IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jaura v. Rosal,*
2023 BCSC 1512

Date: 20230829
Docket: M203061
Registry: Vancouver

Between:

Rita Jaura

Plaintiff

And

Karen Bicalan Rosal, and
Nikolai Lalisan Arcilla

Defendants

Before: The Honourable Justice Caldwell

Reasons for Judgment

Counsel for the Plaintiff:	B.J. Yu
Counsel for the Defendants:	C.D. Jago N. Badesha
Place and Dates of Trial:	Abbotsford, B.C. April 11-14, 20-21, 2023
Place and Date of Judgment:	Vancouver, B.C. August 29, 2023

Table of Contents

[1] This is an action arising from a motor vehicle collision which occurred on May 4, 2018, at the intersection of Inverness Street (north and south) and 49th Avenue (east and west) in Vancouver. The intersection is controlled by traffic lights on 49th and stop signs on Inverness. There are pedestrian activated controls and pedestrian light signal displays on each corner. Liability and quantum/causation are disputed.

THE PLAINTIFF

[2] The plaintiff, Rita Jaura ("Ms. Jaura"), is 62 years old. She came to Canada in 1989 and holds a Bachelors degree in English, Math, and Science from India. She is married and has three children, all of whom are adults. She and her husband owned and ran a jewelry store for several years. In 2008, she worked seasonally at Purdy's making chocolate. In February 2011, she began work with Swissport as an aircraft groomer – cleaning and re-stocking aircraft after landing and before subsequent takeoff. Her position was unionized and she was entitled to extended health benefits. The work was physically demanding.

[3] Prior to the collision, the plaintiff not only worked full-time at Swissport but also did most of the work around the home – cooking, cleaning, vacuuming, laundry and the like.

[4] The plaintiff gave very little evidence regarding her pre-collision social activities. She said that she has been unable to socialize with friends but provided little, if any, details. Her family bought her tickets to a musical event but she was unable to go. She testified that she went to the YMCA prior to the collision to exercise and swim, but that she no longer does so.

THE COLLISION EVIDENCE

[5] The plaintiff was alone in her vehicle, proceeding northbound on Inverness. She says that:

- she stopped appropriately at the stop line on the south side of the intersection;

- traffic on 49th was heavy;
- she waited until the intersection was clear and she saw “the walk man” signal for pedestrians to cross 49th and then she proceeded directly into and across the intersection;
- she was struck on the passenger door section of her vehicle;
- her vehicle rolled, she estimates three times, and ended up on its roof at the north-west corner of the intersection; and
- she did not see the car that hit her but thinks that it must have been travelling in the outside westbound lane through the intersection, against the red light.

[6] The defendant driver, Nikolai Arcilla (“Mr. Arcilla”), with his girlfriend, Karen Rosal (“Ms. Rosal”), and a child in the vehicle, were travelling westbound on 49th. He says that:

- he was in the left lane, not the outside (northernmost) lane on 49th going westbound;
- traffic was heavy on 49th;
- he was several cars back from the intersection but slowly moved forward with traffic flow until he was the first car in that westbound lane;
- he was waiting for an opening to get across the intersection without blocking cross traffic on Inverness;
- he had the green light; an opening came up across the intersection and he moved to cross the intersection;

- he did not look to the sides or scan the intersection before proceeding; and

- as he moved forward, the plaintiff's vehicle was in front of him, he had no time to react or avoid collision and struck her vehicle at the passenger door with the front of his vehicle.

[7] Exhibit 14 is a short video taken of the scene almost immediately following the incident. It appears to show the defendant's dark blue van slightly into the intersection and in the left lane position, not the outer or northernmost lane position. It shows the plaintiff's white SUV on its roof at the north-west corner of the intersection.

[8] The Exhibit 14 video was shot by Inderjit Hira ("Mr. Hira"). He was in a car also travelling westbound on 49th but positioned two to three cars behind the defendant's van. He said that the light on 49th was red for westbound travel and he had been stopped for 10–15 seconds, possibly more. He did not give evidence that the cars in front of his were moving forward slowly or otherwise. His evidence was that the cars in his lane were stopped. He saw the white SUV enter the intersection. He looked down to adjust the radio and heard a bang. He then looked up and saw the SUV rolling at the north side of the intersection. He did not see the impact. When he looked up, he noted that the light was still red.

