IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ahonen v. Thauli,*
2013 BCSC 1607

Date: 20130903
Docket: M111523
Registry: Vancouver

Between:

Jo-Ann Ahonen

Plaintiff

And

**Michael Thauli and Chrysler Financial Services Canada Inc.
doing business as Chrysler Financial Services**

Defendants

Before: The Honourable Mr. Justice Smart

Reasons for Judgment

Counsel for the Plaintiff:	James C. Gopaulsingh
Counsel for the Defendants:	Catherine Wang Donald Fiorvento
Place and Date of Hearing:	Vancouver, B.C. June 10-14, 2013
Place and Date of Judgment:	Vancouver, B.C. September 3, 2013

I. INTRODUCTION AND BACKGROUND

[1] The question before me concerns the amount damages that should be awarded to the plaintiff, Jo-Ann Ahonen, as a result of injuries suffered in a motor vehicle accident on April 17, 2009 (the "MVA").

[2] Ms. Ahonen is 45 years of age, married and the mother of an 18-year-old daughter and 15-year-old twins. She is employed as a Project Manager with Semiahmoo Housing Society ("SHS"), a non-profit organization that provides services to developmentally disabled adults.

[3] The defendants admit liability for the MVA but dispute the award of damages sought.

[4] The plaintiff's evidence concerning the MVA is not challenged.

[5] The accident occurred at approximately 6:00 a.m. on Friday, April 17, 2009, as the plaintiff was driving her Chevrolet Uplander van northbound on King George Boulevard in Surrey, British Columbia. The defendant was driving southbound on King George in his Dodge Ram 1500 pick-up truck when, without warning, he turned left and drove into the plaintiff's vehicle. There was no intersection and the plaintiff could not have anticipated the defendant would turn as he did into her direction of travel. The front of the defendant's truck struck the left front of the plaintiff's vehicle. Photographs of the vehicle show significant damage to the front end of both vehicles and both vehicles were "written off" by ICBC.

[6] The plaintiff testified that she was scared and shaking after the accident. She called 9·1·1 on her Blackberry but when she spoke to the 9·1·1 operator she was too shaken to answer questions. She said a woman present at the accident scene reached into her vehicle, took her Blackberry, and spoke to the operator. The same woman then called the plaintiff's husband, David Ahonen.

[7] The plaintiff remained in her vehicle until emergency personnel arrived. A firefighter climbed into her van through the sliding door and held her neck.

Paramedics placed a cervical collar on her neck. The "jaws of life" was used to remove her from the vehicle and she was put on a gurney and into an ambulance. Her husband arrived at the accident scene when she was in the ambulance and spoke with her. He described her as being "white and very scared". He said her hands were shaking and she was almost crying.

[8] She was taken to Surrey Memorial Hospital where she was examined, x-rayed, and released. She was given an anti-inflammatory medication, Naproxen, and prescribed 500 mg, the maximum dose. She was driven home by her husband and went to bed and remained in bed for most of the weekend.

[9] She developed severe bruising over her chest and lap, knees, shin and ankle. She was examined by her family doctor, Dr. Brian Morgan, on April 21, four days after the MVA. He noted:

- a large linear bruise on her left chest in the collarbone region;
- a bruise on her left hip;
- bruising on her upper left thigh where the seatbelt had been;
- bruising on the right and left knees;
- bruising of the left hand;
- a bruise and abrasion on her left forearm; and
- her range of motion in her neck was reduced in all directions.

[10] Dr. Morgan diagnosed her as having grade 2 cervical strain and extensive soft tissue bruising. He found that she was unfit to return to work for two weeks and recommended physiotherapy and that she continue to taking the maximum dose of Naproxen. She returned to work full time on June 1, 2009.

[11] The plaintiff's case includes certain documentary evidence as well as *viva voce* evidence from the following witnesses:

- the plaintiff;
- David Ahonen, the plaintiff's spouse;
- Laurie Barnhart, a friend of the plaintiff;
- Teresa Randle and Wendi Mackintosh, co-workers of the plaintiff;
- Joyce Taks, the plaintiff's sister;
- Dr. Brian Morgan, the plaintiff's family physician;
- Dr. Mark Adrian, a physiatrist who conducted an independent examination of the plaintiff;
- Shawna Bonsen, an occupational therapist; and
- Dr. Paul Janke, a psychiatrist who examined the plaintiff.

