IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. Gibeau*,
2023 BCSC 784

Date: 20230510
Docket: 185128
Registry: Victoria

Between:

Catherine Dianne Lewis

Plaintiff

And:

Tania Nina Gibeau,
George Bridges, and Dianne Bridges

Defendants

Corrected Judgment: The text of the judgment was amended at paragraphs 29, 30, 66, 67 and 68 and the Table of Contents was updated on June 8, 2023

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for Plaintiff:	D. D. McKnight
Counsel for Defendants:	J. A. Hemmerling M. Prah
Place and Date of Trial:	Victoria, B.C. August 29-31, 2022 September 2, 7-8, 2022
Place and Date of Judgment:	Victoria, B.C. May 10, 2023

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I. INTRODUCTION

[1] The plaintiff, Catherine Dianne Lewis, was injured in a motor vehicle accident on December 9, 2016, close to Ladysmith, British Columbia, while she was a front seat passenger in a vehicle owned and operated by Dianne and George Bridges respectively. While Mr. Bridges was making a permitted left turn at a controlled intersection, it was struck on the passenger side by a vehicle owned and operated by the defendant Tania Gibeau, who had failed to stop for a red light. The impact was significant.

[2] Liability has been admitted on behalf of all of the defendants. The trial proceeded on the issues of causation and assessment of damages.

II. WHAT INJURIES DID THE ACCIDENT CAUSE?

A. Injuries the parties agree on

[3] There was a great deal of consensus between the parties with respect to a number of injuries that were caused by the accident.

[4] The defendants reasonably concede the plaintiff suffered a mild traumatic brain injury ("MTBI") as a result of the accident, as well as chronic left-sided neck pain and stiffness and associated headaches, although the defendants take the position those headaches and left neck pain can be largely controlled with various treatments.

[5] I agree with the defendants that the plaintiff's neck pain and headaches have become less severe since the accident, and can be controlled for a time with injection treatments, which the plaintiff has so far found to be beneficial. However, I find the accident has left the plaintiff with ongoing pain in the left side of her neck as well as frequent associated headaches and that those conditions are permanent. While the pain can be managed through treatment, which in and of itself is fairly invasive, the underlying injuries and the pain they cause have not been eliminated.

[6] The plaintiff also argues the evidence establishes that the accident probably caused her to suffer post-traumatic brain injury syndrome following the MTBI,

chronic right shoulder and shoulder girdle pain, and a secondary adhesive capsulitis (also known as frozen shoulder), as well as psychological and emotional injury in the form of depression and anxiety. The defendants deny these aspects of the plaintiff's claim.

B. Cognitive and psychological symptoms

[7] Dr. Kemble, a neurologist, testified as part of the defendants' case. He assessed the plaintiff in April 2022. Dr. Kemble has been a practising neurologist since 1971. His memory and recall about various aspects of the assessment was somewhat frail. In his report, Dr. Kemble notes that during his assessment he observed the plaintiff was "functioning normally in terms of her cognition". However, based on the limited testing he did in order to reach that conclusion, I do not place much weight on that aspect of his opinion. Dr. Kemble recognized the plaintiff continued to suffer from anxiety. Based on the evidence of the lay witnesses at trial, including but not only the plaintiff, I also find as a fact that she has been suffering from some low mood symptoms resulting from the accident. I find the accident caused the plaintiff to suffer very minor cognitive and psychological symptoms, namely some occasional dizziness as well as mild forgetfulness, but that those have now resolved. However, her anxiety and low mood symptoms persist and are likely permanent.

C. Post-traumatic brain injury syndrome

[8] I am satisfied that the accident has also probably left the plaintiff with post-traumatic brain injury syndrome. That is the opinion of Dr. Donald Cameron, a neurologist, who was not cross-examined by the defendants. Post-traumatic brain injury syndrome can be a sequelae of an MTBI. Symptoms of post-traumatic brain injury syndrome include headaches, dizziness, decreases in balance, decreases in memory, irritability, mood swings, phonophobia, disturbed sleep patterns, decreased interest in socializing, decreased concentration, decreased attention span, decreased libido, photophobia, decreased self-confidence, and decreased self-esteem, all of which have affected the plaintiff since the accident. Even if these

symptoms were not the effects of post-traumatic brain injury syndrome, they are nonetheless symptoms for which the plaintiff is entitled to be compensated given my finding that they have been caused by the accident. However, while some of these symptoms linger, they largely resolved by the spring of 2018.

D. The plaintiff's right shoulder injury

[9] This is the most contentious of the plaintiff's injury claims and there was differing expert opinion on the causation issue.