[9] Mr. Arcilla's girlfriend, Ms. Rosal, owned the van Mr. Arcilla was driving. Ms. Rosal was in the passenger seat at the time of the collision. Her evidence was inconsistent and seemed more explanatory than actually observational.

[10] Ms. Rosal testified in direct that she saw the green light – "we were stopped, it turned green and we moved". This is inconsistent with Mr. Arcilla, who said that the light was green, cars ahead moved forward, he waited for a spot to open so he could clear the intersection and then he went forward. It is also inconsistent with Mr. Hira, who said that he was stopped two to three cars behind the blue van and that the light was red before and after he heard the bang and saw the SUV roll over.

[11] Nearing the end of direct examination, she stated “she has to yield – it’s the only thing I remember”. On cross-examination, she said that “as far as I know, we were on a green light”. She seemed distinctly unclear as to whether she had actually seen the green light.

[12] It was clear that she and Mr. Arcilla had discussed the collision often since it occurred. She initially denied this outright, but changed her evidence when confronted with her examination for discovery transcript.

[13] She testified that the SUV struck the driver’s side of the van. All other evidence clearly indicates that the van drove into the passenger side of the SUV.

[14] Neither party provided reconstruction evidence nor even any clear evidence of speed estimates or impact and directional forces required to produce the kinds of results seen in this collision.

THE LAW

[15] Defence counsel cited ss. 127(1)(a)(i-iii), 129(1), 144(1), 175(1)(a) and (b), and 186(a),(b) and (c) of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 [*MVA*], which provide as follows:

> **Green light**
>
> **127** (1) When a green light alone is exhibited at an intersection by a traffic control signal,
>
> (a) the driver of a vehicle facing the green light
>
> (i) may cause the vehicle to proceed straight through the intersection, or to turn left or right, subject to a sign or signal prohibiting a left or right turn, or both, or designating the turning movement permitted,
>
> (ii) must yield the right of way to pedestrians lawfully in the intersection or in an adjacent crosswalk at the time the green light is exhibited, and
>
> (iii) must yield the right of way to vehicles lawfully in the intersection at the time the green light became exhibited, and …
>
> …
>
> **Red light**

> **129** (1) Subject to subsection (2), when a red light alone is exhibited at an intersection by a traffic control signal, the driver of a vehicle approaching the intersection and facing the red light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, and subject to the provisions of subsection (3), must not cause the vehicle to proceed until a traffic control signal instructs the driver that the driver is permitted to do so.
>
> …
>
> **Careless driving prohibited**
>
> **144** (1) A person must not drive a motor vehicle on a highway
>
> (a) without due care and attention,
>
> (b) without reasonable consideration for other persons using the highway, or
>
> (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.
>
> …
>
> **Entering through highway**
>
> **175** (1) If a vehicle that is about to enter a through highway has stopped in compliance with section 186,
>
> (a) the driver of the vehicle must yield the right of way to traffic that has entered the intersection on the through highway or is approaching so closely on it that it constitutes an immediate hazard, and
>
> (b) having yielded, the driver may proceed with caution.
>
> …
>
> **Stopping at intersections**
>
> **186** Except when a peace officer directs otherwise, if there is a stop sign at an intersection, a driver of a vehicle must stop
>
> (a) at the marked stop line, if any,
>
> (b) before entering the marked crosswalk on the near side of the intersection, or
>
> (c) when there is neither a marked crosswalk nor a stop line, before entering the intersection, at the point nearest the intersecting highway from which the driver has a view of approaching traffic on the intersecting highway.

[16] Defence counsel also cited a variety of authorities. From them, I have distilled what I take to be the principles most helpful and applicable to the present case:

1. At common law, drivers have an overarching duty to exercise reasonable care, which includes an obligation to keep a proper lookout and exercise reasonable caution in response to apparent potential hazards: *Stewart v. Dueck*, 2012 BCSC 1729 at para. 38 (Dardi J.); *Borgford v. Ball*, 2022 BCSC 2026 at paras. 57–58 (Fleming J.).