[12] The defendants called no witnesses.

[13] I will not review all of the evidence. Counsel reviewed much of it in their thorough written arguments.

[14] I will first discuss the medical evidence and then address the credibility of the other witnesses before reviewing the evidence in the context of the various heads of damages.

II. MEDICAL EVIDENCE

Dr. Mark Adrian

[15] Dr. Adrian specializes in physical medicine and rehabilitation. He conducted an independent medical assessment of the plaintiff on October 5, 2011.

[16] In addition to interviewing the plaintiff, Dr. Adrian was provided with the clinical records of Dr. Morgan concerning the plaintiff for the preceding five years, clinical records of Surrey Memorial Hospital and Twin Rinks Physiotherapy, and a medical report prepared by Dr. Morgan for ICBC, dated June 26, 2009.

[17] Dr. Adrian was thoroughly cross-examined on the opinions he expressed in his report and reiterated in his direct examination and, in particular, on the plaintiff's failure to exercise regularly and whether if she did, her neck pain could improve.

[18] Dr. Adrian was an impressive witness. His report explains the basis for his opinions. He was careful to stay within his area of expertise when answering questions. In my view, he was not an advocate for the plaintiff and fulfilled his responsibility to assist the court. He is clearly qualified to provide the opinions he expressed. His evidence was consistent and his opinions made sense and were reasonable. They were consistent with the evidence as a whole.

[19] I accept and rely on Dr. Adrian's evidence. I will quote extensively from his report, including his summaries of information he received from the plaintiff as it is generally consistent with her courtroom testimony.

> **Pre-Accident Status:**
>
> Ms. Ahonen did not experience pre-accident regularly occurring or physically limiting headaches or neck pain.
>
> …
>
> Prior to the 2009 motor vehicle accident, Ms. Ahonen was physically active with gymnasium exercises, cycling, soccer, and recreational hockey. She was physically interactive with her children. She was employed on a full time basis as a program manager. She did not experience physical limitations with her ability to perform her employment, recreational, or household activities.
>
> **Current Status:**
>
> Ms. Ahonen experiences daily pain affecting her neck. The intensity fluctuates. The symptoms are triggered by activities that involve prolonged reaching; prolonged carrying; prolonged lifting; motion of the neck; and awkward positioning involving the neck, as occurs with desk work or looking upward. The symptoms temporarily improve when she alters her position and posture. The neck pain symptoms spread to the upper back region. Her

> neck pain symptoms can disturb her sleep. She feels best when laying down with her neck supported.
>
> Ms. Ahonen experiences … minor tingling involving her left great toe.
>
> Ms. Ahonen experiences headaches present over the upper neck area that spread to the forehead area. She experiences these types of headaches roughly three times per week.
>
> Ms. Ahonen indicates that she is anxious when travelling in a vehicle since the accident. She is more emotional than usual since the accident.
>
> **Current Functional Status:**
>
> Ms. Ahonen is independent with activities of daily living. Since the accident, she modifies her housework activities. She perform[s] her housework activities at a slower than usual pace. She requires frequent brief breaks. She has difficulty mowing the lawn and avoids this activity since the accident. Her symptoms affect her ability to perform activities that require prolonged sitting. She has difficulty lifting heavier items while shopping.
>
> Ms. Ahonen's symptoms affect her recreational activities. She is unable to exercise in the gymnasium or cycle with the intensity she was capable of prior to the accident. Since the accident, she avoids hockey and soccer due to her pain symptoms.
>
> **PHYSICAL EXAMINATION:**
>
> **Spine:**
>
> Ms. Ahonen has mild head-forward posture (poor posture). She has a full range of motion of her neck. The neck pain symptoms are triggered by motion into backward bending and rotation to either side. Tenderness is present over the mid cervical spinal segments. She has full range of motion of her thoracic and lumbar spine that is pain-free. Tenderness is present over the mid cervical spinal segments and base of neck.