[10] Dr. Patrick Chin, an orthopedic surgeon who has performed thousands of shoulder surgeries, assessed the plaintiff's condition in April 2021. Dr. Chin was of the opinion the accident had caused and left the plaintiff with chronic right shoulder and shoulder girdle pain, chronic left-sided neck pain and stiffness, and occipital headaches. Dr. Chin's opinion was that within a year of the plaintiff returning to work after the accident, she developed adhesive capsulitis, also known as "frozen shoulder", which in his opinion was probably a consequence of the accident, but a secondary condition to the rotator cuff injury the plaintiff sustained immediately at the time of the accident. Dr. Chin also observed that when the plaintiff returned to work in June 2020 following three months of COVID-19 lockdown during which she was not using her shoulder in the same way, the corresponding increase in workload caused the inflammation in her shoulder joint to significantly worsen to the point where the plaintiff developed "frozen shoulder".

[11] The defendants relied on the physiatry assessment of Dr. Paul Winston. Dr. Winston assessed the plaintiff in April 2022. He is a highly qualified physician, but he acknowledged that he was not provided with all of the medical records which he agreed would have been important in forming his opinion. He also appears to have been somewhat selective in the plaintiff's self-reports he elected to rely on in forming his opinion. On examination, Dr. Winston observed that the plaintiff's right shoulder was "grossly impaired", with significant decreases in most aspects of the right shoulder's ranges of motion. At the time Dr. Winston examined the plaintiff, she was continuing to experience tenderness on the left side of her neck and associated

headaches, as well as ongoing adhesive capsulitis (again, frozen shoulder) in her right shoulder. However, Dr. Winston is of the opinion that the plaintiff's frozen shoulder is not causally a consequence of the accident. While he acknowledges that a frozen shoulder can onset after trauma to the region, in his view "it would be expected to happen within weeks after the motor vehicle collision, not more than three years later". He also places significant weight on the absence of reference to shoulder pain in many of the notes of the plaintiff's treating medical practitioners. In his report he records that "Ms. Lewis' complaints of significant deficits in the right shoulder appear to have arisen late into [sic] of 2020, nearly 4 years after her motor vehicle collision. There is no reason to attribute this to her motor vehicle collision."

[12] Dr. Winston points out that a recent peer-reviewed publication noted that "the largest single group of patients have no detectable underlying cause for their symptoms, known as primary idiopathic frozen shoulder", with persons with diabetes making up the second largest group. However, the plaintiff does not have diabetes. Dr. Winston also notes that the same journal concludes that the "peak incidence of a frozen shoulder is between 40 and 60 years old", an age group within which the plaintiff falls, and another peer-reviewed article found that 69 percent of frozen shoulders were in women, with a mean age of 52, with 54 percent of those frozen shoulders being on the right. Essentially, as I understand Dr. Winston's opinion, because several of the plaintiff's characteristics would place her within statistical groups of individuals who have developed frozen shoulder for no apparent reason, and there is an absence of references to shoulder pain in the plaintiff's clinical notes from the outset following the accident, his opinion is that the accident did not cause the plaintiff's frozen right shoulder.

[13] However, within a very short period of time after the accident, there are references in the plaintiff's clinical notes that demonstrate she was experiencing pain in her right shoulder that radiated down her arm, which was aggravated with lifting the hairdryer at work, and almost immediately she began to experience significant restriction of her right shoulder's range of motion, as well as a lot of "clicking" in her right shoulder. Again, I wish to emphasize this is not information that was made

available to Dr. Winston when he was asked to provide his opinion. Given that a significant fact upon which Dr. Winston's opinion is based, namely that the plaintiff did not experience shoulder pain shortly after the accident, is not supported by the evidence, I would place less weight on his opinion for that reason.

[14] I find the plaintiff's frozen shoulder was caused by the accident. Even in the immediate aftermath of the accident, the plaintiff had pain in her shoulders, even though this was not her predominant symptom. Her right shoulder was worse after the plaintiff returned to work after the initial COVID-19 lockdown, but it had not healed before the onset of COVID-19. I prefer the evidence of Dr. Chin to that of Dr. Winston, because of the frailties I have already outlined with respect to the limited information Dr. Winston had available to him upon which to base his evidence.

III. WHAT IS A FAIR AND REASONABLE ASSESSMENT OF THE PLAINTIFF'S DAMAGES?

A. Non-pecuniary damages

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

[16] Non-pecuniary damages are to be assessed in accordance with the non-exhaustive list of factors articulated in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

(a) age of the plaintiff;
(b) nature of the injury;
(c) severity and duration of pain;
(d) disability;
(e) emotional suffering;
(f) loss or impairment of life;

(g) impairment of family, marital, and social relationships;

(h) impairment of physical and mental abilities; and

(i) loss of lifestyle.

[17] A plaintiff whose stoicism leads them to continue to work when it would be reasonable for them to not work should not be penalized for their grit: *Giang v. Clayton*, 2005 BCCA 54 at paras. 54–55.

