff had in her first year.

[75] Gary Owens is a realtor with 40 years of experience in Vancouver and east to the Tri-Cities area. He pointed out that the real estate business is an "extremely competitive" field, in which five percent of realtors earn a large share of the money. Incomes can vary wildly from year to year. Many realtors have assistants or work in teams with other realtors. There is no evidence the plaintiff has adopted that business model.

[76] According to the Sutton award information, 48 percent of realtors have a gross income greater than $100,000. However, 52 percent of realtors have gross commissions of less than $100,000. The plaintiff argues she would be above average given her personal characteristic of being a hard worker.

[77] The defendants concede the plaintiff has some loss of past earning capacity for which she should be compensated. They argue the plaintiff's 2015 net commissions income ($39,322) should be used as the "without accident" income to determine her past loss of earning capacity, resulting in a past loss of $132,076.

[78] However, in my view, that approach does not adequately account for an increase in the plaintiff's earning power as her experience increases. Assuming a constant 13 percent increase in her net commissions year over year after 2015, which I view as being a real and substantial possibility, would have resulted in the plaintiff earning $462,309 based on the following net incomes in the following years:

a) 2016 – $44,433

b) 2017 – $50,209

c) 2018 – $56,750

d) 2019 – $64,128

e) 2020 – $72,465

f) 2021 – $81,885

g) 2022 – $92,520

[79] According to the agreed statement of facts, the plaintiff's net income between 2016 and 2019 was $86,569. Based on her net business income being 50 percent of her gross commissions in 2020 through 2022, and assuming her gross commissions in 2022 were $48,551 (based on an average of her gross commissions in 2016–2021), I find the plaintiff probably earned $154,103. Therefore, her before tax past loss would be $308,209 (being $462,412 less $154,103). In my view, a 20 percent tax rate is appropriate given the plaintiff's income would not have risen above $100,000 per year.

[80] I award $246,567 in damages for the plaintiff's past loss of earning capacity claim.

***Future loss of earning capacity***

[81] Both parties agree the determination of the plaintiff's loss of future earning capacity should be made using the capital asset approach, but they disagree on what methodology should be applied. The plaintiff advocates for the use of a multiplier to determine the present value of what she argues is a 60–80 percent reduction in her work and earning capacity caused by her injuries, which is based on the plaintiff's evidence that she now only works approximately 2 hours per day, and will likely only work 10–20 hours per week in the future, which is a reduction of 60–80 percent compared to the 50 hours per week she was working at the time of the Second Collision. The plaintiff seeks $1,975,000 in damages for her loss of future earning capacity.

[82] Once again, the plaintiff's position is premised on it being a real and substantial possibility she will be incapable of working full-time as a realtor for the foreseeable future and that but for the accidents she likely would have earned, as a "floor" range, between $200,000 and $300,000 per year until she retired at age 70. The plaintiff argues this level of income is a real and substantial possibility since it was her goal, she was a hard worker, she had no physical limitations before the accidents, and she "had already built a two-year runway for what would have likely been the start of an increasingly successful real estate career".

[83] In this case there is no actuarial or economic evidence to assist the Court in determining the present value of the plaintiff's future pecuniary loss. Factoring in the prescribed discount rate of 1.5 percent pursuant to s. 56(2)(a) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and assuming retirement at age 70, the plaintiff advocates using a present value multiplier of 14.1313 as set out in Appendix E of *CIVJI: Civil Jury Instructions*, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2021 update), which accounts for future inflation and general increases in productivity, which tend to increase wages.

[84] The defendants argue damages should be assessed in an amount equal to three years of her average gross business income, citing cases where a similar approach has been used by the Court: *Curpen* at para. 236; *Flores v. Burrows*, 2018 BCSC 334 at paras. 138–139; *Sharpe v. Koomson*, 2019 BCSC 558 at para. 358; *Andreas v. Vu*, 2020 BCSC 1144 at para. 111. The defendants advocate for this approach, and propose to exclude 2016 when she was off work for an unspecified period of time. According to the defendants, this would place the plaintiff in the mid-range of Sutton's "Directors" award category.

[85] I prefer the approach taken by the plaintiff as I feel it is more in keeping with the methodology established by the case law.

[86] I am satisfied the evidence discloses there is a real and substantial possibility that the plaintiff's injuries arising from the accidents could lead to a loss of earning capacity. The defendants did not argue otherwise.

[87] The defendants also concede, and I find, the evidence discloses a real and substantial possibility that the plaintiff's injuries will cause a financial loss to her in the future. The issue remains as to the value of that future loss, given the likelihood of it occurring.

[88] I will not repeat my comments with respect to the aspects of the plaintiff's claim for loss of future earning capacity that I have already addressed under the rubric of her past loss claim.

