IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gill v. Bahman,*
2024 BCSC 1453

Date: 20240809
Docket: M185746
Registry: New Westminster

Between:

Shinder Kaur Gill

Plaintiff

And:

Danaei-Manesh Bahman and Sunshine Cabs Limited

Defendants

Before: The Honourable Justice Whately

Reasons for Judgment

Counsel for the Plaintiff:	S. Wittman G.A. Smith
Counsel for the Defendants:	K. Dhaliwal A. Frempong
Place and Date of Trial:	New Westminster, B.C. January 15-19 and 23-26, 2024
Place and Date of Judgment:	New Westminster, B.C. August 9, 2024

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[1] On May 23, 2015, the Plaintiff, Shinder Kaur Gill was travelling eastbound on 33rd Avenue approaching Commercial Street in Vancouver, British Columbia when she was rear-ended by a taxi (the "Accident"). Danaei-Manesh Bahman was driving the taxi, which was owned by Sunshine Cabs Limited (the "Defendants"). Mrs. Gill claims damages for injuries she sustained as a result of the Accident.

[2] Liability has been admitted and the Defendants did not personally appear at trial. I will refer to them as the Defendants in these reasons, and mean no disrespect in doing so. The assessment of Mrs. Gill's claim for damages is the only issue before the Court.

Background

Pre-Accident

[3] Mrs. Gill was born in India and came to Canada with her family in 1969. She married her husband, Resham Gill, in 1982 and they have three adult children—Reshina, Raymond and Selina—and four grandchildren. Mrs. Gill was 55 years old on the date of the Accident. She was 64 years old at trial.

[4] By all accounts, the Gill family enjoyed close relationships that centred on the strong cultural and family bond created by Mrs. Gill and her husband during their long marriage.

[5] Soon after her marriage to Mr. Gill, Mrs. Gill embarked on her life-long career as a senior care aide. She attended the Care Aide Program at Vancouver Community College, and began working at Little Mountain Place ("Little Mountain") in 1987. Mrs. Gill worked at Little Mountain for over 30 years until her retirement in 2019.

[6] For the majority of her career, Mrs. Gill worked in the special care unit at Little Mountain. The residents in this unit are of ages that range from 55 to over 100, and have needs that range from low to extended care. Many residents have dementia. Mrs. Gill testified that in the early 2000s changes to provincial health care meant that

residents requiring extended and complex care, and even psychiatric care were all placed in the same units. This made an already difficult job even more challenging.

[7] Little Mountain cares for 120 residents, 60 to each resident floor, with a main floor for dining and activities.

[8] Mrs. Gill worked both day and evening shifts. She would usually work three days and two evenings, but her schedule would often change. The day shift started at 7:00 a.m. and ended at 3:00 p.m. The evening shift started at 3:00 p.m. and ended at 11:00 p.m. There were night shifts from 11:00 p.m. to 7:00 p.m., but Mrs. Gill said she did not work any night shifts during the five years prior to the Accident.

[9] Each shift had different duties. Mrs. Gill described the day shift as taking a report from the nurse, managing breakfast, snack and lunch service, and direct patient care, including getting the residents out of bed, and assisting with sponge baths, showers, dining, tea and coffee. The evening shift involves reports, room checks, snacks and dinner at 5:00 p.m., and helping residents get ready for bed.

[10] The work was physically and mentally challenging, as it involved cleaning and physically managing residents with incontinence and mobility issues, as well as significant cognitive challenges. Some residents were non-compliant and combative due to dementia or other health issues.

[11] Some residents could walk, but others were almost entirely incapacitated, and needed complete care and assistance with hygiene, movement and feeding. Certain residents were designated as one-person transfers, and some were two-person transfers, indicating how many aides were required to move the resident from bed or bath to a wheelchair or vice versa. Care aides were required to use mechanical lifts for transfers, but using these lifts also required manual strength and dexterity.

[12] Despite the challenges, it was clear from Mrs. Gill’s testimony that she loved her work and found much satisfaction in caring for the residents of Little Mountain. She described how rewarding it was to look after someone’s loved family member.

She enjoyed hearing the residents' stories, and took pride in providing the care they needed at this stage of life.

[13] Throughout her testimony, Mrs. Gill presented as extremely soft spoken with a mild demeanor. When she described her work, she became notably animated and expressive. Mrs. Gill would occasionally pause her testimony to recount an anecdote or memory about a particular resident. She testified that the staff at Little Mountain supported and helped each other, and were like a family.

[14] Mrs. Gill took similar pride in her role as wife, mother and primary homemaker in the family home. Mr. and Mrs. Gill were true marital partners with shared household duties, but it is clear that the duties were divided along traditional lines. Mrs. Gill did most of the shopping, cleaning and cooking. Mr. Gill did yard work, but Mrs. Gill often helped with raking, gardening and other seasonal yard tasks. Mrs. Gill did the mopping, sweeping, vacuuming, and cleaned the windows inside and out, although Mr. Gill would do the higher up windows requiring a ladder.

[15] Mrs. Gill stated that Mr. Gill would sometimes help her inside the house, and would offer to order take-out for meals, but she loved to cook and took pride in preparing and serving traditional Indian food for her family. She described it as labour intensive, with a lot of stirring, and hand kneading and rolling of roti dough.

[16] Mrs. Gill described herself as picky, with high standards for both cooking and cleaning. She was particular about how things were done in her home, and described herself as having no ongoing or persistent physical limitations in completing her household tasks prior to the Accident.

[17] Selina Gill, Mrs. Gill's daughter, testified that her mother was very outgoing, with a bubbly personality, before the Accident. She was extremely independent, and did not ask for help or rely on assistance from anyone. She described the very traditional household roles in her family, and confirmed that her mother was essentially "in charge" of anything and everything her family needed.

[18] Ms. Gill is now a lawyer and a legal relations advisor. She candidly admitted, with some measure of embarrassment, that prior to the Accident she did not help her mother with household tasks or cooking—no one did. She said that even if they offered, Mrs. Gill would refuse help.

[19] Mr. Gill confirmed this description of his wife, although he did say that he or his children would help Mrs. Gill when she needed help. He described that Mrs. Gill was gentle and kind, and never yelled or screamed during their 42 years of marriage. They spent all their time together, going for walks, going for holidays and having dinners together every night.

[20] Mrs. Gill sustained injuries in two separate incidents prior to the Accident at issue in this trial.

[21] In 2008, Mrs. Gill was involved in a motor vehicle accident in which she suffered injuries to her neck, back and left knee. She undertook physiotherapy treatments and was off work for approximately five to six months, before participating in a six-week gradual return to work program. Mrs. Gill did not experience ongoing symptoms following her return to work.