1. What was the plaintiff's condition before the accident?

[18] At the time of trial the plaintiff was 59 years old. She had been married to John Lewis, who also testified at the trial, for 40 years. They have two daughters as well as two granddaughters, aged three and four.

[19] Prior to the accident, the plaintiff was very healthy. She attributes much of this to the fact that she had a kidney removed in 2011, which she found to be a wake-up call. After that experience she took great strides to become healthy and fit. Her efforts were successful. At the time of the accident she was extremely physically fit. She attended high intensity kickboxing classes frequently and would jog the 10–15 minutes' distance to and from those classes. She was an avid runner, heading out two or three times per week for 8–10 kilometre runs. She completed a mountain biking trek in early 2016 and attended spin classes in the winter months.

[20] At the time of the accident, other than the occasional headaches, the plaintiff had no significant or related health complaints. She was a very confident woman and had good self-esteem. She enjoyed socializing, slept well, and had a healthy libido. She had no problem with her memory or concentration nor did she suffer from confusion at all. She was able to plan and organize well. Her emotional state was good.

[21] Before the accident the plaintiff and her husband were "boaters" and had a 30-foot cruiser which she helped to navigate. They owned fishing boats and had a campsite in Port Renfrew where they would spend many weekends from May through September. None of these activities caused the plaintiff any problems.

[22] The couple's division of labour saw the plaintiff being responsible for all of the housework inside their 1800 square foot home, paying the household bills, cooking, grocery shopping, and most of the gardening, other than the lawn mowing of their one-quarter acre property, which they shared. The plaintiff was able to do all these tasks without pain or discomfort.

[23] In short, the plaintiff was a healthy, vibrant, middle-aged woman, living an active life but also approaching her golden years.

2. What was the plaintiff's condition after the accident?

[24] In the weeks immediately following the accident the plaintiff had pain "all over" but the pain was most prominent in her neck, shoulders, and low back and she had a terrible headache. She had trouble sleeping. She experienced a constant taste of metal in her mouth, although that subsided fairly quickly. She was very fatigued and found it hard to concentrate.

[25] After taking ten days off work, she returned to working four days per week. Her testimony was that her hours were limited to three to four hours per day.

[26] In the weeks and months following the accident her pain continued and has not abated. Not only does she continue to suffer pain in her left neck and right shoulder, as well as a significant reduction of her range of motion in that shoulder, the impact her injuries have had on her lifestyle and her physical abilities has caused her tremendous emotional suffering. Whether considered within the above factors as an aspect of emotional suffering or impairment of life or lifestyle, or as a separate factor, the emotional impact on a plaintiff's feeling of sense of self-worth and their personal identity arising from the interruption of their work life and career can also be relevant to the assessment of non-pecuniary damages: *Burdett v. Eidse*, 2010 BCSC 219 at para. 212, rev'd in part on other grounds 2011 BCCA 191; *Lai v. Griffin*, 2020 BCSC 377 at paras. 77–78.

[27] The plaintiff has undergone massage therapy, acupuncture, physiotherapy, and chiropractic treatments. She stopped massage therapy on the advice of a

physician, and ended her chiropractic treatment when it was no longer covered by ICBC, although she continues to attend physiotherapy, which she pays for herself. She has also undergone nerve block injection therapy for her neck pain (covered by British Columbia's Medical Services Plan) which provides some relief, albeit temporarily. Although the same treatment was trialed for her right shoulder, there was little to no pain relief benefit obtained. She has done all the exercises recommended to her by her physiotherapist. In fact, she has done everything her treating medical practitioners have recommended.

[28] As at the time of trial, the plaintiff's primary symptoms remain ongoing pain, weakness, and stiffness in her right shoulder area, although she also continues to suffer pain and stiffness to the left side of her neck, as well as painful headaches. The plaintiff receives medial branch nerve block injections approximately every six months which provide a significant degree of improvement of symptoms and pain relief. However, following an injection, the benefits of this treatment wear off over time. The injections provide some relief to the point where she would describe her neck symptoms as having improved to 60–70 percent, which she finds to be more tolerable.

[29] Today, the plaintiff has pain every day. She does not socialize, read, or travel as frequently or as easily as she did before the accident. She is able to do some recreational activities, such as painting, and is now able to help with some of the household tasks, such as preparing dinner. She has difficulty doing some household tasks, such as putting fitted sheets on the bed, dusting high surfaces, and carrying laundry baskets. Nonetheless she continues to do many housekeeping tasks, including watering and working in the garden. The difference in the before and after-accident condition and situation of this plaintiff is marked. Whereas before the accident she felt energized and excited about where her life was going, she now feels hopelessness for the future.