[89] In my view, it is also appropriate to take into account the following specific contingencies, some of which favour the defendants and some of which favour the plaintiff, and some which cancel each other out:

- The possibility that average home prices decrease, and the possibility that average home prices continue to grow;

- The possibility the plaintiff would have retired early, or gradually reduced her work as she aged, even if she had not been injured in the accidents. I consider this to be a significant contingency. In my view, this is best captured by assuming a retirement age of 68 rather than 70 as proposed by the plaintiff;

- The possibility her professional relationship with Mr. Nam would not have continued throughout her career;

- The possibility that the plaintiff would not have earned between $200,000 and $300,000 per year as she expected. I find this to be a significant contingency, even taking into account her strong social ties and connection to the Korean-community, which is an asset for a realtor according to the evidence. In 2021, of the 1500 realtors that work for Sutton's offices in B.C.'s Lower Mainland and Fraser Valley areas, only 894 earn more than $50,000 or more in gross commissions annually. That is almost half of Sutton's realtors. Looking at the same data, 816 (636 plus 180) earn $100,000 or less and 1119 (636 plus 303), which is almost 75 percent, earn less than

$200,000. Within those groups there will be realtors of various ages and levels of experience, and some may choose to work less than full-time, but I have no evidence about those details;

- The possibility that her expenses would continue to be 50 percent of her gross earnings; and

- The possibility she will retire earlier than age 70 because of her injuries.

[90] I do not consider it to be a real and substantial possibility that the plaintiff may have earned more than her $200,000 to $300,000 goal.

[91] I acknowledge the plaintiff was a hard worker but in my view, the evidence supports the conclusion that it is a real and substantial possibility the plaintiff would have grown her gross commissions to, at a maximum, $200,000 per year. Further, it would have taken her several more years to attain that level of commissions. I also disagree with the plaintiff's position that her loss is a 60–80 percent erosion of her capital asset. I have already outlined my views with respect to the frailties of the overall evidence, including the testimony of the plaintiff and Mr. Nam, as well as the medical evidence in this regard. In my view, her injuries have eroded her capital asset earning capacity to some degree.

[92] Taking into account the totality of the evidence, the relevant contingencies, the case law, and the parties' submissions, I assess the plaintiff's loss of future earning capacity to be $375,000. This is roughly equivalent to an annual loss of $30,000 per year for 14 years, applying a multiplier of 12.5434.

**Special damages**

[93] The parties agree the accidents caused the plaintiff to incur $14,985.66 for out-of-pocket expenses for which she has not yet been, but is entitled to be, compensated. The parties further agree the plaintiff incurred $5,711.75 of that amount of expenses because of the First Collision, and $9,273.91 because of the

Second Collision. I award the plaintiff special damages, as against their respective defendants, in accordance with that agreement.

**Costs of future care**

[94] Damages for costs of future care are intended to provide for the improvement or maintenance of the physical and mental health of the injured person: *Wilhelmson v. Dumma*, 2017 BCSC 616 at para. 353. Damages for cost of future care require a prediction about the future which is unknown. Because damages are assessed once and for all time at trial, the Court must peer into the future and fix the damages for future care as best it can: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. Where a plaintiff can establish a real and substantial risk of incurring such costs in the future, they are entitled to compensation for reasonable costs of future care that are medically justified to preserve and promote a plaintiff's physical and mental health: *Peters v. Ortner*, 2013 BCSC 1861 at para. 141, as cited in *Carmody v. Druex*, 2022 BCSC 891 at para. 124; *Warick v. Diwell*, 2017 BCSC 68 at paras. 202–209, aff'd 2018 BCCA 53; *Pololos* at para. 144; *Thind v. Mole*, 2022 BCSC 1895 at para. 63. Medically justified means something less than medical necessity, and requires only some evidence the expense claimed is directly related to the disability arising out of the accident, and incurred with a view toward ameliorating its impact: *Harrington v. Sangha*, 2011 BCSC 1035 at para. 151; *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 83–84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.); *Gregory* at para. 39. A particular expenses is considered medically justified if a reasonably-minded person of ample means would be ready to incur it: *Andrews* at 245.

[95] The parties agree on the following future care items and their cost:

a) Psychological counselling – 48 sessions (total $9,600)

b) Driver rehabilitation – $1,300

c) Cervical pillow/mattress overlay – $200

d) Gym membership – $16,545.15

[96] The parties also agree the categories of future care costs outlined below are medially justified but disagree about what constitutes a reasonable cost for those care items.

***Physiotherapy / Massage Therapy / Chiropractic Care***

[97] Both parties agree to some degree of future care with respect to physiotherapy, massage therapy, and chiropractic care. However, the parties disagree on the amount of sessions permitted and the length of time the treatment should continue. The plaintiff seeks an initial cost of $2,185 as well as the high end range of the ongoing cost of 24 sessions of these various treatments amounting to an annual ongoing annual cost of $1,080 for her lifetime. The defendants submit that the treatment should be limited to three years, with $1,700 in one-time costs and $840 in ongoing costs, totalling $3,380.

[98] Dr. Parhar's opinion is that the plaintiff's symptoms are best managed through ice, heat, and rest, and that for severe exacerbations the plaintiff may require massage therapy, physiotherapy, or chiropractic treatment. Considering the totality of the evidence, and in particular the significant level of uncertainty about the plaintiff's need for these treatments in the future, I find a total allowance of $5,000 is reasonable.