[22] In 2014, Mrs. Gill was struck by a resident, leaving her with pain in her left arm. She was off work for two weeks, but made a full recovery after approximately a month and a half.

[23] Mrs. Gill confirmed that she had fully recovered from both of these incidents and did not have any symptoms from either prior to the Accident.

Accident

[24] On the afternoon of May 23, 2015, Mrs. Gill was driving a 2008 Honda Civic along 33rd Avenue on her way home from work with a co-worker in the passenger side of the vehicle.

[25] Mrs. Gill had come to complete stop behind traffic when she was struck from behind by the Defendants' taxi. The Honda's airbags did not deploy. Mrs. Gill said

she did not hit her head on the steering wheel, but she recalled feeling her head hit the back head rest as she was forcefully thrown back and forth. She felt pain in her neck almost immediately. She was very shaken at the scene, and felt like she was in shock, such that her co-worker obtained the taxi driver's information on her behalf. Mrs. Gill called her husband after the Accident, but wanted to ensure her co-worker got home safely. Mrs. Gill drove her co worker to the SkyTrain station, and then drove herself home slowly.

[26] Mrs. Gill's vehicle sustained damage to the rear bumper area, which required approximately $1,024 in repairs.

Post-Accident

[27] After the Accident, Mrs. Gill experienced pain in her neck, upper back, shoulder blades and lower back. She also described having headaches and sleep disruption due to pain.

[28] Mrs. Gill attended at her family doctor's clinic two days after the Accident, on or around May 25, 2018. The attending physician at the clinic, Dr. Ting, told Mrs. Gill to take some time off work and to attend physiotherapy.

[29] Mrs. Gill attended twice a week for physiotherapy and, some time later, massage therapy as well. At physiotherapy, she was provided with instructions for exercises to do at home, which she did.

[30] Mrs. Gill returned to full-time hours and full duties at Little Mountain two months following the Accident, on July 28, 2015. Mrs. Gill testified that she was able to provide personal care to the residents without compromising any standards. However, this was despite her injuries, and not because she was back to her pre-Accident condition. Mrs. Gill testified to the significant changes to her day-to-day work and home life that she experienced following the Accident.

[31] Ms. Gill recalled needing assistance from coworkers for resident transfers. She had difficulty picking up big jugs and trays, and would experience pain when

reaching over her head and reaching forward, especially when putting the sling on a resident for the swinging lift. She would experience headaches that built up over the day after repeating the various movements that caused her pain, such as bending down or moving her neck. She reported getting headaches that would last well into the night, particularly after an evening shift.

[32] Mrs. Gill was asked under cross what efforts she made to minimize the movements that caused pain or triggered headaches. She recalled that while she could use a footstool to minimize reaching for items above her head, this was not always workable because the aides were required to hide footstools from the residents to keep them from harming themselves. She asked for help whenever she could or thought it was reasonable to do so. However, she added that it was the nature of the job that someone might not always be available to help, everyone was busy and had their own jobs to do. Mrs. Gill also still helped her co-workers whenever she was called upon to do so..

[33] Mrs. Gill said that even caring for the smaller residents could be extremely physically taxing if they were non-compliant, and that any personal care she provided, including bathing, dressing and toileting required repetitive bending, squatting twisting and lifting—all of which aggravated her lower and upper back, and triggered headaches. The noise of the facility also triggered headaches over the course of a shift.

[34] Mrs. Gill testified that by the end of a work day, she was completely drained, physically and mentally. She had to sit down with a heating pad, or lie down. She could not cook or clean, and was not able to enjoy spending time with her family the way she used to.

[35] Mr. Gill testified that after the Accident, he could see that Mrs. Gill was in pain, but she would not complain and would not talk about it. She would lie on the sofa or on the floor at times when she never would have needed to do so before. He observed that her sleep was seriously disrupted, such that he felt that anytime he awoke in the night, she was already awake.

[36] Mr. Gill said that Mrs. Gill either dismissed or minimized her pain, even when it was obvious. He would ask to help her, but she would tell him never mind, or not to worry. He said that over time, communication between them dwindled to almost nothing. He said that the lack of communication became like a silent treatment, or like a punishment, which hurt him greatly. He encouraged her to retire from her work, which caused further tension and disagreements between them, as Mrs. Gill did not want to retire.

[37] Selina Gill testified that her mother did not tell her about the Accident right away because she did not want to worry her daughter during her first year of law school in England. When Ms. Gill saw her mother in the summer of 2015, she could see she was experiencing shoulder and neck pain. She required help with housework, which Mrs. Gill had never asked for previously, and she also would see her mother lying on the ground after a work shift, which had also never happened in the past.

[38] Ms. Gill observed that in general, her mother was quieter and far more reserved. She spent less time with Mr. Gill, needed help preparing meals and experienced difficulty preparing the traditional foods she had made in the past. Ms. Gill specifically recalled that during family get togethers around Christmas, Mrs. Gill could not even grate cheese, because that motion was too difficult for her.

[39] Ms. Gill observed that Mrs. Gill's condition appeared to deteriorate in the months following the Accident. Ms. Gill tearfully recalled that when her mother came home from work, she didn't want to cook, spend time with her family, or even talk to anyone. She noted that her father has essentially taken over the housecleaning tasks. Mrs. Gill does still cook, but she requires help. Ms. Gill commented that when she visits now, she spends all of her time in the kitchen with Mr. Gill, which never used to be the case.

[40] A co-worker of Mrs. Gill, Daljit Gill (no relation) also testified. She characterized Mrs. Gill as a "real go-getter" prior to the Accident. After, she was quieter, often grimaced in pain at work even when she was on "light duties". She

said that Mrs. Gill never complained, but she seemed down, and very uncomfortable.

Retirement from Little Mountain

[41] Mrs. Gill testified that even though she required more assistance from co-workers in order to complete many tasks, and she continued to experience pain throughout her workday, she did not receive any complaints from her employers about her work between 2015 to 2019. She testified that she always tried her best at work, and she visibly bristled on the stand at the suggestion that resident care could have been affected by the pain she was suffering.

[42] Mrs. Gill admitted that she did not request any formal accommodations from her employer and she did not consider requesting part-time work. Mrs. Gill's view was that "once you are at work, you are expected to do your job. They are not going to keep you if you can't do your job." She also observed that "part-time" did not significantly reduce the hours in a shift, it may just meant fewer shifts in a week. She remarked: "…there are no four-hour shifts'[and]there are no 'easy' shifts."

[43] Mrs. Gill confirmed her understanding that going to part-time hours would have affected her pension, and that this factored into her rejection of this idea.

