

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hewitt v. Tang*,
2023 BCSC 580

Date: 20230413
Docket: M180490
Registry: Vancouver

Between:

Jacqueline Hewitt

Plaintiff

And

Lisa Tang, Daniel Abbate, Nguyen Quoc Ly and Robert Ly

Defendants

Before: The Honourable Mr. Justice Brongers

Reasons for Judgment

Counsel for the Plaintiff:

T.L. Martin
H.T.H. Chiong

Counsel for the Defendants
Nguyen Quoc Ly and Robert Ly:

D.C. Fong
E.J. Lundberg
A. Alimadad, Articled Student

No other appearances

Place and Dates of Trial:

Vancouver, B.C.
November 28-30, 2022
December 1-2 and 5-7, 2022

Place and Date of Judgment:

Vancouver, B.C.
April 13, 2023

Table of Contents

INTRODUCTION 4

BACKGROUND..... 4

 The Plaintiff’s Circumstances Prior to the Accident 4

 The Accident 5

 The Plaintiff’s Injuries and Treatment 5

 The Plaintiff’s Circumstances After the Accident 6

ANALYSIS..... 8

 Overview and Issues 8

 Factual Evidence 8

 Expert Evidence 9

 Dr. Paul Waraich..... 9

 Dr. Shao-Hua Lu..... 10

 Dr. Malgorzata Sudol 11

 Simone Szarkiewicz..... 12

 Sergiy Pivnenko 12

 Issue 1: General (Non-Pecuniary) Damages..... 13

 Legal Principles 13

 Plaintiff’s Position on Non-Pecuniary Damages..... 13

 Defendants’ Position on Non-Pecuniary Damages 14

 Analysis of Non-Pecuniary Damages 15

 Issue 2: Past Loss of Income 17

 Legal Principles 17

 Plaintiff’s Position on Past Lost of Income 18

 Defendants’ Position on Past Loss of Income..... 19

 Analysis of Past Loss of Income 19

 Issue 3: Future Loss of Earning Capacity..... 20

 Legal Principles 20

 Plaintiff’s Position on Future Loss of Earning Capacity..... 22

 Defendants’ Position on Future Loss of Earning Capacity 24

 Analysis of Future Loss of Earning Capacity 24

 Issue 4: Cost of Future Care 29

 Legal Principles 29

Plaintiff’s Position on Cost of Future Care 29

Defendants’ Position on Cost of Future Care..... 30

Analysis of Cost of Future Care 30

Issue 5: Loss of Housekeeping Capacity 31

 Legal Principles 31

 Plaintiff’s Position on Loss of Housekeeping Capacity 32

 Defendants’ Position on Loss of Housekeeping Capacity 32

 Analysis of Loss of Housekeeping Capacity 33

Issue 6: Special Damages..... 33

CONCLUSION..... 33

COSTS 34

INTRODUCTION

[1] Jacqueline Hewitt (the “Plaintiff” or “Ms. Hewitt”) seeks damages in connection with personal injuries sustained in a motor vehicle accident (the “Accident”). Liability for the Accident is admitted by the Defendants. At issue is the amount of damages to which Ms. Hewitt is entitled in compensation for her injuries.

BACKGROUND**The Plaintiff’s Circumstances Prior to the Accident**

[2] Ms. Hewitt was born in 1988 and grew up in Maple Ridge. From the ages of 9 to 14, she attended the Royal Winnipeg Ballet School, first as a summer student and then as a full-year boarding student. However, she later experienced home-sickness and returned to Maple Ridge to live with her family and to complete secondary school.

[3] Ms. Hewitt then attended the University of British Columbia (“UBC”) from 2006 to 2011. She graduated with a Bachelor of Arts in Psychology. While studying, Ms. Hewitt held a number of part-time and summer jobs. They included work at Tim Horton’s and Costco, as well as waitressing. Starting in 2007, she also worked as a teller for HSBC Bank Canada (“HSBC”).

[4] In 2012, Ms. Hewitt began full-time employment with HSBC in its Fraud Operations Department. She received two promotions in 2014. At the time of the Accident, Ms. Hewitt was a Senior Fraud Specialist earning an annual salary of \$51,203 plus overtime and bonuses.

[5] Outside of work, Ms. Hewitt enjoyed a physically and socially active lifestyle. Her recreational pursuits included running, hiking, weightlifting, and playing sports with work colleagues. Ms. Hewitt organized team activities such as volleyball, softball, and competing in the “Tough Mudder” obstacle course. She had many friends and was close with her family. When they travelled together, Ms. Hewitt was often responsible for trip planning and organizing. Ms. Hewitt had no relevant pre-existing health issues before the Accident.

The Accident

[6] On May 20, 2016, Ms. Hewitt was a passenger in a Volkswagen Jetta. The car was owned by Ms. Hewitt's friend, Lisa Tang, and was being driven by Ms. Tang's fiancé, Daniel Abbate. The three of them were in Vancouver on their way to the airport. Ms. Hewitt was sitting in the back seat behind Ms. Tang, on the right (passenger) side of the vehicle. Ms. Hewitt was wearing her seat belt.

[7] At the intersection of East Broadway and Nanaimo Street, the Volkswagen was struck by a Toyota Matrix driven by Robert Ly and owned by Nguyen Quoc Ly. The Volkswagen was travelling westbound through the intersection on a green light and apparently had the right of way. The Toyota was travelling southbound through the intersection and t-boned the Volkswagen.

[8] The specific point of impact was on the right (passenger) side of the Volkswagen and the front of the Toyota. The force of the collision caused the Volkswagen to spin into the oncoming traffic lane on the opposite side of East Broadway, where the car came to rest after striking a pole. Both vehicles sustained extensive damage, were deemed to be total losses, and were written off.

[9] The force of the impact was also sufficient to cause air bags to deploy. Emergency services attended and Ms. Hewitt was transported by ambulance to Vancouver General Hospital. She was discharged and released later that day.

The Plaintiff's Injuries and Treatment

[10] In addition to her emergency room assessment, Ms. Hewitt was seen by a number of medical professionals in the weeks and months that followed the Accident. They included staff at a walk-in clinic and a concussion clinic, her family physician, a psychological counsellor, an orthopedic specialist, and an otolaryngologist.

[11] It was noted that Ms. Hewitt had back, neck, and hip pain consistent with soft tissue injuries. For these conditions, she was prescribed painkillers, physiotherapy,

massage therapy, vestibular rehabilitation therapy, and chiropractic therapy. She pursued all of these treatments.