[30] Where a plaintiff has suffered a true loss of housekeeping capacity because their injury would make a reasonable person in the plaintiff's circumstances unable

to perform usual and necessary household work, that loss may be compensated by a pecuniary damages award, whereas where a plaintiff suffers a loss more in the nature of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award: *Kim v.* Lin, 2018 BCCA 77 at para. 33. The plaintiff does not seek a segregated award for loss of her homemaking capacity but asks that the impact of her injuries on her ability to care for her home be taken into account in assessing general damages. In my view this is appropriate and I have done so.

[31] The plaintiff argues non-pecuniary damages of $250,000 should be awarded, relying on the following cases:

- *Dubitz v. Knoebel*, 2019 BCSC 1706 - $180,000 ($206,454.95 present day value)
- *Sundin v. Turnbull*, 2017 BCSC 15 - $175,000 ($209,218.63 present day value)
- *Dornan v. Stephens*, 2019 BCSC 701 - $200,000 ($229,394.39 present day value)
- *Mickelson v. Sodomsky*, 2019 BCSC 806 - $200,000 ($229,394.39 present day value)
- *Tan v. Mintzler and Miller*, 2016 BCSC 1183 - $210,000 ($254,988.27 present day value)
- *Harrington v. Sangha*, 2011 BCSC 1035 - $210,000 ($273,140.70 present day value)
- *Adamson v. Charity*, 2007 BCSC 671 - $200,000 ($279,567.96 present day value)
- *Sirna v. Smolinski*, 2007 BCSC 967 - $200,000 ($279,567.96 present day value)

[32] According to the defendants, the appropriate award for non-pecuniary damages in this case is $110,000, based on the following cases:

- *Chai v. Greenwood*, 2020 BCSC 1294 - $120,000 ($136,427.53 present day value)

- *Ingram v. Munroe*, 2019 BCSC 234 - $110,000 ($126,166.91 present day value)
- *Laybolt v. Baylis*, 2021 BCSC 1798 - $110,000 ($122,371.06 present day value)

[33] In my view, this case is most analogous to *Mickelson*. In *Mickelson*, the plaintiff also lived an active lifestyle prior to the accident, and was involved in a similar motor vehicle accident which caused injuries to her head and neck, including an MTBI. The injuries altered the plaintiff's previously vibrant personality and resulted in the termination of her career plans. However, each case turns on its own facts. Taking into account all of the evidence, the applicable legal principles, and the helpful submissions of counsel, I assess the plaintiff's non-pecuniary damages at $220,000.

B. Loss of earning capacity

1. Applicable legal principles

[34] Both past and future loss of earning capacity claims involve the consideration of hypothetical events as well as positive and negative contingencies: *Gregory v. Insurance Corporation of British Columbia,* 2011 BCCA 144 at para. 33; *Hussack v. Chilliwack School District No. 33,* 2011 BCCA 258 at paras. 92–93; *Falati v. Smith*, 2010 BCSC 465 at para. 41, aff'd 2011 BCCA 45; *Cook v. Symons*, 2014 BCSC 1781 at para. 218. In considering past loss, the Court is to examine the plaintiff's actual post-accident working life and determine what their past working life would have been but for the accident. When considering future loss of earning capacity, the Court determines a plaintiff's future earning trajectory without, and with, the accident. The relevant past or future hypothetical will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27, 1996 CanLII 183; *Grewal v. Naumann*, 2017 BCCA 158 at para. 48; *Kim v. Morier*, 2014 BCCA 63 at para. 8.

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

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

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

2. Analysis

[37] Prior to the accident, the plaintiff's work as a stylist and salon proprietor involved two separate physical aspects. The first involved the actual styling services she provided to clients—shampooing clients' hair, haircuts, blow-drying hair, and using different tools to complete the style—all of which involved significant use of the plaintiff's arms, shoulders, upper back, and neck. Her arms were lifted a significant portion of the time. She would frequently juggle two clients at once, working on parts of one client's treatment while another client's colour or perm was setting, and had no difficulty coordinating and completing multiple tasks concurrently. In addition to that aspect of the plaintiff's work, there were tasks associated with stocking the salon and sweeping the floor. Prior to the accident the plaintiff had no problem doing any of the tasks associated with either aspect of her work at the salon and routinely successfully completed all aspects of her work without pain or discomfort. She worked Tuesday through Friday, for eight to ten hours per day. She was not tired at

the end of the day. She loved her job and would regularly post highlights of her work on social media.

[38] After the accident the plaintiff was unable to work for ten days, returning on December 27, 2016. She testified she returned to work, still working Tuesday through Friday, but only for three to four hours per day. The evidence is unclear as to how long that pattern of work continued.

[39] The plaintiff testified that after returning to work she was not able to perform her job effectively. Noise in the salon caused her confusion, she could not adequately follow client card instructions, and she made some basic but significant errors. However, her client base remained stable; she lost some clients, but gained others.