[44] Mrs. Gill acknowledged that her family had been urging her to consider retirement as early as 2018. Her husband and children thought she was burnt out and not the same person, particularly when she came home from a shift.

[45] Mrs. Gill did not want to retire or quit her job. Her job at Little Mountain was her life and her routine. She loved being around people, and she liked making a financial contribution to her household. She testified that she did not even want to retire at age 65. She recalled former coworkers who had retired but continued to take on shifts following official retirement, and she planned to do the same.

[46] Mrs. Gill's co-worker stated that she and Mrs. Gill often talked about working until age 65, and confirmed that most care aides work to 65 – she knew this because

she had planned many retirement parties for colleagues over the years. She also confirmed that some care aides worked beyond the age of 65.

[47] In April 2019, Mrs. Gill was asked to meet with her supervisor, and subsequently received a warning letter regarding her "high sick leave of 7.13%", which was "above the [Little Mountain] union average." The letter stated that "if [Mrs. Gill is] able to reduce [her] sick time to below the LMP union average, no further meeting will be required."

[48] Mrs. Gill testified that she was shocked and embarrassed to receive this letter after all the years she had worked without complaint. Mrs. Gill said that she tried her best not to call in sick after the Accident, but she did call in when needed and her pain and headaches had continued to impact her work.

[49] After receiving the letter, Mrs. Gill reconsidered her family's pleas for her to retire. While the letter hastened her decision-making, she now acknowledged that if things continued as they were, she was not any good to her family, given her low mood, and because she was in pain and tired all the time.

[50] On July 31, 2019, Mrs. Gill provided her employer notice of her retirement. She said that her co-workers wanted to give her a party, but she refused any of the usual pre-retirement festivities, or any recognition of her long service. She said she just could not manage it emotionally. Mrs. Gill's last day at Little Mountain was August 31, 2019.

[51] Following her retirement, Mrs. Gill testified that she continues to struggle with pain and low mood. She is not as outgoing as she once was, and she struggles with her inability to keep the house in the manner she once did. She stated that the chores get done, but not to the standard she prefers or that she was once able to maintain, and this bothers her and gets her down. She is unable to cook in the way she did before, which involved making large batches of traditional foods like roti and samosas. Lifting pots and pans and rolling dough causes her pain, as do many other household tasks.

[52] Mrs. Gill confirmed that her relationship with her husband has changed, and that she gets fatigued easily, which makes her feel guilty, because she does not participate in the way she and others expect her to. She continues to experience pain in her upper and lower back, shoulders and neck. Mrs. Gill misses her work. She misses the residents, her co workers and her daily routine. She testified that she feels that a huge chunk of her life is missing.

Experts

Dr. Kwang Yang – Plaintiff's Family Doctor

[53] Dr. Kwang Yang provided a medical report and testified at trial as a qualified family physician, and as Mrs. Gill's family doctor. Dr. Yang confirmed that Mrs. Gill complained of neck and back pain in her initial post-Accident attendance at his clinic. He noted that she continued to report neck and back pain in her visits in the following weeks.

[54] Dr. Yang confirmed that Mrs. Gill was attending physiotherapy twice a week and massage once a week in the months following the Accident. In a note dated October 27, 2015, Dr. Yang recorded that that Mrs. Gill had attended 40 sessions of physiotherapy and 10 massage sessions since the Accident, but that "range of movement of both the neck and back induced pain."

[55] In the notes that followed, Dr. Yang described several subsequent visits from 2015 to May 2017.

[56] Dr. Yang confirmed Mrs. Gill made ongoing complaints of pain and limited range of movement with little to no change during that time. Dr. Yang initially recommended that Mrs. Gill cease physiotherapy but continue with massage and exercise, then that she cease massage and start shock wave therapy, and finally that she return to massage therapy.

[57] As of September 2016, Dr. Yang noted that Mrs. Gill reported that massage provided relief while she was in the appointment, but that her pain would shortly return. Throughout, Dr. Yang advised Mrs. Gill to continue exercises, take

analgesics, and attend massage or other kinds of appointments to address her ongoing symptoms. Mrs. Gill followed her doctor's recommendations.

[58] As of May 2, 2017, the last office visit noted in Dr. Yang's report, Mrs. Gill was still reporting pain, aches and stiffness in her neck and back.

[59] Dr. Yang diagnosed Mrs. Gill with post-traumatic muscular contraction headaches and cervico-thoraco-lumbo-sacro spine strain injuries. He noted that Mrs. Gill was still motivated to work full-time despite her discomfort and pain. He also referred to a pre-existing "degenerative change" in Mrs. Gill's spine, but said that her "frequent headaches, neck pain, upper mid and lower back pain, [and] shoulder pain" arose from the Accident.

[60] In his report, Dr. Yang expressed "concern that if the problems of this pain, aches, stiffness and discomfort of the spine persist […] the prognosis will be quite guarded."

[61] The Defendants raised the issue of a reference to a "frozen shoulder" diagnosis, which first appears in Dr. Yang's clinical notes in or around June 2020. Mrs. Gill testified that she did experience "frozen shoulder" in 2020, resulting in some increased pain and difficulties in completing home tasks in the summer of 2020.

[62] The Defendants urge me to consider this as an intervening event or injury that is unrelated to the Accident injuries.

[63] Mrs. Gill submits that there is no expert evidence with respect to the frozen shoulder, and neither Dr. Yang nor Dr. Helper was asked about an intervening or separate injury on cross.

Dr. Steven Helper – Physiatrist, Plaintiff's Independent Medical Examiner

[64] Dr. Steven Helper was qualified as an expert in physical medicine and rehabilitation, including the diagnosis, treatment and care of disabilities arising from musculoskeletal injury and chronic pain (among other conditions).

[65] Dr. Helper produced two reports pertaining to Mrs. Gill dated February 3, 2017, and August 25, 2019, respectively. Dr. Helper diagnosed Mrs. Gill with:

- Central and right sided neck pain at the mid-to-upper cervical spine emanating from the right C3-4 cervical facet joint;
- Musculotendinous or myofascial pain in the upper and mid back; and
- Discogenic low back pain, sacroiliac joint pain or muscular pain in the low back (with respect to Mrs. Gill's low back pain, Dr. Helper came to a differential, not a primary diagnosis).

[66] For the most part, Dr. Helper's opinions in 2017 did not change upon re-examination of Mrs. Gill in 2019. He confirmed that Mrs. Gill appropriately reported her functional capabilities and the impact of pain on her quality of life.