2. In Canada, "there is only one civil standard of proof at common law and that is proof on a balance of probabilities": *F.H. v. McDougall*, 2008 SCC 53 at para. 40 (Rothstein J.).

3. "… [T]he driver emerging onto the highway has the initial responsibility to assess whether the oncoming vehicle is an immediate hazard". Also, "If a driver becomes the dominant driver, as provided for in the *MVA*, then that person must continue to use reasonable care to avoid a reasonably foreseeable collision, notwithstanding the existence of the right-of-way": *Currie v. Taylor*, 2012 BCSC 1553 at paras. 64 and 76 (Armstrong J.), aff'd 2014 BCCA 51.

4. "In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the [*MVA*] and other rules of the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard": *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21 (Groberman J.).

DECISION ON LIABILITY

[17] I am satisfied on the balance of probabilities that:

1. the plaintiff stopped at the stop sign on Inverness at the south side of 49th;

2. the traffic on 49th was stopped and “bumper to bumper” in both directions;

3. at the time of the collision, the “walking man” pedestrian signal was displayed for a pedestrian to be able to cross 49th and the lights were red for east/west traffic on 49th;

4. if I am wrong as to that conclusion and the lights were green for east/west traffic on 49th, such traffic was still at a stand-still due to congestion;

5. there was a clear lane of travel for the plaintiff to cross 49th and having stopped at the Inverness and 49th stop sign, the plaintiff was entitled to proceed across 49th as her traffic control signal was a stop sign, not a red light;

6. the defendant, Mr. Arcilla, was stopped at the front of the left or inner lane of traffic heading westbound on 49th;

7. the plaintiff clearly travelled across the first half of the intersection – both eastbound lanes – safely and without incident;

8. whether the light for east/west traffic on 49th was red and stayed red, was green and stayed green, or was red and turned green while the plaintiff was crossing the intersection, Mr. Arcilla, by his own admission in evidence, left a stationary position of safety, drove into the intersection without in any way checking whether it was safe to do so, and collided with the plaintiff’s vehicle when it was halfway across his lane of traffic and squarely in front of him; and

9. had he checked to his left, the collision could have been avoided entirely: Mr. Arcilla would have been able, from his position at the head

> of the lane of westbound traffic and being in the inner lane, to have seen the plaintiff's vehicle as it entered the intersection to cross 49th.

[18] I find the defendants to be 100% liable for the collision.

CAUSATION

[19] The plaintiff must establish on a balance of probabilities that the defendant's negligence caused or materially contributed to an injury. The defendant's negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 (S.C.C.) at paras. 13–17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

[20] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurfice Corp. v. Hanke*, 2007 SCC 7 at paras. 21–23.

[21] Causation must be established on a balance of probabilities before damages are assessed. As Chief Justice McLachlin stated in *Blackwater v. Plint*, 2005 SCC 58:

> [78] … Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*.

[22] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects

of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32–35.

INJURIES

[23] The plaintiff testified to having experienced a variety of injuries and symptoms in the period immediately following the collision. Some resolved over days, weeks or, in some cases, a few months. Others continue to the present.

[24] Among the plaintiff's initial complaints that resolved over a short period of time were dizziness, numbness in her arms and legs, bleeding from the left ear, blurry eyesight, nausea, left arm pain, abdominal pain, left ankle swelling/tenderness and jaw discomfort.

[25] She initially suffered from reasonably severe and regular headaches. These have reduced in frequency and severity but are still occasionally present and are addressed with Tylenol and Advil.

[26] She complained of knee pain in both knees shortly following the collision and says that the pain in her left knee has continued or worsened, particularly after a fall at her home in approximately June 2020, more than two years after the collision.

[27] She testified that she had some anxiety about driving but the evidence, including video evidence, seems to indicate that she has overcome that.

[28] She says that she was "sad" for some period of time as she was limited in the activities which she could enjoy both socially and within the home – attending events and concerts, visiting friends and doing normal household activities such as cooking, cleaning and the like.