[40] The plaintiff also had physical difficulty lifting her arms constantly to perform the routine tasks of hairdressing. Her clients would need to sit lower in the chair for the plaintiff to be able to do her work. Some dried their own hair. Nonetheless, the plaintiff agrees that at some point her hours increased.

a) Does the evidence disclose a potential future event that could lead to a loss of capacity?

[41] I am satisfied the evidence discloses a potential future event that could lead to a loss of capacity, namely the plaintiff's ongoing neck and shoulder injuries and her consequential reduced physical abilities.

b) Does the evidence disclose a real and substantial possibility that the future event will cause a financial loss to the plaintiff?

[42] I am also satisfied the evidence discloses a real and substantial possibility that the plaintiff's ongoing neck and shoulder injuries have caused, and will continue to cause, a financial loss to the plaintiff.

c) What is the value of that possible future loss, given the relative likelihood of it occurring?

[43] The plaintiff asks that damages for past loss of earning capacity be assessed at $46,271, based on the "rough and ready" approach to such assessment: *Martin v. First Truck Centre Vancouver Inc.*, 2020 BCSC 240 at para. 173; *Moini v. Liang*, 2016 BCSC 702 at para. 85; *Lai v. Griffin*, 2020 BCSC 377 at para. 106. The plaintiff seeks damages of $529,830 for her loss of future earning capacity.

[44] The plaintiff's claim for past and future loss of earning capacity is based on an assumption that the plaintiff's annual net income has been $8,483.66 per year lower since the accident, and that because of the accident the plaintiff will suffer an annual loss at the same rate until retirement, and that she "might very well have worked until the age of 70" but for the accident.

[45] In *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 10, the Court of Appeal identified several factors relevant to assessing the erosion of a plaintiff's capital asset representing their ability to earn income in the future:

> [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
>
> [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to them, had he not been injured; and
>
> [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[46] The plaintiff's injuries have left her in a compromised physical condition. Considering the factors set out in *Rosvold*, I have no hesitation in finding the plaintiff's income-earning capacity, past and future, has been eroded. There are tasks that she no longer can do, or do as well, which renders her less capable of earning income after the accident than she was before. The plaintiff is no longer able to stand, sustain neck flexion, reach above her shoulder, or reach forward to the extent required as a hairstylist. But the question remains, to what extent is she compromised?

[47] The challenge with respect to the plaintiff's loss of earning capacity claim is the valuation of that loss, both past and future. This is the function of several factors as well as several negative contingencies which serve to decrease the value of her loss.

[48] The plaintiff was unable to provide sufficiently detailed reliable evidence about her reduced hours worked after the accident, which affects her past loss of earning capacity claim, as well as reliable forecasting about her future loss. The plaintiff did not calculate her loss of income before her retirement in January 2022, but testified she missed ten days following the accident. With respect to the reduction in her hours of work that followed, I find the plaintiff's evidence to be unreliable. I do not suggest that the plaintiff was not a credible witness; I find that she was. But an honest and sincere witness can nonetheless be mistaken and as a result provide unreliable evidence: *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.). In this case, the plaintiff's ability to recall and convey the actual hours that she worked subsequent to her return to work in late December 2016 was not reliable. There was no other evidence led to fill the void left by the plaintiff's own testimony.

[49] Further, I am not satisfied the evidence is capable of anchoring a finding that it was a real and substantial possibility the plaintiff would not have retired until age 70 but for the accident. Her evidence was that she only knows a handful of stylists that have worked into their 60s. At the time of the accident the plaintiff had been working in hairstyling for almost four decades. She had left high school in grade 10, went directly to hairdressing school in the summer of that year at age 17, and 12 months later had obtained her diploma in hairdressing from a school in Nanaimo, British Columbia. She secured a job right away as an apprentice, worked at a few salons thereafter, and has worked steadily in that field ever since. Hairstyling, by the plaintiff's own evidence, is a physically demanding profession. The plaintiff was approaching 60 when she decided to retire.

[50] The plaintiff eventually started her own business—Twisted Scissor Lounge—with two other stylists. Their business model involved each stylist operating their own business independently, but all three were signatories on the salon's lease and they shared monthly expenses. When the salon's lease came up for renewal in June 2021, for the first time the plaintiff did not sign the renewal. However, by that time the business was already undergoing significant changes, with one of the plaintiff's two co-stylists having left the business in May of that year.

[51] By January 2020 the plaintiff decided to compress her schedule and work only three days per week instead of four, but according to her evidence those days were much longer. Compressing her work week to Tuesdays through Thursdays, instead of Tuesdays through Fridays, allowed the plaintiff to enjoy four-day weekends with her husband. The plaintiff's husband had retired from his full-time job shortly before the accident. This decrease in her work week was consistent with the plan the plaintiff had before the accident to begin to reduce her work schedule. The plaintiff enjoys spending time with her husband and her grandchildren. The plaintiff had begun helping with the care of her grandchildren before retiring and was able to dedicate more time to doing so after her retirement.