[67] Based on his examination in 2019, and his conclusions regarding Mrs. Gill's pain, residual endurance and strength (he found her to be "generally deconditioned and weak"), Dr. Helper agreed with the opinion of occupational therapist Russell McNeil (discussed later in these reasons). He opined that Mrs. Gill was not competitively employable in medium or medium-to-heavy level work, did not have capacity to perform full-time, light-duty work, and would have limitations in performing sedentary work. In sum, presenting as Mrs. Gill did, Dr. Helper agreed that her decision to retire early at 60 rather than 65 was appropriate.

[68] Counsel for the Defendants urge me to consider Dr. Helper's 2017 recommendation for Mrs. Gill to undergo kinesiology treatment, and his subsequent observation that Mrs. Gill had not followed this recommendation.

[69] In his 2019 report, Dr. Helper commented that if this recommendation had been followed, he would have expected to see a "partial improvement" with respect to Mrs. Gill's mid back pain and related functioning. Dr. Helper later concluded in his 2019 report that Mrs. Gill's rehabilitation "has been less than ideal." However, Dr. Helper also stated in that report that he "would not expect [Mrs.] Gill's midback pain to be resolved with participation in kinesiology." I will address this later in this decision when I discuss the Defendants' position that Mrs. Gill failed to mitigate her injuries.

[70] During trial, information emerged that Dr. Helper had produced a 2023 report. It was not produced nor relied on by Mrs. Gill. The Defendants urge me to draw an adverse inference based on the failure to enter the 2023 report into evidence. The Defendants state that the Court is left to speculate as to what Dr. Helper's 2023 findings might have been.

[71] Counsel for Mrs. Gill argued that Dr. Helper was available on the stand for cross-examination by the Defendants, and that the Plaintiff was not obligated to submit a report that did not constitute a correction or change to a previous report.

[72] The Defendants did not provide me with any case law in support of their submission that I ought to draw an adverse inference in these circumstances, nor was it clear what the impact of such an adverse inference should or could have on my assessment of the issues. As Dr. Helper both provided a report and testified, and was available to the Defendants to cross examine, I decline to draw an adverse inference with respect to the 2023 report.

Dr. Todd Bentley – Physiatrist, Defendants' Independent Medical Examiner

[73] Similar to Dr. Helper, Dr. Todd Bentley was qualified as an expert in physical medicine and rehabilitation. He testified at trial and produced a report dated October 21, 2019, having examined Mrs. Gill in September 2019.

[74] Dr. Bentley diagnosed Mrs. Gill with:

- Whiplash associated disorder type II, with cervicogenic headaches, impairment in cervical spine range of movement, and secondary restriction in bilateral shoulder range of movement with no suggestion of intrinsic shoulder pathology; and

- Lumbar sprain/strain – impairment in lumbar spine bilateral flexion range of movement, secondary restriction in hip flexion range of movement, and negative neural tension.

[75] Dr. Bentley stated that the long-term prognosis for Mrs. Gill for complete symptom resolution was "guarded" given anticipated degenerative changes in her cervical and lumbar spine, and her ongoing pain and subjective disability more than four years after the Accident.

[76] Dr. Bentley opined that Mrs. Gill's symptoms did not cause significant disability from her employment, despite her reports to him that she was frequently absent from work due to Accident-related complaints, and that she retired five years earlier than intended because her job was so physical. Under cross, Dr. Bentley conceded that his statement that Mrs. Gill reported no vocational disability may not be accurate, given her statements about absences and early retirement.

[77] Under cross, Dr. Bentley conceded that he did not inquire into, and Mrs. Gill did not offer, any information about "pacing" techniques she may have been doing at work prior to her retirement to manage her symptoms. These would include taking longer to do tasks, modifying her duties, asking for assistance, and spending time

lying on the floor after work, all of which Mrs. Gill (or her family) testified to. Dr. Bentley stated that this information would have been helpful to his opinion.

[78] Like Dr. Helper, Dr. Bentley commented on Mrs. Gill's lack of a formal active rehabilitation program after her last physiotherapy appointment in late 2015. He commented that massage therapy on its own would not change the natural history of her condition. Dr. Bentley did not state whether or to what degree participation in a formal active rehabilitation program would have changed Mrs. Gill's prognosis or current state. He concluded that she "may benefit" from participation in such a program going forward.

Russell McNeil – Occupational Therapist

[79] Mr. McNeil produced a functional capacity evaluation and cost of future care report, dated November 30, 2017. He also submitted a homemaking/activities of daily living ("ADL") assessment report, dated July 22, 2020.

[80] Mr. McNeil initially assessed Mrs. Gill in October 2017. He describes occupational therapy as a bridge between the clinical environment and the workplace. His testing is meant to mimic or simulate a typical work day. In Mrs. Gill's case, this meant that most of the testing took place while standing or completing various movements, as her job did not involve extended periods of sitting.

[81] Mr. McNeil commented that his assessments take place in what he characterized as a "trustless" environment, in that he has to assume that the client will not give full effort. Therefore, his assessment is structured to "prove" lack of full effort, in order to establish the opposite. He found that Ms. Gill put in a consistent or increased level of effort in order to complete a reliable assessment

[82] Mr. McNeil described Mrs. Gill as an unreliable self-reporter in terms of pain. He said this because he observed that Ms. Gill tended to minimize her symptoms, rather than exaggerate them. He also observed that she overestimated her lifting capacity, and persisted with tests to completion despite experiencing pain.

[83] Mr. McNeil observed a consistent pattern of declining performance over the course of his six-hour assessment, despite Mrs. Gill reporting a positive or consistent ability to perform. He observed that Mrs. Gill made postural accommodations to complete tests that involved bending, crouching, squatting or kneeling. With lifting, her estimation of her abilities far exceeded her actual ability.

[84] Ms. Gill demonstrated weakness in both shoulders, but greater weakness on her right side, including her shoulder and elbow, as well as below average grip strength in her right hand. She experienced difficulties with reaching above shoulder level using both arms and with bending, particularly over time. With many exercises, including bending, crouching or kneeling, she was able to achieve the position but her tolerance was low and she could only do it briefly.

[85] Mr. McNeil concluded that Mrs. Gill was capable of sedentary work, finding that she did not demonstrate the capacity for light, medium or heavy work. He assessed her role at Little Mountain as “medium to heavy work” and opined that Mrs. Gill demonstrated restrictions in her capacity to perform the full physical requirements of her work as a care aide, with a particular focus on her inability to lift 50 pounds, one of the O*NET Occupational Database criteria for work as a care aide.

[86] Under cross, Mr. McNeil conceded that he was not aware of WorkSafeBC regulations with respect to lifting, but he stated was aware of the mandated use of mechanical or assisted lifts at the bedside or if a resident fell, as Mrs. Gill advised him of same.