[29] In spite of these limitations, it is to be noted that she travelled to and attended medical appointments approximately every one to two weeks on average from the date of the collision until July 2021. There were some occasions when the visits were slightly further apart, but other times when they occurred several times in a

week, sometimes daily. Many of the medical entries are little more than repetition of previous entries from previous days, weeks, and months.

[30] She experiences some memory and concentration issues and has some sleep irregularities.

[31] Based on her evidence and the evidence/report of Dr. Best, a physiatrist, the plaintiff's main continuing complaints are of neck pain, low back pain, left knee pain, and concussion symptoms.

[32] No neurological evidence was led by the plaintiff regarding concussion or mild traumatic brain injury.

[33] No psychiatric or psychological evidence was led by the plaintiff regarding her alleged mood or other mental health concerns.

[34] No expert medical evidence was led by the defence.

[35] Dr. Best provided opinion evidence and a report regarding the plaintiff's injuries. The report included diagnoses, probable causation, treatment options, and prognoses.

[36] In cross-examination, Dr. Best acknowledged that:

- he was not told and was not aware that the plaintiff had suffered any previous back injury – she in fact denied any such prior injury;
- the fact that she had suffered such prior injury at work – which had kept her off work and then on reduced duties during the year prior to the collision – was information relevant to his assessment and could have affected his opinion regarding causation;
- he had no medical records after April 2022, when he met with the plaintiff to examine her and provide his opinion/report;
- he could not recall any mention by the plaintiff of the fall in June 2020;

- his review of records indicated that the first complaint regarding the left knee pain was in June or July 2020, when the fall was recorded in the notes; and

- had he been more aware of the knee pain arising only after the fall in June 2020, his opinion regarding causation would likely have been different.

[37] Dr. Best opined that the neck pain was likely cervical facet joint pain, cervical discogenic pain, or myofascial pain. He recommended physiotherapy, chiropractic treatments, and analgesic medications. He recommended medial branch blocks to further evaluate cervical facet joint pain and to assess the plaintiff's candidacy for further treatments, such as such as radiofrequency nerve ablation, corticosteroid injections, and/or plasma injections. He provided some frequency and cost evidence regarding some of these procedures.

[38] Regarding the lower back or lumbar pain, Dr. Best opined that it was likely lumbar discogenic pain, but that lumbar facet joint pain, sacroiliac joint pain, and myofascial pain were also possible options. Certain diagnostic options were listed along with a variety of possible therapeutic options, depending on the outcomes of the diagnostic approaches.

[39] Regarding the left knee, Dr. Best reports that her MRI reveals a medial meniscus tear. Treatment options included analgesic medications, physiotherapy, corticosteroid injections, plasma injections, nerve blocks, and nerve ablation. Discussion of possible arthroscopic surgical repair was left for discussion with an orthopedic surgeon.

[40] Based on the information which he had, Dr. Best opined that:

> … on a reasonable degree of medical certainty, the aforementioned chronic painful conditions were the results of the MVS of May 4, 2018. There was documentation that included discussion of bilateral foot pain prior to the car accident, but this was not an issue that was derived from the MVA in question. Finally, the examinee denied any issues relating to the cervical

> spine, lumbar spine, left knee or concussion history prior to the May 2018 motor vehicle accident.

[41] Dr. Best also opined on the plaintiff's work limitations, interference with daily activities, and treatments and prognoses. He believes her injuries to be permanent.

[42] There are obvious problems with the opinion of Dr. Best, especially as to causation. The plaintiff not only failed to disclose a recent, prior, serious back injury, but she actively denied that it had occurred. She, on a balance of probabilities, failed to disclose her fall in June 2020 to Dr. Best. As noted, Dr. Best agreed in cross-examination that both of those pieces of information could have had an effect on his opinion.

[43] Notwithstanding that problem, at least as regards the neck, shoulder, and back issues, the defendants in their closing submissions admit causation. At para. 89 of their written submissions, they state:

> The defendants concede that Ms. Jaura sustained the majority of injuries complained of as a result of the Accident, in particular neck, shoulder and back injuries.

[44] On the basis of that admission, I find that the neck, shoulder and back injuries detailed in Dr. Best's report are present and were caused by the collision.

[45] The left leg injury is a different matter.