[52] For all of these reasons I am not satisfied the plaintiff would have worked until age 70 but for the accident. I find it more likely that she would have retired at age 65, which is a common age of retirement.

[53] I have found that the plaintiff's injuries caused some erosion of her income earning capacity, and I acknowledge, as a matter of common sense, that persistent and enduring pain can have an adverse impact on a person's ability to persevere in their efforts to earn income: *Morlan v. Barrett*, 2012 BCCA 66 at para. 41. I also accept that there may be cases where, when a plaintiff concludes that the pain associated with the physical demands of their work is going to continue unabated and indefinitely, it may be considered reasonable for them to decide that the satisfaction and financial benefit arising from their work "is simply not worth the price" in terms of physical discomfort and fatigue: *Austin v. Reardon*, 2014 BCSC 37

at para. 72. However, compressing her work week also meant the plaintiff did not have the benefit of the physical respite and recovery time that staggering her work days could have provided. Ms. Ashea Neil, an occupational therapist who conducted a functional capacity evaluation of the plaintiff in May 2022, and who testified as part of the plaintiff's case, is of the opinion that the plaintiff's symptoms and limitations caused by her frozen shoulder meant "she is likely restricted to part-time work of 3 to 5 hours daily for 3 days a week (alternating)" (emphasis added). It is a real and substantial possibility that if the plaintiff had staggered her work days she would have been able to continue to work, even the longer days she had elected to take on. That is a negative contingency which I take into account.

[54] There is also a real and substantial possibility the plaintiff's frozen shoulder will improve, which is a negative contingency. The medical opinion evidence establishes there is a real and substantial likelihood the plaintiff's frozen shoulder will resolve and her symptoms significantly improve at some point in the future, although the time frame is uncertain. According to orthopedic surgeon Dr. Patrick Chin, frozen shoulders resolve spontaneously 85 percent of the time, without surgical intervention, often within 12 to 24 months. Dr. Chin was also of the opinion that surgery could be a viable treatment option for the plaintiff.

[55] In addition, the plaintiff's income remained relatively stable in the years before and after the accident, until the COVID-19 pandemic hit in 2020, despite her evidence that she reduced the number of hours she worked. In advancing her claim for past and future loss of earning capacity, the plaintiff uses an earnings approach based on her net (of business expenses, not income tax) income. However, in my view net (of expenses) business income is not the appropriate metric to use to assess the plaintiff's actual earning capacity, and any decrease thereof, because business expenses are not a direct function of a plaintiff's capacity to work. The plaintiff's gross business income provides a far more accurate measure in that regard, since it reflects the income she is capable of generating.

[56] While the plaintiff received some tips in cash, and was candid that she may not have fully reported that income on her income tax returns, her income tax returns reflected the vast majority of her income. Her gross and net business income in the years leading up to, and those since the accident, was as follows:

	Gross business income	**Net business income**
2014	$70,514	$50,465
2015	$69,279	$50,863
2016[1]	$65,172	$46,720
2017	$65,851	$47,556
2018	$66,948	$47,466
2019	$62,552	$45,477
2020[2]	$48,501	$33,116
2021	$51,996	$33,947
2022[3]		$2,833

[57] The vast majority of the plaintiff's business income was earned from the sale of styling services, with only a small portion coming from the sale of styling products. The evidence establishes the plaintiff's gross business income increased the first two years after the accident, dropped only slightly in the third, before dropping because of the COVID-19 pandemic in 2020. Even assuming some increase in the

[1] The accident occurred on December 19, 2016.
[2] COVID-19 resulted in the closure of hair salons for approximately three months between March 2020 and June 2020.
[3] Up to her date of retirement on January 27.

price of her salon services, her earnings history is simply inconsistent with her working, or earning, significantly less following the accident.

[58] In addition, I do not consider the methodology employed by the plaintiff to be a reliable means by which to assess the plaintiff's damages for past or future loss of earning capacity. The plaintiff's claim for past loss of earning capacity is based on an annual loss of $8,486.66 per year, being the difference between the plaintiff's net business income in 2015 (the year before the accident) and the average of her net business income earned in 2016–2021, for a total of $49,488, from which the plaintiff then backed out three months (3 x $706.97), to account for the three-month lockdown for COVID-19 in 2020.

[59] I am not satisfied that approach adequately accounts for the impact of COVID-19 beyond the three-month lockdown. Further, while the plaintiff's methodology subtracts three months for the lockdown, that three-month period is included in the method by which the plaintiff determined the average post-accident income, which has the effect of skewing the annual average down, for no reason related to the accident.

[60] The typical means of approaching a loss of earning capacity when there is no identifiable loss of income, as is the situation in this case, is the capital asset approach, where the Court makes an award for the plaintiff's loss of opportunity: *McKee v. Hicks*, 2023 BCCA 109 at para. 77; *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 17.