[12] In addition, Ms. Hewitt experienced headaches, dizziness, difficulty concentrating, anxiety, and depression. As recommended, she has treated these symptoms with prescription medicine and counselling.

The Plaintiff's Circumstances After the Accident

[13] Following the Accident, Ms. Hewitt was on medically-supported leave from her work at HSBC for approximately three months. She commenced a gradual return to work on August 29, 2016. By mid-November 2016, she was again working full-time.

[14] Once back at HSBC, Ms. Hewitt found the mental effort required to complete her tasks to be significantly greater than what it was prior to the Accident. She was less focused, less confident, and less driven. Ms. Hewitt needed to take more breaks, sit in a dark room and close her eyes, and use ear plugs in order to properly concentrate. Interruptions would sometimes cause her to cry because she could no longer multitask and easily return to what she was doing previously.

[15] Ms. Hewitt nevertheless applied for a promotion in the fall of 2016 when an opportunity arose to compete for the position of manager of fraud operations in her department. However, Ms. Hewitt was not selected. She was disappointed by this outcome, believing that she would have been the successful candidate but for the post-Accident changes to her personality.

[16] Around the same time, Ms. Hewitt also took some steps towards pursuing graduate studies in clinical psychology. On September 27, 2016, she wrote the Graduate Records Examination ("GRE"), but was unhappy with her results. She re-wrote the GRE on November 2, 2016, scoring better. Ms. Hewitt then applied to three universities, but her applications were not accepted. Ms. Hewitt believes that this can be explained partly by her failure to send some required documentation, and because she did not respond in a timely fashion to a professor who had expressed

interest in her application. To date, Ms. Hewitt has not completed the admissions process to any graduate programs in spite of her past interest in doing so.

[17] In early 2017, however, Ms. Hewitt successfully obtained a position in the HSBC Human Resources Department as a Business Support Manager. Ms. Hewitt was still working in this position at the time of trial, although her job title has changed and it is currently that of a Business Risk Control Manager. While her performance reviews are routinely positive, she is being encouraged to work on projecting self-confidence so that she can assume more of a leadership role. She has received steady pay raises since 2017, and her annual employment earnings in 2021 were slightly over \$100,000.

[18] In September 2017, Ms. Hewitt moved out of her family home in Maple Ridge after having purchased a condominium apartment in New Westminister. She has lived there alone since that time. Ms. Hewitt made this move with the hope that it would reduce her anxiety, particularly after a serious flood occurred at the Maple Ridge house in the summer of 2017. However, she finds the mental effort of planning and executing ordinary household tasks difficult. While her unit is relatively small, she struggles to keep it tidy and organized.

[19] In terms of physical activities, Ms. Hewitt exercises daily by running, hiking, doing strength training at the gym, and through yoga. Notably, she runs five kilometers three times per week, and tries to do a strenuous hike, such as the Grouse Grind, once per week. In the summer of 2021, she joined a group of her friends on a two-week trip to Banff, which involved hiking up to 12 hours per day. However, Ms. Hewitt sometimes has trouble maintaining her balance and avoiding falls, notwithstanding her background in ballet and sport.

[20] With respect to her social life, Ms. Hewitt's family and friends report that she is less extroverted and outgoing than she was before the Accident. While Ms. Hewitt still socializes and travels with them, she is now more emotional, irritable and anxious. She is less willing to plan and organize, and finds it difficult to handle stress and make decisions. Ms. Hewitt has had romantic relationships since the Accident,

but they have not lasted. Ms. Hewitt believes that this may partly be the result of her lack of emotional investment stemming from her current state of mind. That said, Ms. Hewitt is still hopeful that she may have children and a family one day.

ANALYSIS

Overview and Issues

[21] Shortly before the trial, a notice of discontinuance was filed in respect of Ms. Hewitt’s claim against Ms. Tang and Mr. Abbate. The remaining defendants, Nguyen Quoc Ly and Robert Ly (the “Defendants”), admit liability for the Accident and do not dispute that it caused her injuries. The Defendants nevertheless take issue with the total quantum of compensation that Ms. Hewitt is claiming. That damages claim is made under the following headings:

- 1) non-pecuniary (general) damages;
- 2) past loss of income;
- 3) future loss of earning capacity;
- 4) cost of future care;
- 5) loss of housekeeping capacity; and
- 6) special damages.

[22] An analysis of the parties’ respective positions on the amounts to be awarded under each of these headings is set out below, following a description of the nature of the evidence that was presented at trial.

Factual Evidence

[23] The factual evidence before the Court consisted of an agreed statement of facts, documentary material entered into evidence in accordance with the parties’ document agreement, and the testimony of eight witnesses, all of whom were called by the Plaintiff. Their names and relationships to the Plaintiff are as follows (set out in order of appearance):

- 1) Jacqueline Hewitt: the Plaintiff herself;

- 2) Barbara Calvert: the Plaintiff's mother;
- 3) Marie Breining: the Plaintiff's former co-worker;
- 4) Heather MacDonald: the Plaintiff's friend;
- 5) Percie Ly: the Plaintiff's co-worker;
- 6) Maclean Hewitt: the Plaintiff's brother;
- 7) Paul Hewitt: the Plaintiff's father; and
- 8) Jackson Hewitt: the Plaintiff's brother.

[24] Ms. Hewitt was, of course, the primary and most significant of the Plaintiff's witnesses. She testified comprehensively about her background, education, work experience, the Accident, her injuries, the treatments she has received, and her post-Accident circumstances.

[25] Counsel for the Defendants do not argue that any of the factual testimony presented by Ms. Hewitt or the Plaintiff's other witnesses should be discounted. In my view, they are right not to do so. I accept the veracity of the relevant factual statements they made while under oath as I found all of these witnesses to be credible and reliable.

Expert Evidence

[26] Five expert reports were entered into evidence. All of them were commissioned by counsel for the Plaintiff. Three of the authors testified in relation to the reports they prepared, and they were all qualified as experts in their respective fields. The remaining two reports were entered without objection and with the understanding that their authors did not need to testify. This expert evidence can be summarized as follows.

Dr. Paul Waraich

[27] Dr. Waraich is a psychiatrist who was retained by the Plaintiff to conduct an independent medical examination and to prepare an expert report on the extent of Ms. Hewitt's mental injuries. The examination was conducted on April 4 and 6, 2018.