[87] The Defendants took issue with Mr. McNeil’s findings, given that Mrs. Gill worked full-time with no accommodations until August 2019, almost two full years after her assessment.

[88] With respect to housekeeping, in his 2020 report, Mr. McNeil again found weakness in Mrs. Gill’s shoulders and elbows, this time varying between moderate to severe. She still exhibited greater weakness on her right side. She was unable to

lift more than ten pounds, worse than her already diminished capacity in 2017. She reported severe pain when lifting. She also demonstrated a decline in grip strength and repetitive grasping.

[89] Mr. McNeil recommended certain pain management tools for sleeping, including a heat pad, and contour and body pillows, as well as lighter cleaning tools, such as a lightweight vacuum. More significantly, Mr. McNeil recommended that Mrs. Gill retain two hours of homemaking assistance per week, plus seasonal cleaning assistance.

[90] He also variously recommended further exercise equipment, occupational therapy sessions, a personal trainer, massage and physiotherapy, and some counselling to help Mrs. Gill cope with her pain.

Sergei Pivnenko – Economist

[91] Mr. Pivnenko provided an opinion on Mrs. Gill's economic loss arising from the Accident. He is a labour economist.

[92] Mr. Pivnenko's report was dated December 19, 2019, and was prepared with a 2020 trial date in mind. At trial he provided some updated calculations.

[93] Mr. Pivnenko reviewed Mrs. Gill's statements of earnings and deductions, her pension plan and pensionable service, benefits plans, pay scales for care aides over time, and various other facts and details pertaining to her employment, age, and the dates of the Accident, her retirement and trial date.

[94] Mr. Pivnenko's conclusions regarding Mrs. Gill's wage loss include:

- As of the date of her retirement, Mrs. Gill accrued 25.825 years of service. If Mrs. Gill worked full-time from the Accident to age 65, she would have accrued 31.5 years of pensionable service; 35 years of pensionable service if she had worked to age 68.

- Had Mrs. Gill not retired in August 2019, in the period from September 1, 2019, to January 15, 2024, her earnings would have been $230,068, for a gross loss, inclusive of non-wage benefits, of $246,172.76.

- Had Mrs. Gill worked from the date of trial to age 65, she would have earned an additional $32,352.

- Had she worked from the date of trial to the end of February 2028, she would have earned $226,408.

[95] Most of Mr. Pivnenko's conclusions were not disrupted under cross. However, due to the age of his report, Mr. Pivnenko' calculations of the difference between pension benefits received were no longer current.

[96] The Defendants produced a report by economist Thomas Steigervald in response to Mr. Pivnenko's report. Mr. Steigervald did not testify. I received limited submissions with respect to Mr. Steigervald's report.

[97] Most of Mr. Steigervald's disputes with Mr. Pivnenko's calculations do not amount to significant changes. One example of this, is that in one of his tables, Mr. Pivnenko uses 7% of wages as an estimate of employer funded benefits for life insurance and health and dental plans for families of two or more; Mr. Steigervald uses 6.3% for that same estimate.

[98] The primary dispute between the parties is focused on the likelihood that Mrs. Gill would have retired at 65 (or later) but for the Accident, rather than with respect to any specific calculations or methodologies used by Mr. Pivnenko to arrive at his totals. Where Mr. Pivnenko needed to correct or update his initial report and calculations to reflect changes in pension rules, multipliers, or because of the passage of time, he did so. While I reviewed and considered Mr. Steigervald's report, I will not go into detail with respect to his conclusions.

Credibility

[99] Assessing credibility involves a consideration of a number of factors as set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296, leave to appeal ref'd [2012] S.C.C.A. No. 392:

> [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
>
> [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[100] Credibility and reliability are not the same thing. Credibility is concerned with a witness's veracity. Reliability is concerned with the accuracy of a witness's testimony, and involves consideration of their ability to accurately observe, recall, and recount the events in issue: *Ford v. Lin*, 2022 BCCA 179 at para. 104.

[101] Counsel for Mrs. Gill submitted that there are no significant credibility concerns in this case, and I agree. I found Mrs. Gill to be both credible and reliable. She did not seek to exaggerate her injuries or the impacts of same on her work or

home life, and answered questions to the best of her ability. She was a good historian of her work and homelife, and her evidence was corroborated by other witnesses, including her family, co worker, and the experts who she engaged with.

[102] The only area where her reliability was at all questioned was with respect to her propensity to minimize her pain, or to overestimate her ability to complete work or tasks. This is in line with Mrs. Gill's own evidence about her struggle to continue working as a care aide, and the evidence of her family about how this impacted her.

[103] Generally speaking, all of the witnesses who testified - both lay and expert – I found to be credible and reliable. Like Mrs. Gill herself, Mrs. Gill's family and friends testified thoughtfully and carefully, giving their accounts without varnish or exaggeration.

Findings and Causation

[104] I find that Mrs. Gill suffered soft tissue injuries arising from the Accident, which resulted in persistent and ongoing pain in her low, mid and upper back, neck, shoulders, as well as cervicogenic headaches. The experts used different terms to describe various of the injuries, including: "whiplash associated disorder", "musculotendinous" and myofascial pain" and "cervico-thoraco-lumbar-sacral spine strain". I find that the range of injuries to Mrs. Gill as described and diagnosed by Dr. Yang, Dr. Helper and Dr. Bentley were caused by the Accident.

[105] I find that Mrs. Gill's return to work following the Accident was seriously impacted by her Accident injuries and her ability to manage the tasks associated with her job as care aide was seriously impaired, despite her stoicism under increasing pain and discomfort.

[106] I decline to find that the fact that she worked full-time after the Accident until her retirement in 2019 is evidence that her injuries had resolved or were short-lived. On the contrary, I find that the Accident injuries and resulting pain persisted throughout that period of full-time work, leading to a significant deterioration in Mrs. Gill's quality of life, and causing Mrs. Gill's decision to retire earlier than planned.

[107] Given the existence of shoulder pain or injury arising from the Accident, the timing (e.g. post-early retirement) of the first mention of "frozen shoulder", the limited evidence with respect to the duration, impact or severity of the "frozen shoulder" as differentiated from the Accident injuries, as well as the lack of any expert evidence or testimony on this point, I decline to consider Mrs. Gill's frozen shoulder as an intervening event that would disturb or change the above findings of causation.

Damages

Duty to Mitigate

[108] A plaintiff has an obligation to take all reasonable measures to reduce his or her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234.