[20] Dr. Adrian diagnosed Ms. Ahonen has having mechanical neck pain, which he explained implies that the source of an individual's pain symptoms stem from the musculoskeletal structures of the cervical spine. He continued:

> In my opinion, Ms. Ahonen suffers from chronic mechanical neck pain.
>
> Ms. Ahonen experiences headaches. The headaches are present over the upper neck area. In my opinion, Ms. Ahonen's headaches are cervicogenic (related to the neck) in nature.
>
> Ms. Ahonen was involved in a head-on type collision. This type of impact can cause the head and neck of an occupant to move suddenly in one direction and then another (whiplash). Studies show this mechanism can result in abnormal forces to the musculoskeletal structures of the neck resulting in an injury.
>
> In Ms. Ahonen's situation, she developed neck pain symptoms shortly following the accident. She experiences persistent symptoms affecting her

> neck since the accident. Ms. Ahonen probably suffered physical forces to the musculoskeletal structures during the course of the accident resulting in an injury and chronic mechanical neck pain.

[21] Dr. Adrian described her prognosis as:

> In general, individuals suffering mechanical spinal pain following a whiplash-type impact experience improvement overtime. Some individuals, however, experience persistent symptoms despite the passage of time. In other words, not all individuals refer from these types of injuries. In my experience, individuals suffering mechanical spinal pain beyond two years from the injury date are unlikely to experience further significant improvement.
>
> In Ms. Ahonen's situation, over two years have elapsed since the accident date. She experiences persistent neck symptoms that affect her physical activity levels. The prognosis for further recovery of the injuries suffered in the accident over time is poor. It is unlikely that the injuries suffered in the accident will undergo progressive deterioration over time. [Emphasis added]

[22] With respect to her functional capacity, Dr. Adrian stated:

> Ms. Ahonen will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured structures involving her neck. Specifically, she will probably continue to experience difficulty performing employment, recreational, and household activities that involve heavy or repetitive lifting; prolonged carrying; repetitive motion of the neck; prolonged static or awkward positioning involving her neck; and impact activities. The prognosis for further recovery of these functional limitations over time is poor. Ms. Ahonen is probably permanently partially disabled as a result of the injuries suffered in the accident. [Emphasis added]

[23] Finally, with respect to therapeutic steps that can be taken, he said:

> Ms. Ahonen has reduced her physical activity levels since the accident. She has probably become relatively deconditioned. She may benefit with the involvement of a skilled personal trainer or kinesiologist to instruct her in a suitable exercise program to optimize her level of fitness without placing unnecessary physical forces onto the painful and injured structures involving her neck. It is unlikely that exercise will "cure" her mechanical spinal pain, however.

Dr. Paul Janke

[24] Dr. Janke interviewed Ms. Ahonen at his office on March 27, 2012 at the request of her counsel for the purpose of assessing the effects of the MVA from a psychiatric perspective. I received his evidence by video-taped deposition.

Dr. Janke is a respected forensic psychiatrist. He was thoroughly cross-examined. He too was an impressive witness who was careful not to overstate his opinions or exceed his expertise. I accept and rely on his evidence for essentially the same reasons I stated with respect to Dr. Adrian.

[25] Dr. Janke in his report of November 16, 2012 offered the following opinion:

> Ms. Ahonen did have significant driving anxiety immediately following the motor vehicle accident. She undertook a self-directed desensitization program which involved deliberately driving through the accident site. As a result, Ms. Ahonen has persisting driving anxiety that does not reach a level where a formal diagnosis of Post-Traumatic Stress Disorder could be made. She does have persisting situational anxiety and can experience reliving if there is sufficient triggering event.
>
> …
>
> Ms. Ahonen should continue her antidepressant medication. She had pre-existing anxiety symptoms and it is my opinion that more likely than not she would have used the Wellbutrin on an ongoing basis. The development of anxiety symptoms following the motor vehicle accident in my opinion has resulted in the need for increased dose and certainly maintaining the increased dose for an extended period of time.
>
> Ms. Ahonen would benefit from a short course of treatment with respect to her anxiety symptoms. …
>
> As a result of this motor vehicle accident, Ms. Ahonen will be susceptible to the development of significant Post-Traumatic Stress Disorder symptoms if she was exposed to a similar trauma. I would note that subsequent traumatic events do not need to be as severe as the initial event to trigger either recurrent Post-Traumatic Stress Disorder or to initiate a new pattern of Post-Traumatic Stress Disorder. If this was to occur, Ms. Ahonen would require greater intervention in terms of both pharmacology and psychological treatments.