There is no dispute regarding his assessment or conclusions, and the parties agreed that he need not testify at trial.

[28] Dr. Waraich's report states that the Accident caused Ms. Hewitt to sustain the following psychological injuries: (1) post-traumatic stress disorder ("PTSD"); (2) major depressive disorder; (3) generalized anxiety disorder ("GAD"); (4) somatic symptom disorder with predominant pain; and (5) mild neurocognitive disorder due to traumatic brain injury.

[29] In terms of treatment, Dr. Waraich made a large number of recommendations. They included increasing Ms. Hewitt's dosage of anti-depressant medicine, referral to a registered psychologist with expertise in high-fidelity cognitive behavioural therapy, aerobic exercise, sleep hygiene, and a safety plan for addressing suicidal ideation. Dr. Waraich also noted that he was unable to accurately determine how long Ms. Hewitt will continue to be impaired given that she had not yet received extensive treatment for her psychiatric issues.

Dr. Shao-Hua Lu

[30] Dr. Lu is another psychiatrist retained by the Plaintiff to prepare an expert report regarding Ms. Hewitt's mental condition. His assessment of the Plaintiff was conducted on August 18, 2022, over four years after that of Dr. Waraich. Dr. Lu testified after being qualified as an expert in the diagnosis, treatment and prognosis of psychiatric and chronic pain disorders, including occupational and functional disability.

[31] In his report, Dr. Lu opined that Ms. Hewitt had suffered mild traumatic brain injury ("mTBI") following the Accident. However, as she has been able to return to full-time work, Dr. Lu feels that Ms. Hewitt has likely made a functional recovery from her mTBI, and that it is unlikely to cause significant long-term cognitive changes for her.

[32] That said, Dr. Lu also opined that Ms. Hewitt has moderate GAD which developed in response to the functional impacts of her chronic pain. In terms of

future care, Dr. Lu recommended that she should continue with her current psychological treatment for two more years and, if an effective combination of medications is found, they should be used for at least five years.

[33] Dr. Lu also believes that Ms. Hewitt's prognosis is guarded. Due to the mutual interaction of her chronic pain and her GAD with features of major depression, he feels that Ms. Hewitt will have fluctuating mood and anxiety symptoms indefinitely.

Dr. Malgorzata Sudol

[34] Dr. Sudol is a physical medicine specialist who was retained by the Plaintiff to prepare an expert report on the extent of Ms. Hewitt's physical injuries. Her examination of Ms. Hewitt was conducted on August 17, 2022. Dr. Sudol testified after being qualified as an expert in physical medicine and rehabilitation to opine on the assessment, diagnosis, and treatment of musculoskeletal problems, as well as on rehabilitation of impairment and associated disabilities.

[35] Dr. Sudol opined in her report that it is more likely than not that the Accident caused the following injuries sustained by Ms. Hewitt:

- a) musculoligamentous injuries of the neck, mid-back, low back, and right hip girdle; and
- b) concussion with sequelae of cognitive, vestibular, and headache symptoms and sleep and mood disruption.

[36] Dr. Sudol is also of the view that since it has been over six years since the Accident, it is highly unlikely that Ms. Hewitt will have a full resolution of her symptoms. Instead, Ms. Hewitt will likely continue to have soft tissue pain through the neck, mid-back, and lumbar regions. However, Dr. Sudol feels that Ms. Hewitt will be able to continue to work full-time and will not be restricted in her recreational activities.

[37] With respect to treatment of Ms. Hewitt's physical symptoms, Dr. Sudol recommends that she maintain her current regimen of self-massage, stretching, positional changes, and a regular strength and aerobic exercise program.

Simone Szarkiewicz

[38] Ms. Szarkiewicz is an occupational therapist and life care planner who was retained by the Plaintiff to prepare a future cost of care analysis report.

Ms. Szarkiewicz testified after being qualified as an expert in occupational therapy and life care planning to opine on the assessment of impairment, care needs, and the cost of care.

[39] Ms. Szarkiewicz conducted her examination of Ms. Hewitt on September 6, 2022. It was performed at Ms. Hewitt's apartment in New Westminster.

Ms. Szarkiewicz noted that Ms. Hewitt's home was unkempt and extremely cluttered, which was surprising given that Ms. Hewitt had advance notice of the examination and claimed to have spent some time cleaning and tidying up beforehand.

[40] Ms. Szarkiewicz's report provides future care recommendations and estimates of their cost. They include physiotherapy, massage therapy, occupational therapy, ergonomic equipment, decluttering services, and house cleaning.

Sergiy Pivnenko

[41] Mr. Pivnenko is an economist who was retained by the Plaintiff to prepare a cost of future care valuation report. While this report was entered into evidence without objection, Mr. Pivnenko was not called to testify at trial.

[42] Mr. Pivnenko's report is dated September 20, 2022. Using data set out in Ms. Szarkiewicz's report referenced above, Mr. Pivnenko's report provides estimates of the present value of the costs of future care for Ms. Hewitt.

Issue 1: General (Non-Pecuniary) Damages

Legal Principles

[43] The legal principles applicable to assessing non-pecuniary damages designed to compensate a plaintiff for the pain and suffering and loss of enjoyment of life caused by a defendant tortfeasor are well established and not in dispute. The plaintiff bears the burden to show that there is a substantial connection between the accident caused by the defendant and the plaintiff's injuries: *Thompson v. Helgeson*, 2017 BCSC 927 at paras. 28–30. If causation is established, the court will then consider a number of factors when determining an appropriate quantum for non-pecuniary damages. In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, a non-exhaustive list of these factors was set out. It includes:

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

Plaintiff's Position on Non-Pecuniary Damages

[44] Counsel for the Plaintiff submit that causation is not at issue in this trial. The Plaintiff's medical evidence is uncontested and establishes that the Accident caused

Ms. Hewitt's chronic back, neck, and hip pain, as well as her headaches and psychiatric disorders.

[45] Counsel for the Plaintiff urge the Court not to reduce Ms. Hewitt's compensation for these injuries just because she is still an extremely high-functioning individual. While Ms. Hewitt is making the most of what she has and is carrying on with her life by being active and maintaining a full-time career, she has still suffered a loss. In particular, while she was once in peak physical condition and could function without restrictions, she now has a limited parcel of energy which she must ration. Ms. Hewitt does so by channeling this energy into keeping her career afloat, to the detriment of her life at home and her relationships with family and friends. She feels shame, embarrassment, and guilt in relation to her home and her perceived inadequacies, and continues to experience daily suicidal ideation.