[46] The plaintiff complained about foot pain and problems prior to the collision, probably in regards to the use of steel-toed boots at her workplace.

[47] Following the collision, she made one or at most two complaints about her legs during the first few weeks following the collision. Thereafter, up until mid-2020, there were no such complaints in spite of extremely frequent attendances at her family doctors' clinic and at other specialists to whom she was referred. There was, on my review of the clinical notes, a single reference to occasional tingling or numbness in her legs.

[48] Between the date of the collision and the June 2020 fall, the plaintiff walked regularly in the home and walked outside of the home to attend her frequent medical appointments. There was evidence that she occasionally used a cane or other device at her discretion. No medical indication of such requirement was provided. She attended physiotherapy, registered massage therapy, and acupuncture sessions, apparently without complaint as to any leg problems.

[49] While there may be some possibility that the fall was caused by or contributed to by the collision, thus leading to the left knee complaints, there is virtually no evidence to support such a conclusion. It would be conjecture to conclude that the collision had anything whatsoever to do with the fall.

[50] I find that the left knee injury is not causally connected to the collision.

NON-PECUNIARY DAMAGES

[51] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188–189.

[52] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

> [46] The inexhaustive list of common factors cited in *Boyd* [*v. Harris*, 2004 BCCA 146] that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:

> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005 BCCA 54].
>
> [Emphasis omitted.]

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

[54] Courts must still be "exceedingly careful" when assessing a plaintiff's subjective reports of pain, especially where "there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery": *Edmondson v. Payer*, 2012 BCCA 114 at para. 2, citing then-Chief Justice McEachern in *Price v. Kostryba* (1982), 70 B.C.L.R. 397, 1982 CanLII 36 (S.C.).

[55] In this case, the plaintiff is 62 years old. It is admitted that she has suffered neck, shoulder, and back injuries as a result of the collision. Those injuries are chronic and although they may respond to treatments to alleviate some of the symptoms, they have caused and will continue to cause the plaintiff some level of pain and discomfort on a permanent basis.

[56] She is disabled from at least the heavier aspects of housework which she performed prior to the collision. She probably experienced some sadness and anxiety connected with her injuries and the resulting limitations. She may have suffered some impairment of family, marital and social relationships and lifestyle, however the evidence in support of this is virtually non-existent.

[57] The cases relied upon by the plaintiff involve, in my respectful view, plaintiffs who suffered much more severe and extensive injuries, including fibromyalgia. It

also appeared that those plaintiffs presented far more evidence of a "before and after" nature to show the significant impact on the plaintiffs' lifestyles and activities.

[58] The cases relied upon by the defendants, while closer to the factual situation of this case, seem to simply provide examples at the lowest end of the range.

[59] Considering the circumstances of this case and the factors in *Stapley*, I award $110,000 in non-pecuniary damages, within which figure I have included a modest, non-pecuniary amount of $20,000 for the plaintiff's claim for past and future housekeeping services, as discussed and provided for in the recent case of *Quigley v. Cymbalisty*, 2021 BCCA 33 at paras. 71–74.

LOSS OF PAST EARNING CAPACITY

[60] In the recent case of *Klimek v. Lockhart*, 2023 BCSC 582 at para. 81, Justice Milman quoted Justice Goepel in the case of *Grewal v. Naumann*, 2017 BCCA 158 on the issue of both past and future loss of earning capacity:

> [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
>
> [49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[61] The plaintiff was working full-time at Swissport at the time of the collision. Her base pay rate was $16.06 per hour immediately before the collision. In addition to her normal pay, she occasionally worked overtime shifts at a premium rate. She also worked occasional shifts as a "lead", also at a premium rate. As previously indicated,

she was in a union and enjoyed extended health benefits. She received payments from SunLife as a result of her disability after the accident, but there is a subrogation claim for those payments to be repaid to SunLife from monies recovered in this action. Her combined short-term disability and long-term disability payments for the relevant period totalled $55,919.

[62] Based on her regular hourly rate of pay, she could reasonably expect to earn approximately $35,000 per year, and slightly more if significant overtime or lead position shifts became available. That is reflected in her income in 2016 which was approximately $36,000. She made a similar amount in 2017 but a portion of that was from WCB payments related to her back injury and reduced work hours.