[109] To establish a reduction in damages as a result of the plaintiff's failure to mitigate their losses, a defendant must prove: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably: *Chiu v. Chiu,* 2002 BCCA 618 at para. 57; *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 53. The defendant bears the onus of proving both branches of this test on a balance of probabilities: *Haug v. Funk*, 2023 BCCA 110 at paras. 55 and 61.

[110] The Defendants state that Mrs. Gill's failure to attend kinesiology program is a "major issue". They also submit that Mrs. Gill failed to mitigate her earnings loss by not seeking out alternative or part-time work, or requesting additional accommodations from her employer, instead of fully retiring. The Defendants say I ought to apply a 20-25% discount to any damages awarded for non pecuniary loss, past and future loss of earning capacity, loss of housekeeping and future care costs.

[111] First, with regard Mrs. Gill's failure to attend a kinesiology program, Dr. Helper commented on Mrs. Gill's failure to undertake a more comprehensive strength-based fitness plan, and said he would have expected to see some improvement in

her function if she had. It was not clear from the evidence when Mrs. Gill was made aware of a recommendation to undertake kinesiology in addition to, or instead of physiotherapy, nor that she was expected to follow the recommendations of anyone outside of her family physician.

[112] Neither Dr. Helper nor Dr. Bentley confirmed that participation in such a program would have had a demonstrable impact on Mrs. Gill's over all outcome. Dr. Helper stated that kinesiology would not have resolved Mrs. Gill's symptoms, and Dr. Bentley did not say what - if any -impact Mrs. Gill's participation in such a program would have had. Dr. Bentley could only say that kinesiology may have some benefit to Mrs. Gill going forward. There was no evidence presented as to the difference between the physiotherapy Mrs. Gill underwent and the exercise program she continued to do, and a kinesiology program.

[113] Until the summer of 2019, Mrs. Gill worked full-time as a care aide. She did an exercise program at home designed for her by a physiotherapist, and attended physio and massage appointments as directed by her physician, and when she felt it was helping her. Mrs. Gill attended roughly 300 treatments in total since the Accident, and persisted with treatment and home exercise through a full-time work schedule (she did not take time off work for these appointments, she scheduled them before or after shifts), and continued to do so when possible throughout COVID, online and at home.

[114] I find that under all the circumstances and on a balance of probabilities, the Defendants have not shown that Mrs. Gill acted unreasonably with respect to treatment of her injuries and management of her symptoms.

[115] With respect to Mrs. Gill's purported failure to seek alternate or part-time work, or to request accommodations from her employer. I also do not find that Mrs. Gill failed to mitigate her damages. I find that she tried to work to the best of her ability, far beyond her capabilities and in spite of her symptoms. The Defendants did not establish that part-time work at Little Mountain would have had a demonstrable

impact on Mrs. Gill's symptoms, or would have allowed her to work for longer, given the nature of her impairments.

[116] The Director of Clinical Care at Little Mountain, Ms. Sital Dhillon Randhawa briefly testified. Even though she was her supervisor for approximately four years, Ms. Randhawa had no specific memory of Mrs. Gill. Ms. Randhawa was the signatory on the "sick time" letter that precipitated Mrs. Gill's decision to retire, and would have met with her about it. Ms. Randhawa stated that a "part-time" shift at Little Mountain was 5 to 6.5 hours, and a full-time shift was 7.5 hours. She stated that part-time positions were posted periodically through the union, and that some accommodations were possible, such as graduated returns to work programs, but that not all accommodations can be managed.

[117] I was not provided with sufficient information regarding Mrs. Gill's options for part-time work at Little Mountain such that I can find she was "unreasonable" in not pursuing that as an option. Nor was there sufficient information to counter Mrs. Gill's testimony about the demands of the job, or what accommodations would have been possible – not just in theory, but in practice given the nature of care required in Mrs. Gill's unit. A slight reduction to shift time (1-2 hours), likely would not have alleviated Mrs. Gill's symptoms, or increased her ability to complete her daily tasks without pain. This is not a case where the plaintiff simply refused to return to work, or made no attempt to work after an accident. Mrs. Gill tried and did work for several years after the Accident, to her detriment.

[118] I am also not convinced of, and was not provided any evidence to support the reasonableness or viability of a plan for Mrs. Gill to change careers after 30 years as a care aide at Little Mountain, and to find comparable work that would suit her abilities and limitations at her age.

[119] As a result, I will not apply a deduction for failure to mitigate.

Non-Pecuniary Damages

[120] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, and loss amenities and enjoyment of life: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. 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, and damage awards will vary to meet the specific circumstances of each case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

[121] Assessment of non-pecuniary damages is guided by the non-exhaustive list of factors set out by the Court of Appeal 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;

i) loss of lifestyle; and

j) the plaintiff's stoicism

[122] Mrs. Gill claims $130,000 in non-pecuniary damages. The Defendants state that damages in the range of $70,000-75,000 are appropriate.

[123] Mrs. Gill relies on three cases in support of her claim: *Banic-Govc v. Timm, 2018 BCSC 1073*, *Sdrakas v Dawe-Cook* 2017 BCSC 2276, and *Popove v Attisha.* In all three of these case, the plaintiff was female, in her 60s at or around the time of their accidents, with similar soft tissue injuries and consequent impacts on work and life activities to Mrs. Gill. The range of non pecuniary damage awards in those cases are, respectively, $130,000, $110,000 and $120,000. Given that these cases are now several years old, Mrs. Gill submits that an appropriate award would be on the higher end of this range.

[124] The Defendants rely on *Fillo v. Yoshime*, 2022 BCSC 1578, *Wark v. Edlund*, 2021 BCSC 1410, and *Mills v. Graham*, 2019 BCSC 641 in support of a lower range of non pecuniary awards. The Defendants submit that a range of $70,000-75,000 is appropriate.

[125] After reviewing the cases submitted by the parties, I am of the view that Mrs. Gill's non-pecuniary loss is greater than seen in the cases cited by the Defendants. Specifically, Mrs. Gill was impacted both physically and emotionally by her injuries, and suffered lasting impacts to her home life, relationships and her work.

[126] In *Fillo*, the plaintiff suffered a "moderate amount of pain and discomfort" and had to modify both work and recreational activities. However, he did not miss work, and did not experience emotional suffering associated with his injuries. In *Wark*, the plaintiff experienced ongoing pain "flare-ups" but his injuries had largely resolved and he continued to work as a heavy equipment operator as of the time of trial, and there was no evidence of depressed mood or significant impact on home life. Similarly, in *Mills*, the plaintiff continued to suffer pain and tightness from her soft tissue injuries, but continued to work as a massage therapist, seeing her pre-accident workload of 11 patients a day, albeit with some discomfort after a long day.