[46] With respect to quantum, the Plaintiff's position is that an appropriate monetary amount of compensation for Ms. Hewitt's non-pecuniary damages would be in the range of \$160,000 to \$225,000. In support of this position, counsel for the Plaintiff brought four cases to my attention:

- *Fletcher v. Biu*, 2020 BCSC 1304: \$200,000 award;
- *Lim v. Busha*, 2019 BCSC 1223: \$160,000 award;
- *Steinlauf v. Deol*, 2021 BCSC 1118: \$225,000 award; and
- *Gabor v. Boilard*, 2015 BCSC 1724: \$200,000 award.

[47] They say that the fact patterns in these cases are comparable to what occurred in the case at bar. Therefore, a similar amount of damages, albeit with an adjustment for inflation, should be awarded here. The specific amount suggested by Plaintiff's counsel is \$190,000.

Defendants' Position on Non-Pecuniary Damages

[48] Counsel for the Defendants do not dispute that Ms. Hewitt's injuries were caused by the Accident. However, they question their severity and submit that the

quantum of non-pecuniary damages that ought to be awarded should be significantly less than what Ms. Hewitt is claiming.

[49] The Defendants rely on two decisions in support of their position on non-pecuniary damages:

- *Abraha v. Suri*, 2019 BCSC 1855: \$70,000 award; and
- *Bal v. Makichuk*, 2022 BCSC 1695: \$95,000 award.

[50] While they do not propose a specific amount in respect of Ms. Hewitt's award, counsel for the Defendants suggest that a range from \$78,000 to \$95,000 would be appropriate.

[51] Finally, counsel for the Defendants also advanced a mitigation argument in their oral closing submissions that was not mentioned in their written closing submissions. Specifically, they suggested that it would be appropriate to reduce Ms. Hewitt's non-pecuniary damages by 20% since she did not fully avail herself of HSBC's Employee Assistance Program ("EAP") to address her mental health challenges.

Analysis of Non-Pecuniary Damages

[52] There is no dispute that Ms. Hewitt's soft tissue and psychological injuries were caused by the Accident and that they have significantly affected her enjoyment of life.

[53] In particular, the evidence presented through the agreed statement of facts and the consistent testimony of all eight of the factual witnesses showed a marked contrast between Ms. Hewitt's circumstances before and after the Accident, especially in relation to her psychological state. Prior to May 20, 2016, Ms. Hewitt was motivated, ambitious, outgoing, and self-confident. These adjectives can no longer be used to describe Ms. Hewitt following that date. Ms. Hewitt is acutely aware of this difference, and continues to experience debilitating pain, shame, embarrassment, and guilt.

[54] I also agree with Plaintiff's counsel that Ms. Hewitt's commendable ability to superficially manage her symptoms in order to maintain her professional career through hard work and a disciplined exercise regime is a reflection of her stoicism, and does not warrant a reduction in compensation for the suffering she has experienced as a result of the Accident.

[55] Furthermore, I disagree with Defendants' counsel that Ms. Hewitt has failed to mitigate her damages by not continuing to treat her psychological injuries through HSBC's EAP program after 2017.

[56] The legal principles that apply to mitigation in the context of a personal injury claim are well established and were conveniently set out by our Court of Appeal in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57:

The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (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. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[57] In its very recent decision in *Haug v. Funk*, 2023 BCCA 110 at paras. 56–81, the Court of Appeal reaffirmed that the defendant bears the “high burden” to demonstrate a plaintiff's failure to mitigate on a balance of probabilities standard, and not on a lower “real and substantial possibility” standard.

[58] As noted by counsel for the Plaintiff, Ms. Hewitt did attend counselling sessions provided by Homewood Health through her employer's EAP in 2016 and 2017. Ms. Hewitt subsequently decided to access counselling through her doctor, particularly after receiving Dr. Waraich's report in 2018. I also agree with Dr. Lu's opinion provided in cross-examination that Ms. Hewitt's choice not to seek further EAP counselling was reasonable in her circumstances. In sum, the Defendants, who chose not to present any direct evidence in support of this argument, have not met their burden to justify a finding that the Plaintiff's damages should be reduced for failure to mitigate.

[59] With respect to quantum, I have reviewed the six cases that counsel for the parties referred to me for assistance in determining an appropriate amount for non-pecuniary damages. I find that the circumstances in *Fletcher* bear the most similarities to those in the case at bar.

[60] Ms. Fletcher was a 32-year-old occupational therapist who had immigrated to Canada from Ireland. She experienced a motor vehicle accident in Vancouver as a passenger that was roughly comparable to the one involving Ms. Hewitt. Ms. Fletcher suffered soft tissue injuries and developed depression, PTSD, and anxiety. While Ms. Fletcher's PTSD and depression had remitted by the time of trial, her chronic pain and anxiety remained. She nevertheless continued to work as an occupational therapist, first in Vancouver and then later after she returned to Ireland to avail herself of emotional support from her family. The Court noted that as a result of the accident, Ms. Fletcher had lost confidence, courage, and the source of much of the joy in her life. Her non-pecuniary damage award was \$200,000. This amount included compensation for Ms. Fletcher's loss of housekeeping capacity.

[61] I am cognizant of the principle that assessments of a plaintiff's injuries are done by reference to each individual's own circumstances, which obviously will never be identical to those of another litigant: *Schubert v. Knorr*, 2008 BCSC 939 at para. 97. Indeed, it appears that the impact of Ms. Fletcher's accident and the pain and suffering she felt were slightly more severe than that experienced by Ms. Hewitt, particularly in relation to physical pain and incapacity.

[62] Accordingly, I conclude that an award of \$190,000 would fairly compensate Ms. Hewitt for all of her non-pecuniary damages, including her loss of housekeeping capacity, in the circumstances of this case.

Issue 2: Past Loss of Income

Legal Principles

[63] The legal principles that apply to the calculation of damages in relation to an injured plaintiff's past loss of income from the time of the accident to the time of trial

are also well established. Such calculations are challenging because they necessarily involve a consideration of hypothetical events in order to answer a speculative question, namely, what income would the plaintiff have earned but for the injuries that resulted from the accident? The burden of proof to demonstrate these hypothetical events lies on the plaintiff, but the standard of proof is the real and substantial possibility threshold rather than the more onerous balance of probabilities standard: *Grewal v. Naumann*, 2017 BCCA 158 at paras. 48 and 49; *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21; *Perren v. Lalari*, 2010 BCCA 140 at para. 30; and *Rousta v. MacKay*, 2018 BCCA 29 at para. 17.