[63] Due to COVID, the plaintiff was laid off in or about March 2020. Swissport ceased operations in or about March 2021.

[64] No evidence was led regarding CERB benefits.

[65] The plaintiff returned to work in approximately August 2022, as an employee at LUSH. Her pay rate is slightly higher than at Swissport, but her hours are less and her tenure is uncertain. It appears from the evidence that she is establishing herself at LUSH and is on track to return to a similar or higher income than she had at Swissport.

[66] Based on an estimated gross annual income of $36,000, I calculate her past losses as follows:

2018	7 months at $3,000/month =	$21,000
2019	12 months at $3,000/month =	$36,000
2020	3 months at $3,000/month =	$9,000
2020	9 months at $1,500/month =	$13,500 (due to reduced service jobs available during COVID)
2021	6 months at $1,500/ month =	$9,000 (due to reduced service jobs available during COVID)
2021	6 months at $2,000/month =	$12,000 (due to reduced but improving number of service jobs available during COVID)
2022	6 months at $3,000/month =	$18,000
	Total gross:	**$118,500**

[67] Pursuant to s. 98 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231, a plaintiff is only entitled to recover damages for past net income loss. In the ordinary course, the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. I therefore reduce the $118,500 figure by 15% ($17,775) to allow for the tax payable, to arrive at a gross amount of $100,725. I reduce that figure by 10% ($10,072) due to the claimant's work injury history and the likelihood that she might well have suffered another workplace injury resulting in 4.9 months time off work. I arrive at a final figure for loss of past earning capacity of $90,652.

LOSS OF FUTURE EARNING CAPACITY

[68] I need not review the law or evidence regarding this head of damage as both the plaintiff and the defendants propose the amount of $35,000 for loss of future earning capacity, and I make that order accordingly.

FUTURE CARE

[69] The defendants do not take issue with the recommendations of Dr. Best regarding the ablation and platelet rich plasma treatments for both sides of the neck and back. The cost is agreed at an estimate of $1,125 per year before the discounted rate. They also agree that the recommended physiotherapy sessions are appropriate at a cost of $1,400–$1,600 per year.

[70] What is not agreed on is the length of time that such payments should continue. The plaintiff says that both the physiotherapy and treatments should continue to age 80. The defence says that the treatments should only continue to age 65, and the physiotherapy to age 70. No reason is provided for any of the positions taken as to age or duration of care. Neither party led any evidence regarding life expectancy.

[71] With a small allowance for non-prescription medications and vestibular rehabilitation, but without allowance for psychological evaluation and counselling or

the knee injury, and after application of the appropriate discount rate, the plaintiff seeks $55,527.25. The defendants propose a global amount of $13,793.11.

[72] Without any evidence about an appropriate duration for treatment in light of life expectancy, I have no alternative but to attempt to apply some type of common-sense approach to the parties' positions. I see no reason why the plaintiff should be left in pain and without the treatments once she reaches the reasonably young age of 65 or without the relief from physiotherapy at age 70. It seems reasonably predictable that she will live beyond 70; it seems less reasonable to predict that she will live to age 80.

[73] In light of this, I award a global amount of $40,000 for future care.

LOSS OF HOUSEKEEPING CAPACITY

[74] As stated above, I have dealt with this head of damage by way of an allowance in the award for non-pecuniary damages.

SPECIAL DAMAGES

[75] There appears to be no dispute regarding special damages. The plaintiff claims the amount of $58,585.05 and subject to deductions arising under s. 83 of the *Insurance (Vehicle) Act*, which deductions must be determined after judgment is given, the defendants accept that figure.

SUMMARY

[76] The following is a summary of the various amounts awarded:

Non-Pecuniary Damages: (including Loss of Housekeeping Capacity):	$110,000.00
Loss of Past Earning Capacity:	$90,652.00
Loss of Future Earning Capacity:	$35,000.00
Future Care:	$40,000.00
Special Damages:	$58,585.05
Total:	**$334,237.05**

COSTS

[77] If the parties are unable to agree on costs, any of them may apply before me on that issue. Such application is to be filed within 30 days of the release of this judgment.

"Caldwell J."