[61] However, regardless of whether the earnings approach or the capital asset approach is used, as I understand the position advanced by the plaintiff *vis-à-vis* her past loss of earning capacity, she argues it is only by virtue of her stoicism that she was able to continue to work through the pain and earn what she did, and that but for the impact of her injuries caused by the accident, the plaintiff could have earned more. As I understand the plaintiff's position with respect to her future loss of earning capacity, it is that but for the accident she would not have retired until later.

[62] In my view, that is a logical position, based on the fact that the plaintiff had been working as a hairstylist for almost 40 years and had a reliable client base. For all these reasons, it seems to me that this is one of those circumstances where it is appropriate to use the capital asset approach to assess the plaintiff's loss of earning capacity. In doing so I recognize that while the capital asset approach can be appropriate where it is difficult to quantify a loss, that approach is not a panacea for situations where what could have been proven, or at least given some evidentiary foundation, was not proven or given an evidentiary foundation: *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 33, citing *Gao v. Dietrich*, 2018 BCCA 372 at para. 62. Even when using a rough and ready approach, the Court should, as much as possible, ground itself in factual and mathematical anchors: *Broman v. Pang*, 2023 BCSC 353 at para. 150, citing *Knapp v. O'Neill*, 2017 YKCA 10 at paras. 17–19.

[63] I have taken into account the prescribed discount rate that must be used in calculating the present value of damages intended to compensate a plaintiff for future loss of earning capacity: *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 56(2)(a); *Law and Equity Regulation*, B.C. Reg. 352/81, s. 1. Using a rough and ready approach, I would assess the plaintiff's past net[4] loss of earning capacity and future earning capacity globally at $89,641.02, based on two years of her average net business income[5]: *Hau v. Patterson*, 2020 BCSC 1069 at paras. 176–180.

[64] I have endeavoured to do the best with the evidence available to me in order to arrive at an assessment of damages that is fair and reasonable to all parties.

[4] *Insurance (Vehicle) Act,* R.S.B.C. 1996, c. 231, s. 98.

[5] I have calculated the plaintiff's average net monthly income for 2020 by dividing her net annual income by nine months to account for the three-month closure of her business due to the COVID-19 lockdown. This yielded an average net monthly income of $3,679.55 which, had the plaintiff's business been open all year, would likely have resulted in a net annual income of $44,154.67. This figure was averaged with the rest of her net annual income figures between 2014–2021.

C. Special damages

[65] The parties agree the accident caused the plaintiff to incur $6,397 for out-of-pocket expenses for which she is entitled to be compensated. I award the plaintiff special damages in that amount.

D. Costs of future care

[66] Future care costs are awarded to compensate the plaintiff for the value of services that are to be rendered to them: *Fatin v Watson*, 2018 BCSC 306 at para. 47, citing *Westbroek v Brizuela*, 2014 BCCA 48 at para. 74. Damages for cost of future care require a prediction about the future which is unknown. Because damages are assessed once and for all time at trial, the Court must peer into the future and fix the damages for future care as best it can: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. Where a plaintiff establishes a real and substantial risk of incurring such costs in the future, they are entitled to compensation for reasonable costs of future care that are medically justified to preserve and promote a plaintiff's physical and mental health: *Peters v. Ortner*, 2013 BCSC 1861 at para. 141, as cited in *Carmody v. Druex*, 2022 BCSC 891 at para. 124; *Warick v. Diwell*, 2017 BCSC 68 at paras. 202–209, aff'd 2018 BCCA 53; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 144. Medically justified is something less than medical necessity, and only requires some evidence the expense claimed is directly related to the disability arising out of the accident, and incurred with a view toward ameliorating its impact: *Harrington* at para. 151; *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33 at 83–84, 1985 CanLII 179 (S.C.), aff'd 49 B.C.L.R. (2d) 99, [1987] B.C.J. No. 1833 (C.A.). Medically justified means a reasonably-minded person of ample means would be ready to incur a particular expense: *Andrews* at 245.

[67] I dismiss the plaintiff's claim for future costs of housekeeping services for the reasons set out in paragraph 30 of these reasons for judgment. Further, in my view the division of housekeeping labour between the plaintiff and her husband reflects

the “normal give and take” that is necessarily part of family life, making future housekeeping costs unreasonable.

[68] With respect to the other pecuniary future care costs pursued by the plaintiff, I find there is a real and substantial risk that in the future the plaintiff will incur the following reasonable costs of future care, all of which I conclude are medically justified to preserve and promote this plaintiff’s physical and mental health.