[64] Furthermore, it should also be noted that s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 provides that a plaintiff is entitled to recover damages for income loss suffered after the accident and prior to the date of trial, but not more than the net income loss they suffered in that period as a result of the accident.

Plaintiff's Position on Past Lost of Income

[65] There are three aspects to the Plaintiff's past loss of income claim.

[66] First, HSBC is making a subrogation claim of \$24,200.12 for short-term disability benefits paid since the Accident. Second, during the period for which Ms. Hewitt received these benefits, Ms. Hewitt experienced a wage loss of \$6,658.67 as a result of the difference between the benefit payments and Ms. Hewitt's regular salary. The total of these two amounts is \$30,858.79.

[67] The third aspect of the Plaintiff's past loss of income claim is in relation to an alleged "delay" in Ms. Hewitt's HSBC career as a result of not having been selected for the fraud department manager position she competed for in the fall of 2016. Counsel for the Plaintiff argue that but for the Accident, Ms. Hewitt would have obtained this job and then continued on an upward trajectory of regular promotions until the time of trial. They say that it was only in 2018 that Ms. Hewitt's earnings caught up to what they would have been had Ms. Hewitt become a fraud department manager in 2016. While counsel acknowledge that this hypothesis is subject to both positive contingencies (that Ms. Hewitt could have made up for lost time and caught

up to her advancement trajectory in any event) and negative contingencies (that she would not have had higher earnings in any event, or that she would have gone to graduate school instead), they balance each other out and are of neutral effect. The net quantum of this alleged loss is said to be \$12,000 per year for the six-year period from 2016 (when Ms. Hewitt would have won the job competition) to 2022 (the time of trial), or a total of \$72,000.

Defendants' Position on Past Loss of Income

[68] The Defendants agree that Ms. Hewitt is entitled to the first two aspects of her past wage loss claim. However, they do not agree that Ms. Hewitt also experienced a loss of income in relation to the alleged delay in her career stemming from having missed a promotion opportunity.

[69] In particular, counsel for the Defendants submit that Ms. Hewitt would not have been chosen for the fraud department manager position in any case because the successful candidate had superior credentials to those of Ms. Hewitt. In the alternative, counsel for the Defendants suggest that an appropriate amount of compensation for Ms. Hewitt's delayed promotions as a result of the Accident would be approximately \$20,000. However, the precise basis for this suggestion was not clearly explained.

Analysis of Past Loss of Income

[70] As the parties have agreed, I accept that an award for past loss of income in relation to the short-term disability payments received by Ms. Hewitt should be made. That award will be in the amount of \$30,858.79, reflecting the employer's subrogation claim plus the difference between the benefits received by Ms. Hewitt and what she would otherwise have earned during her time off work as a result of the Accident.

[71] On the other hand, I do not accept the Plaintiff's hypothesis that, but for the injuries caused by the Accident, Ms. Hewitt would have won the fraud department manager job competition in the fall of 2016 and thereby avoided an alleged "delay" in

the pace of her salary increases at HSBC. The only evidence with respect to this job selection process was provided by Ms. Hewitt and by the successful candidate, Marie Breining. While Ms. Hewitt believes she would have won the competition if she had not experienced the psychological damage caused to her by the Accident, no evidence was led to show that Ms. Hewitt was otherwise more qualified than Ms. Breining. To the contrary, Ms. Breining had significantly more experience than Ms. Hewitt did, having worked for over 20 years at HSBC at the time of the competition. Ms. Breining did offer her lay opinion that if Ms. Hewitt had presented as she had prior to the Accident, Ms. Hewitt would probably have become the fraud department manager eventually, after Ms. Breining's 2018 retirement. However, Ms. Breining did not say that Ms. Hewitt would have been the successful candidate for the fraud department manager position in the fall of 2016 if only Ms. Hewitt had been healthy at the time.

[72] In *Gao v. Dietrich*, 2018 BCCA 372 at para. 34, our Court of Appeal noted that with respect to hypothetical events, both past and future, the standard of proof is a real and substantial possibility. This is a lower threshold than a balance of probabilities, but a higher threshold than that of something that is only possible and speculative. I find that the notion that Ms. Hewitt would have been chosen over Ms. Breining to become an HSBC fraud department manager in the fall of 2016 but for the Accident is merely a speculative possibility, and not one that is real and substantial. The Defendants are not required to compensate Ms. Hewitt for this possibility.

[73] Accordingly, I find that the total appropriate award of damages for Ms. Hewitt's past loss of income is \$30,858.79.

Issue 3: Future Loss of Earning Capacity

Legal Principles

[74] The principles applicable to the assessment of future loss of earning capacity damages are similar to those in relation to past loss of income, although the exercise involves the added complication of requiring an examination of two hypothetical

futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32:

... An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) at para. 8. ...

[75] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:

- 1) Is there a potential future event that could lead to a loss of earning capacity?
- 2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If there is a such a possibility, what is its value?

[76] Valuation of the loss can be done using either the “earnings approach” or the “capital asset approach”: *Brown v. Golaij* (1985), 26 B.C.L.R. (3d) 353 (S.C.) at para. 7; *Perren* at paras. 11–12. The earnings approach involves a calculation of the present value of a plaintiff's annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48. The capital asset approach involves consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski*, 2017 BCCA 134 at para. 123. Under either approach, the plaintiff must prove that there is a real and substantial possibility

of various future events leading to an income loss (*Perren* at para. 33), and that damages are assessed, not calculated (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18).

Plaintiff's Position on Future Loss of Earning Capacity

[77] Counsel for the Plaintiff submit that the first two steps of the *Rab* analysis are satisfied. This is because the evidence shows that Ms. Hewitt has diminished capacity following the Accident resulting in there being a real and substantial possibility that Ms. Hewitt will suffer a pecuniary loss in the future. They note, in particular, that Ms. Hewitt is physically in pain and emotionally overwhelmed. As a result, she has given up on further education and accepted that she will not advance in her career at HSBC following the same upward trajectory she was on prior to the Accident.