[127] I consider that since retirement, some, but not all of Mrs. Gill's physical symptoms have alleviated, considering that her job as a care aide demanded so much of her physically. I accept the observations of Mrs. Gill's family that she was a

different person both emotionally and physically after the Accident. I accept Mrs. Gill's testimony that having to leave her job under the circumstances was exceedingly painful and took her months to accept, even as her quality of life outside of work seriously deteriorated. I accept the evidence of the experts, in terms of Mrs. Gill's injuries and her poor or guarded prognosis. In reviewing the case law and considering the evidence, I find that the cases relied on by Mrs. Gill are more analogous to her condition and circumstances.

[128] Subject to my comments below, based on a review of the evidence and the cases, a fair and reasonable award for non-pecuniary damages would be in the range of $120,00 to $130,000.

[129] I pause here to note that Mrs. Gill submits she is entitled to a separate award to compensate for the loss of housekeeping capacity.

[130] In *McKee v. Hicks*, 2023 BCCA 109, the Court of Appeal provided guidance on whether to make a discrete award for the loss of housekeeping capacity or to address it in the general non-pecuniary award:

> [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.

[131] Whichever option a Court chooses, when valuing these different types of awards, it is important to do so with an eye to the differing rationales behind them: *Kim v. Lin*, 2018 BCCA 77 at para. 34.

[132] In the decision of *Johal v. Bhullar*, 2021 BCSC 427, Justice G.C Weatherill noted the following at paragraph 168:

> In order to justify a separate award for loss of housekeeping capacity, the plaintiff must establish a real and substantial possibility that she will be

> unable to perform usual and necessary household work as a result of her Accident-related injuries: *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37. If the plaintiff is able to carry out such chores albeit with pain and discomfort, her compensation will be part of the award for non-pecuniary damages: *Beaudry v. Kishigweb*, 2010 BCSC 915; *Co v. Watson*, 2010 BCSC 950.

[133] The Defendants argue that while the distribution of chores in the Gill household may have changed, with Mr. Gill doing more than prior to the Accident, Mrs. Gill is still able to do some housekeeping and has not hired outside help to do these tasks. The Defendants also submit that any inability to complete household tasks is due to Mrs. Gill's frozen shoulder diagnosis and not due to her Accident injuries.

[134] While I do not agree with the latter submission, I agree that considering all the circumstances of this case, loss of housekeeping is appropriately considered in the award for non-pecuniary damages. This is particularly in light of the fact that part of Mrs. Gill's enjoyment of daily life included many traditional housekeeping activities involved in the care and cleaning of her home, inside and out. Albeit with some discomfort, Mrs. Gill can undertake housekeeping tasks, some with changes to the speed and frequency of the chores, with some compromise as to quality and some changes to the traditional division of roles, all of which may not be particularly welcomed by Mrs. Gill.

[135] I therefore award Mrs. Gill a total of $145,000 in non pecuniary damages to reflect the totality of her losses under this head, including loss of housekeeping.

Loss of Past Earning Capacity

[136] An award of damages for past loss of earning capacity compensates a plaintiff for the loss of what they would have, not could have, earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64, citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

[137] The standard for past hypothetical events is whether there is a real and substantial possibility that the events would have occurred. If the plaintiff meets this

standard, the Court must determine the measure of damages by assessing the likelihood of the event: *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

[138] Mrs. Gill seeks a total of $225,000 under this head, which is made up of $10,000 for actual wage loss, and $215,600 linked to her early retirement, which she submits would not have occurred but for the Accident. The time period considered for this loss is May 23, 2015 (date of the Accident) to August 31, 2019 (date of retirement, and September 1, 2019 (first day of retirement) to Jan 15, 2024 (first day of trial.)

[139] These amounts are based on calculations of Mr. Pivnenko, contemplates sick days, deductions for employment insurance and Canada Pension Plan payments, and takes into account certain uncertainties that arose under cross regarding whether some of the time away from work between the Accident and Mrs. Gill's retirement were for non-Accident related reasons, such as flu or cold symptoms.

[140] The Defendants submit that there is no support for a claim for wage loss following Mrs. Gill's retirement, as the opinion evidence does not support the contention that Mrs. Gill was unable to work after that date, or that her doctor recommended that she stop working. The Defendants state that the evidence shows that Mrs. Gill would have retired at the age of 60 for reasons unrelated to the Accident.

[141] Alternatively, the Defendants state that Mrs. Gill would have likely retired by the average age of retirement under the "Municipal Pension Plan", which is 61.2. The Defendants state that Mrs. Gill's claim under this head should be limited to $51,667.

[142] I accept the testimony of Mrs. Gill, her co worker and family with respect to her firm intentions to work to the age of 65. She loved her job, felt pride in contributing to the family's finances and prior to the Accident, suffered from no work-limiting disability. Mrs. Gill's understanding about the nature of her pension eligibility,

whether this understanding was 100% accurate, also contributed to her longstanding intention to work to 65.

[143] I relied on the reports of both Mr. Pivnenko and Mr. Steigervald, and considered the detailed submissions of the parties on the various components of past income loss, including average retirement rates, various deductions and percentages. However, as with the other heads of damages, this is an assessment and not a calculation. I find that on a balance of probabilities, and considering various contingencies, but for the Accident, Mrs. Gill would have retired at the age of 65. I award her past wage losses for the time period from the Accident to the first day of trial, for a total of $200,000.

Loss of Future Earning Capacity

[144] A claim for loss of future earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by his or her injuries; and, if so (2) what compensation should be awarded for the resulting financial harm that will accrue over time?

[145] The Court must compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25.

[146] The accepted approach to the assessment of damages for loss of future earning capacity is found in the trilogy of *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421.

[147] The Court of Appeal set out a three-step process to assess damages for the loss of future earing capacity in *Rab,* at para. 47:

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

b) On the evidence, is there a real and substantial possibility that the future event in question will cause a pecuniary loss?

c) If yes, what is the value of that possible future loss, having regard to the relative likelihood of the possibility occurring?

[148] Insofar as it may be necessary to assess the possibility and likelihood of future hypothetical events occurring that may affect the quantification of the loss, allowance may be required for positive and negative contingencies: *Rab* at para. 29. The Court must be mindful that the existence of a specific contingency must be proven on sufficient evidence "capable of supporting the conclusion that the outcome of the contingency is a real and substantial possibility, as opposed to a speculative possibility": *Lo* at para. 74.

[149] At the valuation stage, there are two possible approaches to assessment of loss of future earning capacity: the earnings approach and the capital asset approach: *Davies* at para. 28; *Perren v. Lalari*, 2010 BCCA 140 at para. 32. The earnings approach will generally be more useful when the loss is easily measurable; where the loss not as easily measurable, the capital asset approach is more appropriate: *Perren* at para. 32.