1. Prescriptions and supplements

[69] Dr. Cameron was of the opinion that the plaintiff was a candidate for daily pain medication, such as gabapentin, Lyrica, amitriptyline, and nortriptyline. The plaintiff has found amitriptyline to be ineffective, but some other form of daily pain medication, without components to which she would be allergic, will probably give her some pain relief. Based on Ms. Neil’s evidence, I would estimate the annual cost of such medication to be $158 over her expected lifetime, which I find to be the average mortality of a female in British Columbia who was born on March 18, 1963.

2. Physiotherapy

[70] The plaintiff has attended physiotherapy for several years and has found that treatment to be of benefit. Dr. Chin is of the opinion that physiotherapy treatment should continue. Ms. Neil’s opinion is that monthly physiotherapy would be appropriate for the next two years, and thereafter decreasing frequency to a maintenance level of four to six sessions per year to manage pain flares. Again, those recommendations are supported by the evidence and are reasonable. I would estimate the cost of physiotherapy to be a total of $2,000 for the next two years, and $500 annually thereafter for her expected lifetime.

3. Psychotherapy

[71] Dr. Cameron recommends the plaintiff be referred to a psychiatrist or psychologist to address her symptoms of decreased self-confidence, anxiety, and decreased self-esteem, which were caused by the accident. The plaintiff saw a psychologist for a while but COVID-related health restrictions and the cost of

treatment were both barriers. I find some short-term psychological treatment would probably be beneficial to the plaintiff, and that the cost of such treatment as estimated by Ms. Neil is reasonable.

[72] I would allow 20 sessions, at an average cost of $200 per session, for a total estimated future cost of $4,000.

4. TENS machine replacements

[73] The plaintiff uses a TENS machine for pain relief, which will need replacing probably every five years over her expected lifetime, at an estimated cost of $69 per year.

5. Kinesiology

[74] Dr. Chin recommends an active rehabilitative exercise program, which Ms. Neil opines would effectively be overseen by a kinesiologist and would involve between 10–15 sessions at an average cost of $90 per session. I assess $1,200 as the total future cost for that form of treatment.

6. Conclusion on future costs of care

[75] Taking into account the evidence, the applicable legal principles, and the parties' submissions, I assess damages for the plaintiff's future costs of care for psychotherapy and kinesiology at $5,200.

[76] In the economist report of Mr. Robert Wickson, who gave evidence as part of the plaintiff's case, he provides, at page 5, that "a cost continuing for the entire life of a female in British Columbia who was born on March 8, 1963 would have a present value equal to 20.757 times the annual cost". However, based on Table 1 of that report, it appears that factor presumes the annual costs will be incurred to age 109.5. I am not comfortable with that assumption. Unfortunately, I am unable to determine the average age of mortality of a female in British Columbia who was born on March 18, 1963 based on the evidence led at trial and it is not a fact of which I feel I am able to take judicial notice. Therefore, I order that the total amount of damages for the plaintiff's costs of future care are to be assessed in accordance with

these reasons. For clarity, the costs that I have determined to be annual costs that the plaintiff will incur for her lifetime are to be assessed by applying the cumulative continuing factor referred to in Mr. Wickson's report to the average mortality of a female in British Columbia who was born on March 18, 1963, according to Statistics Canada. If the parties are unable to agree on the amount, the matter shall proceed to a reference before the Registrar: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, R. 18-1(1).

E. In trust award for John Lewis

[77] The plaintiff seeks an in trust award of $30,000 for the benefit of her husband, to compensate him for the increase in domestic responsibilities he undertook following the plaintiff's accident and consequent injuries. However, the plaintiff acknowledges that I have no evidence about the amount of time Mr. Lewis spent contributing to cleaning the plaintiff's salon. Further, I would not include cleaning of the home and related domestic tasks as being "services necessary for the care of the plaintiff", since those are tasks that are not done simply for the benefit of one spouse: *Frankson v. Myre*, 2008 BCSC 795 at para. 51, citing principles set out in *Bystedt (Guardian ad litem of) v. Bagdan*, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124. Further, household contributions by a family member must be "over and above" what would be expected in a spousal relationship in order to support an in trust award: *Frankson* at para. 51. I also have an insufficient evidentiary basis to make a determination about the market cost of obtaining the services for which the in trust award is sought, or the time spent or the quality of the tasks Mr. Lewis performed: *Frankson* at para. 51.

[78] I find that the services provided by Mr. Lewis did not go above and beyond that which would probably be expected in a long-term relationship.

IV. SUMMARY

[79] Having considered the totality of the evidence, the applicable legal principles, and the submissions of counsel, for the reasons given, I am satisfied this is a fair and reasonable damages award.

V. COSTS

[80] The plaintiff sought leave to speak to the issue of costs after judgment. If the parties cannot agree on costs, within 30 days of these reasons either party may submit the appropriate online form to request to appear before a particular judge in order to schedule a time to appear before me to make submissions on that issue.

"V. Jackson J."