[78] With respect to the third step of the *Rab* analysis, counsel for the Plaintiff propose that the capital asset approach be used to calculate Ms. Hewitt's future loss of earning capacity. They suggest that this can be done in three potential ways.

[79] The first is to simply assume that Ms. Hewitt would have continued to work at HSBC, applying for and obtaining promotional opportunities at a more rapid rate than she can now expect given her post-Accident limitations. Counsel for the Plaintiff submit that if this method is chosen, the loss should be quantified at five times her most recent annual earnings of \$102,225, an amount which they approximate to be \$500,000.

[80] The second is to assume that Ms. Hewitt would have enrolled in a clinical psychology program in the fall of 2017, and then completed it by the summer of 2023. Ms. Hewitt would then have started a clinical practice in January 2024 and worked full-time for 34 years until she turned 70 years old. Counsel for the Plaintiff argue that the annual difference between Ms. Hewitt's expected earnings as a clinical psychologist and as an employee of HSBC would be approximately \$75,000. They say that the compensable present value of this annual loss of \$75,000 over 34 years would equate to a total of \$1,986,127.50.

[81] The third way of calculating Ms. Hewitt's future loss of capacity is to employ a loss of capacity percentage and apply it to her expected annual earnings had the Accident not occurred. Counsel for the Plaintiff suggest that this percentage should be 15%, and that it should be applied to both the scenario whereby Ms. Hewitt continues her career at HSBC, and the scenario whereby Ms. Hewitt becomes a clinical psychologist. Under the first scenario (an HSBC career), Ms. Hewitt's average annual earnings until she retires at age 70 are assumed to be \$150,000. A 15% capital loss of such earnings amounts to \$22,500 per year. Counsel for the Plaintiff say that the present value of such a loss incurred over 36 years is \$622,365.75. Under the second scenario (a clinical psychology career), Ms. Hewitt's average annual earnings until she retires at age 70 are assumed to be \$225,000. A 15% capital loss of such earnings amounts to \$33,750 per year. Counsel for the Plaintiff say that the present value of such a loss incurred over 36 years is \$933,548.63. While their written submissions are silent on the point, in oral argument counsel for the Plaintiff posited that there was an even chance (i.e., a 50% probability) that Ms. Hewitt would have become a clinical psychologist rather than pursuing a career at HSBC.

[82] Counsel for the Plaintiff also submit that positive and negative contingencies must be taken into account in measuring damages for future loss of income capacity. They provide several examples. In terms of positive contingencies, Ms. Hewitt's medical condition could improve along with her career advancement prospects at HSBC. In terms of negative contingencies, Ms. Hewitt may have retired early or reduced her work hours even absent the Accident. In addition, her employers may have been less willing to accommodate her condition by allowing her to work from home remotely.

[83] In sum, counsel for the Plaintiff argue that the value of Ms. Hewitt's future loss of earning capacity ranges from approximately \$500,000 to \$1,900,000. Once contingencies are considered, and accepting that the assessment is not a pure mathematical calculation, Ms. Hewitt claims \$800,000 for future loss of earning capacity.

Defendants' Position on Future Loss of Earning Capacity

[84] Counsel for the Defendants submit that Ms. Hewitt's current symptoms do not render her incapable of consistent employment, as demonstrated by the fact that she has been working for over six years since the Accident without interruption. They argue that Ms. Hewitt has had glowing performance reviews from HSBC, and steady annual income increases since 2016. That said, they also acknowledge that Ms. Hewitt suffers from chronic pain and anxiety, and therefore may have to take some time off work in the future. However, the likelihood that such injury-related breaks from work would be of significant duration is low.

[85] Accordingly, counsel for the Defendants submit that fair compensation for Ms. Hewitt's future loss of earning capacity should not exceed one year of her current salary, and should be in the range of \$40,000 to \$100,000.

Analysis of Future Loss of Earning Capacity

[86] In *Rab*, our Court of Appeal explained that the first step of the three-step process for considering claims for loss of future earning capacity is to examine whether the evidence discloses a potential future event that could lead to a loss of capacity. This gives rise to the four considerations set out in *Brown* at para. 8. They are whether the plaintiff is: (1) less capable overall of earning income from all types of employment; (2) now a less attractive employee; (3) less able to take advantage of all job opportunities open to her; and (4) less valuable in terms of earning income in a competitive labour market.

[87] On my assessment of the evidence, all four of these considerations are met. I agree with Plaintiff's counsel's submission that Ms. Hewitt's ability to work productively has been diminished by the injuries she sustained from the Accident, especially those that are psychiatric in nature. In particular, I agree that Ms. Hewitt no longer possesses the same ability to confidently plan and execute work tasks, both as an individual and in teams, that she had before the Accident. This renders it significantly less likely that Ms. Hewitt will obtain higher earning managerial

positions, or professional positions that require additional formal education, in the future.

[88] My findings in this respect are based upon Ms. Hewitt's testimony, as well as the testimony of her workplace mentor Percie Ly (head of Human Resources Operations at HSBC), and that of her father, Paul Hewitt ("Dr. Hewitt"). Ms. Ly testified regarding a relatively recent job competition in her department that Ms. Ly oversaw and for which she encouraged Ms. Hewitt to apply. Ms. Ly explained that while Ms. Hewitt was well prepared and answered interview questions appropriately, Ms. Hewitt was also very nervous which negatively impacted her assessment. Ultimately, an outside candidate who showed a level of confidence and leadership that was superior to that of Ms. Hewitt was selected for the position instead. As for Dr. Hewitt, he is a full professor of psychology at UBC and a registered clinical psychologist who maintains a part-time private practice. While Dr. Hewitt did not testify as an expert witness, I accept his factual evidence regarding Ms. Hewitt's post-Accident struggles with applying for graduate studies and their impact on her ability to pursue a career in his field of clinical psychology.

[89] In my view, all of this evidence justifies a conclusion that Ms. Hewitt has satisfied both the first and the second step of the *Rab* analysis. In particular, there is a real and substantial possibility that Ms. Hewitt will suffer a pecuniary loss in the future because of her diminished capacity resulting from her Accident-related injuries.

[90] The third and final step of the *Rab* analytical framework is to value the lost capacity. As noted earlier, this can be done using either the earnings approach or the capital asset approach. Ms. Hewitt is still relatively young with many working years ahead of her, and therefore cannot be said to have a fully established work history. Furthermore, her income at the time of trial is significantly greater than what she earned before the Accident. As such, I find that the capital asset approach should be used in this case: *McKee v. Hicks*, 2023 BCCA 109 at para. 77; *Rab* at para. 30.