[150] The approach taken to the assessment of loss must be based on the evidence: *Rab* at para. 75. The ultimate award is a matter of judgement as opposed to purely mathematical calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

[151] Mrs. Gill submits that two periods of time must be considered with respect to future loss of earning capacity. The first period starts as of the date of trial through to Mrs. Gill's 65th birthday. The second period starts as of Mrs. Gill's 65th birthday, through to the date she would have reached full pensionable service at the age of 68. Given Mrs. Gill's long-term employment at Little Mountain, she submits that the "earnings approach" is the appropriate method for calculation, as opposed the to capital asset method.

[152] Mr. Pivnenko opined that the present value of Mrs. Gill's future wage loss to age 65, which is approximately seven months from the first day of trial, would be is

$32,352. Mrs. Gill further submits that including wage benefits (at either 6.3% or 7%) results in an approximate future loss of $34,500.

[153] With respect to the second period, Mrs. Gill submits that that the Court should consider it a real and substantial possibility that she would have worked past the age of 65. Mrs. Gill loved her job and found it rewarding, her pension entitlement would have continued to grow, creating incentive to keep working, and absent the Accident, there was no indication that she was developing, or would have developed disabling conditions to prevent her from continuing to work. Mrs. Gill's co-worker also provided evidence for the Court that there were residential care aides that worked past the age of 65. She says that an award in the range of $100,000 to $150,000 is appropriate for future loss of earnings capacity, inclusive of lost non-wage benefits, after factoring in all of the possibilities and negative contingencies.

[154] As discussed above, I found that but for the Accident, Mrs. Gill would have worked to the age of 65. While there was some evidence that Mrs. Gill may have wanted to continue working beyond the "magic number" of 65, given the physical and psychological demands of Mrs. Gill's position as a care aide, I do not consider this possibility real or substantial enough to make an award for earnings loss based on this possibility. Whether Mrs. Gill would have worked occasionally or regularly, for a few weeks, months, or years beyond 65 is too speculative for the purposes of this analysis.

[155] I therefore award Mrs. Gill $34,500 for future wage losses relating to the time period between trial and her 65th birthday.

Loss of Pension

[156] Mrs. Gill submits that she suffered a loss of employer pension contributions as a result of her early retirement. Based on calculations provided and then revised by Mr. Pivnenko, she claims $35,000 to reflect lost pension contributions between her date of retirement and her 68th birthday.

[157] The Defendants submit that there is no loss of pension, as Mrs. Gill would have retired at the age of 60, regardless of the Accident. In the alternative, the Defendants submit that the loss amounts to just under $5,000, considering that Mrs. Gill would have retired one year later, at the average age of retirement of 61.2.

[158] As I have already found that Mrs. Gill would have retired at the age of 65, I award Mrs. Gill $20,000 to reflect her lost pension benefits between her actual retirement date in 2019, and her 65th birthday.

Costs of Future Care

[159] The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (S.C.), aff'd (1987) 49 B.C.L.R. (2d) 99 (C.A.).

[160] The principles applicable to the determination of costs of future care awards were summarized in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, *et cetera*) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and

- no award is appropriate for expenses that the plaintiff would have incurred in any event.

[161] Once again, an assessment of damages for the cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58.

[162] Despite various recommendations in Mr. McNeil's report, Mrs. Gill made limited to no written or oral submissions with respect to her claim for future care, aside from her separate claim for loss of housekeeping.

[163] The Defendants submit that there is a lack of evidence with respect to Mrs. Gill's ongoing needs. To an extent, I agree with this statement. The Defendants helpfully point to the following:

- Both Dr. Helper and Dr. Bentley recommended kinesiology, which Mrs. Gill confirmed she would "try". If I were to find that these treatments will be pursued by Mrs. Gill, the Defendants propose the schedule suggested by Dr. Helper's report, which would amount to approximately $1000.00 at the ICBC scheduled rate.

- Massage therapy, while not curative, and not recommended as part of an "active" rehabilitation program according to Dr. Helper or Dr. Bentley, has provided Mrs. Gill with some relief since the Accident. However, there are no recommendations for same by Mr. McNeil, or evidence about ongoing treatment needs.

- Mrs. Gill claims for contour pillow, body pillow and heat pad, lightweight vacuum, steam mop and cordless electric scrubber. The Defendants say there is no medical evidence for same.

- There is limited evidence with respect to Mrs. Gill's current medications, and no medical evidence to suggest they are recommended going forward.

- For any home exercise equipment, the Defendants submit that $500 is sufficient to cover this expense.

- For seasonal cleaning, the Defendants suggest that an amount reflecting 10 years of such service, to assist Mrs. Gill with heavier seasonal cleaning until she turns 75, at which time she would naturally require additional help, regardless of the Accident. With a discount rate of 2% and a yearly cost of $500, the Defendants suggest an appropriate total would be just under $5,000.

[164] On the evidence, I am not convinced that kinesiology treatment is of interest to Mrs. Gill, nor is it clear that it is recommended by any medical professional in terms of her care needs going forward, as opposed to what “may” have had an impact in the past. While Mrs. Gill agreed in her testimony that she would try any treatment her doctor advised her to undertake, in the absence of submissions by Mrs. Gill, or expert evidence with respect to a specific plan with respect to kinesiology treatments in the future, I decline to make an award for same.

[165] I am in a similar position with respect to Mrs. Gill’s claim for the other items under the heading of cost of future care. I am not clear if Mrs. Gill claims an award for any items aside from the amount claimed for loss of housekeeping, which I have already addressed under non-pecuniary damages.

[166] In reviewing the evidence, including the testimony of Mrs. Gill, and Mr. McNeil’s report, and considering the submissions of the Defendants on this point, I consider an appropriate award for the cost of future care to be limited to $5,000 to cover the cost of heavier seasonal cleaning services for 10 years.

Special Damages

[167] It is well established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to

be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.,* 2011 BCSC 944 at para. 281.

[168] The Defendants accept the plaintiff's claim for $9,166.35 in special damages as agreed to by both parties.

Conclusion

[169] To summarize, Mrs. Gill is awarded the following:

Damages	**Award**
Non pecuniary (including loss of housekeeping)	$145,000
Past Wage Loss	$200,000
Future Wage Loss	$34,500
Loss of Pension	$20,000
Cost of Future Care	$5,000
Special Damages	$9,166.35
Total:	**$413,666.35**

[170] The parties have leave to address any adjustments needed to finalize the above award. As Mrs. Gill has been largely successful, she is awarded her costs at Scale B.

"J. Whately, J."