***Occupational Therapy***

[99] The parties agree that some form of occupational therapy is necessary, but disagree on the amount of sessions. The plaintiff submits three occupational therapy sessions at the high end cost range of $1,080 is appropriate, while the defendants agree to 2–3 sessions but at the low range cost of $720.

[100] Considering the totality of the evidence I am satisfied an award representing the mid-range cost of $900 is reasonable.

***Active Rehabilitation***

[101] The parties agree the plaintiff should be compensated for 24 sessions of active rehabilitation totalling $1,920. However, the plaintiffs submit this should be

followed by ongoing costs of $960 while the defendants submit the 24 sessions are sufficient.

[102] In my view, some allowance for ongoing active rehabilitation costs is appropriate but the plaintiff's claim is beyond what is reasonable considering the overall award. Ongoing oversight of the plaintiff's posture, strength, and flexibility by a kinesiologist over her lifetime may be "ideal", but is not necessary as the plaintiff can reasonably be expected to increase her own ability to manage her exercise regime in much less time. I will allow $5,000 towards this category of future care costs.

***Dietician***

[103] Dr. Lu recommended dietician services but did not opine on how many would be required. The plaintiff suggests twelve but I agree with the defendants that six is reasonable in all of the circumstances. I allow $535 for this potential future care cost.

***Ergonomic Chair***

[104] The parties agree that an ergonomic chair is a future care cost item but disagree on the value of the cost. The defendants agree to $298.99 for the cost of the chair but I agree with the plaintiff that a reasonable potential cost is $474.99, particularly because she may require one ergonomic chair at work and another at home.

***Sit/Stand Desk***

[105] The parties agree to a sit/stand desk as a future care cost item but do not agree on the value of the cost. The plaintiff seeks $1,275 for this item. The defendants agree to $1,049, which I find is reasonable given the uncertainty that this cost will be incurred.

***Automated Vacuum***

[106] The parties agree an automated vacuum is an appropriate category of future care cost but disagree on the value of the item. Costs range from $275 to $1,400.

The plaintiff seeks $750 for this expense while the defendants agree to $274.99, an amount I find is reasonable.

***Regular Household Cleaning, Heavier/Seasonal Household Cleaning, and Handyperson Services***

[107] The plaintiff's claim for costs of future housecleaning, heavier/seasonal cleaning, and handyperson services is dismissed for the reasons provided in paragraph 39 of these reasons for judgment.

***Ergonomic Assessments***

[108] The plaintiff claims $480 for two ergonomic assessments, while the defendants have made no submissions on this point. In my view, the costing advanced by the plaintiff is reasonable, again taking into account that different assessments for home and work would be beneficial.

***Medications***

[109] The plaintiff argues the costs of her future medication should be determined on the basis of ongoing annual costs of over $9,000, for items such as Botox treatments to relieve headaches and neck and back pain ($6,000 per year, if effective) and $4,424 per year for Nabilone (a cannabis derivative also used for pain relief). In my view, the plaintiff's approach to her potential future medication costs is not reliable because it overstates the potential costs. Her approach is based on the plaintiff using multiple medications to treat the same symptoms, and does not adequately account for what I consider to be significant uncertainties as to whether some of these treatments will be effective. I find ongoing annual medication costs of $1,000 for the plaintiff's lifetime, with a present value of $25,000, is reasonable.

[110] I find there is a real and substantial risk that in the future the plaintiff will incur the above costs of future care, all of which I conclude are reasonable and medically justified to preserve and promote this plaintiff's physical and mental health.

[111] The plaintiff also seeks $3,152.50 for vocational counselling, while the defendants submit this care item is inappropriate because the plaintiff already has a

career in real estate. In my view, there is an insufficient evidentiary basis to support the cost of vocational counselling. The plaintiff does not intend to pursue an alternate career, nor a different business model for her work as a realtor. I am not satisfied this future cost, if incurred, would be beneficial in the circumstances of this plaintiff.

[112] For all of these reasons, taking into account all of the evidence, the applicable legal framework, and the submissions of counsel, and applying the present value multiplier based on the prescribed discount rate of 2 percent pursuant to s. 56(2)(b) of the Law and Equity Act for ongoing costs over the plaintiff's lifetime, I award damages for the plaintiff's costs of future care in the amount $67,000.

**Summary**

[113] In summary I award the plaintiff the following damages:

| | |
|---|---|
| General damages | $120,000 |
| Past loss of earning capacity | 246,567 |
| Future loss of earning capacity | 375,000 |
| Costs of future care | 67,000 |
| Special damages | 14,985.66 |
| **Total:** | **$823,552.66** |

**Costs**

[114] If the parties cannot agree on costs, within 30 days of the date of these reasons they are to submit an online Request to Appear Before a Specific Judge advising they wish to make submissions on that issue.

[115] I wish to thank counsel for their very helpful submissions.

"V. Jackson J."