[91] In *Pallos v. Insurance Co. of British Columbia* (1995), 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.) at para. 43, our Court of Appeal explained that there are three acceptable methods for assessing the value of lost future earning capacity under the capital asset approach:

- (a) by postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of years remaining, and calculating the present value of this sum (the "Present Value of Total Annual Income Loss Method");
- (b) by awarding the plaintiff's entire annual income for one or more years (the "Present Annual Income Multiplied Method"); or
- (c) by awarding the present value of some nominal percentage income loss per annum applied against the plaintiff's expected annual income (the "Present Value of Nominal Percentage Income Loss Method").

[92] As noted earlier, counsel for the Plaintiff have proposed damage awards for Ms. Hewitt using each of these methods, as follows:

- (a) Present Value of Total Annual Income Loss Method: \$1,986,127.50;
- (b) Present Annual Income Multiplied Method: \$500,000; and
- (c) Present Value of Nominal Percentage Income Loss Method: \$622,365.75 (HSBC career scenario) or \$933,548.63 (clinical psychologist career scenario).

[93] Curiously, however, counsel for the Plaintiff have not suggested which of these three methods should actually be employed, or provided any basis for preferring any one over the others. In addition, their final position is that the Court should simply award Ms. Hewitt \$800,000 for her loss of future earning capacity. No explanation was given as to why this particular figure would ultimately be appropriate after having proposed four other possible amounts that range widely, from \$500,000

to almost \$2,000,000, if one of the accepted capital asset approach loss calculation methods were to be used.

[94] On the other hand, counsel for the Defendants say that only the Present Annual Income Multiplied method should be used for the valuation. They propose an amount of between \$40,000 to \$100,000, which would reflect an approximate multiplier of between 0.4 years and 1.0 years given Ms. Hewitt's most recent annual employment income of \$102,225. However, I note parenthetically that this does not seem to accord entirely with *Pallos* which provides that it is "the plaintiff's entire annual income for one or more years" that ought to be used.

[95] I have nevertheless considered each of the three capital asset approach calculation methods proposed by the Plaintiff. My assessment of their suitability is set out here.

[96] With respect to the first method (Present Value of Total Annual Income Loss), I am not prepared to employ it. This is because its proposed use is founded upon the hypothesis that, but for the Accident, Ms. Hewitt would have pursued graduate studies and become a clinical psychologist. In my view, the Plaintiff has not established a real and substantial possibility of this occurring absent the Accident. I note in particular that while Ms. Hewitt graduated with a bachelor's degree in psychology in 2011, she then waited five years before even attempting to write the GRE and apply to graduate school. No persuasive explanation was provided to justify why Ms. Hewitt did not take these steps before the 2016 Accident. In my view, this timing is strongly supportive of a finding that, but for the Accident, Ms. Hewitt would have been content to pursue her career at HSBC, as she was doing before and is doing now. In any event, I conclude that it is mere speculation that Ms. Hewitt would have become a clinical psychologist, not a real and substantial possibility.

[97] For the same reason, I am unable to use the third method (Present Value of Nominal Percentage Loss) by reference to the clinical psychologist career scenario. On the other hand, I accept that it could potentially be employed by reference to the HSBC career scenario. That said, I am not satisfied that an adequate evidentiary

foundation has been laid for its use in this case either. In particular, no reliable evidence was provided from HSBC that full-time employees in similar circumstances to those of Ms. Hewitt (i.e., having worked for ten years following graduation from university) can then reasonably expect to work until age 70 and achieve annual increases in earnings which would average out to a 50% increase from their present salary. If such evidence were to exist, it logically would have been available to the Plaintiff as she was able to offer testimony from two other current HSBC employees – Ms. Ly and Maclean Hewitt (one of Ms. Hewitt’s brothers) – in addition to Ms. Hewitt herself. Yet none was presented.

[98] Accordingly, I find that the most appropriate capital asset approach method for calculating Ms. Hewitt’s future loss of earning capacity in this case is the Present Annual Income Multiplied Method. I also note that all parties have indicated that it would be acceptable for the Court to use this method and award a multiple of Ms. Hewitt’s most recent annual earnings of approximately \$100,000. Their only disagreement is on what the multiple should be.

[99] While counsel for the Plaintiff has proposed five years, I find that this does not reflect the evidence of Ms. Hewitt’s remaining capacity to perform her employment responsibilities. Indeed, the 2020 and 2021 HSBC Performance Assessment & Review documents entered into evidence indicate that Ms. Hewitt is a “top performer”, “strong performer”, and a “role model” in spite of her post-Accident condition.

[100] On the other hand, I also disagree with counsel for the Defendants that Ms. Hewitt’s loss of earning capacity award should be limited to just one year. This would be inadequate to fairly compensate Ms. Hewitt, especially given her age and the length of her anticipated working career.

[101] Instead, I find that an award that would approximate two years’ worth of Ms. Hewitt’s annual salary would be equitable and properly reflect the relevant contingencies in this case. Accordingly, Ms. Hewitt will be awarded \$200,000 in compensation for her future loss of earning capacity.

Issue 4: Cost of Future Care

Legal Principles

[102] A clear summary of the principles applicable to the assessment of cost of future care claims can be found in Justice Adair's judgment in *Golkar-Karimabadi v. Bush*, 2021 BCSC 990 at para. 107:

An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[103] In essence, the courts' paramount concern in adjudicating a cost of future care claim in a personal injury case is to ensure that the plaintiff is provided with adequate future care for which the need has been objectively demonstrated based on the evidence tendered: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1 (S.C.C.) at 261; and *Gregory* at para. 39.

Plaintiff's Position on Cost of Future Care

[104] The Plaintiff's claim for a cost of future care damage award is founded upon the expert reports of Ms. Szarkiewicz and Mr. Pivnenko.

[105] Based on her review of the medical records and her personal assessment of Ms. Hewitt conducted on September 6, 2022, Ms. Szarkiewicz recommends in her report a number of treatments and interventions to address Ms. Hewitt's ongoing physical and psychological injuries. As for Mr. Pivnenko's report, it provides an itemized calculation of the costs of Ms. Szarkiewicz's recommended items and services under the following headings:

- Medications and Supplements

- Future Medical Care, Testing and Diagnostics
- Projected Therapeutic Modalities
- Aids to Daily Living / Symptom Management
- Ergonomic Equipment
- Household Management, Cleaning, Yard, and Garden Care

[106] Mr. Pivnenko calculates the present value of the total cost of this future care as ranging from \$409,026 to \$467,147.

[107] Counsel for the Plaintiff also note that contingences may be applied to this claim. Most significantly, Ms. Hewitt's actual need for this care may ultimately be greater or lesser than what has been posited by Ms. Szarkiewicz based on her assessment and that of the other medical professionals whose opinions she has relied upon. In addition, further contingencies, such as survival rate and a discount factor, are built into Mr. Pivnenko's calculation.

[108] Weighing these contingencies, counsel for the Plaintiff submit that the Court should award \$420,000 for Ms. Hewitt's cost of future care.

Defendants' Position on Cost of Future Care

[109] Counsel for the Defendants did not present a substantive argument with respect to the Plaintiff's claim for cost of future care. They simply stated that an appropriate award under this head of damage would be in the range of \$16,146.40 to \$45,000.00, inclusive of an award in respect of housekeeping costs. No rationale or justification was offered for these figures, however.

Analysis of Cost of Future Care

[110] I am satisfied that the Plaintiff's claim in respect of cost of future care is well-founded.

[111] I rely in particular upon Ms. Szarkiewicz's thorough report which sets out in considerable detail a specific rationale for each of the future care items and services that she recommends. These recommendations are all justified by specific reference

to the opinions of medical professionals, including those of Dr. Waraich, Dr. Lu, and Dr. Sudol, as well as Ms. Szarkiewicz's own observations made during her personal evaluation of Ms. Hewitt. While Ms. Szarkiewicz was briefly cross-examined by counsel for the Defendants, her expert assessment and opinion regarding the need for this care was not undermined in any way.

[112] As for quantum, I also accept the cost estimates set out in Ms. Szarkiewicz's report, and Mr. Pivnenko's calculation of their present value as set out in his report. This aspect of Ms. Hewitt's cost of care claim was not challenged by counsel for the Defendants either. In addition, I find that counsel for the Plaintiff's assertions regarding how to address contingencies in relation to the cost of Ms. Hewitt's future care are reasonable and acceptable. Furthermore, I agree that Ms. Hewitt has generally followed professional recommendations for treatment and assistance in the past, and is likely to do so in the future.

[113] An award for Ms. Hewitt's cost of future care will therefore be granted in the amount claimed of \$420,000.

Issue 5: Loss of Housekeeping Capacity

Legal Principles

[114] A helpful summary of the law regarding loss of housekeeping capacity claims in personal injury litigation can be found in *Ali v. Stacey*, 2020 BCSC 465. In this decision, Justice Gomery distilled the legal principles established by our Court of Appeal in *Kim v. Lin*, 2018 BCCA 77 and *Riley v. Ritsco*, 2018 BCCA 366:

[67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.

- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[115] It should also be noted that because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred: *O'Connell v. Yung*, 2012 BCCA 57 at para. 67.

Plaintiff's Position on Loss of Housekeeping Capacity

[116] The Plaintiff seeks a separate award for her loss of housekeeping capacity. Her counsel submit that based on the evidence of Ms. Hewitt's pre-Accident ability to do household chores and to maintain a clean and organized home while living independently during her university studies, it is reasonable to assume that, but for the Accident, Ms. Hewitt would have been able to keep her New Westminster apartment clean and organized too. Since the Accident, however, Ms. Hewitt's housekeeping abilities have deteriorated significantly. Ms. Hewitt's family members testified to their concern over the cluttered and dirty state of the apartment, which Ms. Szarkiewicz said bordered on hoarding.

[117] Counsel for the Plaintiff suggest that an award of \$50,000 under this head of damages would be appropriate. This would reflect a capacity loss of four hours per week valued at \$25 per hour over the course of approximately 10 years.

[118] If, however, the Court is disinclined to make a separate pecuniary award for Ms. Hewitt's loss of housekeeping capacity, counsel for the Plaintiff submit that the loss should be reflected in an augmentation of her non-pecuniary damages award.

Defendants' Position on Loss of Housekeeping Capacity

[119] Counsel for the Defendants did not present a substantive argument with respect to the Plaintiff's claim for loss of housekeeping capacity either. They simply say that an appropriate total award for both this claim and Ms. Hewitt's claim in respect of cost of future care would range from \$16,146.40 and \$45,000.00.

However, as has already been noted, no rationale or justification was provided for these figures by the Defendants.

Analysis of Loss of Housekeeping Capacity

[120] I accept that the Plaintiff’s evidence demonstrates that Ms. Hewitt is no longer able to perform household chores and organize her home to the extent she was able to before the Accident. This stems mostly from Ms. Hewitt’s mental health challenges rather than her physical injuries. I find that this situation causes Ms. Hewitt shame and embarrassment with respect to how her housekeeping is perceived by others, even though she is apparently comfortable with the state of her home while she is there alone. However, I also note that there is no evidence of formal complaints from neighbours, interventions by the strata council, or other persuasive indicators that Ms. Hewitt’s housing unit is unsafe or unhealthy.

[121] In these circumstances, I am not inclined to issue a separate pecuniary award under this head of damages. Instead, as noted earlier, I have factored Ms. Hewitt’s loss of housekeeping capacity into the quantum of her compensation for non-pecuniary damages. I also note that Ms. Hewitt’s cost of future care award is inclusive of an amount for household cleaning and decluttering, as set out in the reports of Ms. Szarkiewicz and Mr. Pivnenko.

Issue 6: Special Damages

[122] Commendably, the parties agreed at trial that the quantum of fair compensation for Ms. Hewitt’s special damages is \$27,612.52. I concur that an award in this amount is justified.

CONCLUSION

[123] I award a total of \$868,471.31 in damages to Ms. Hewitt, under the following headings:

- Non-pecuniary damages: \$190,000.00
- Past loss of income: \$30,858.79

• Future loss of earning capacity:	\$200,000.00
• Cost of future care:	\$420,000.00
• Special damages:	\$27,612.52
Total:	<u>\$868,471.31</u>

COSTS

[124] If the parties are unable to agree on the form of a costs order, they may contact Supreme Court Scheduling within 30 days of the date of these reasons for judgment to schedule a hearing on this issue before me.

“Brongers J.”