Dr. Brian Morgan

[26] Dr. Morgan is the plaintiff's family physician and has been for approximately 10 years. The contents of his reports at times suggest he lacked objectivity and was being an advocate on his patient. However, having heard his evidence I find I can generally rely on the opinions he has provided to the court within his areas of expertise and I do so.

[27] I have relied upon and used the contents of his clinical records in accordance with the law, as explained by Metzger J. in *Seaman v. Crook*, 2003 BCSC 464.

[28] Dr. Morgan diagnosed Ms. Ahonen as suffering from at least a moderate grade 2 soft tissue cervical strain as a result of her MVA. In explaining the prognosis with respect to this injury, he stated:

> It is broadly understood that this injury typically results in a prolonged period of fluctuating neck pain and stiffness often associated with debilitating headaches. …
>
> Given the duration of the symptoms since the accident, it is likely that Mrs. Ahonen will be left with a degree of continued disability in the form of neck pain and headaches for the foreseeable future. There is no easy medical cure and physical activity, stretching and periodic anti-inflammatories are the only tools left to help alleviate symptoms when they flare up.

Shawna Bonsen

[29] Ms. Bonsen is an Occupational Therapist who graduated from Queen's University, Faculty of Medicine, School of Rehabilitation Therapy and is certified in this province as a Work Capacity and Functional Capacity Evaluator. She assessed the plaintiff in a clinical setting, at the plaintiff's work and at the plaintiff's home.

[30] Ms. Bonsen states at page 22 of her Work/Functional Capacity and Ergonomic Assessment of the plaintiff:

> Ms. Ahonen demonstrates limited durability for sustained neck flexion related to her experience of elevated neck pain and headache. Her performance suggests the need to stretch her neck while working and take short breaks every 25-35 minutes to manage her symptoms. Her durability becomes further limited as the duration of neck flexion increases, requiring more frequent breaks that interfere with her productivity. Her tolerance for neck extension is very poor and her performance suggests she is not durable for more than brief periods to obtain an item from a high shelf.

[31] In her assessment of the plaintiff's fitness for her current job, Ms. Bonsen states at page 24:

> Ms. Ahonen continues to work fulltime, however she remains symptomatic. Evaluation findings reveal that her symptoms of neck pain, headache and

> upper back pain interfere with her productivity for her core job demands and she is reliant on pain relieving medication to manage her symptoms.

[32] In her assessment of the fitness's ability to perform alternative work she states at page 24:

> Ms. Ahonen reports she enjoys her job and has plans to continue working in her current field. Should she seek alternate employment at some time in the future, she will require an understanding employer who is willing to accommodate her limitations and the ergonomic adaptations recommended herein. While she has greater strength capacity than required in her current position, her symptom interference would be reduced and her durability for daily job demands optimized by limiting her strength demands to a light level. She does not have the strength capacity to regularly assist clients with transfers or repositioning, as such would exacerbate her symptoms.
> Ms. Ahonen is able to perform sitting and standing based work, provided that prolonged reaching and neck flexion are limited to 20-30 minutes at a time on an occasional basis throughout the day. While prolonged typing has exacerbated her neck symptoms, it is my opinion that with the modifications detailed above this type of work is likely the most adaptable for minimizing functional stress on her neck. However it is recognized that in order for the use of voice activated software to be feasible, she requires her own enclosed office.

[33] Ms. Bonsen's expertise and credibility were not challenged in cross-examination and I accept her evidence.

II. CREDIBILITY

[34] Credibility has two components - honesty and reliability. The evidence of a dishonest witness will rarely be reliable but the reverse is not necessarily true.

[35] Judges usually consider a number of different factors when assessing the credibility of a witness. Many of them are suggested in most standard jury charges. Justice Voith provided this helpful guide in his recent decision in *Joba v. Basant Holdings Ltd.*, 2013 BCSC 1469 at para. 17:

> …. Multiple factors inform an assessment of credibility; *Bradshaw v. Stenner,* 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. Amongst these factors is whether a witness' evidence "harmonizes with independent evidence that has been accepted"; *Bradshaw* at para. 186. This test accords with the well-known guidance offered in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.): "the real test of the truth of the story of a witness … must be its

> harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".

[36] I find the plaintiff to be a credible witness. Her evidence was generally consistent. With respect to her demeanour as a witness, she was anxious at first but this is understandable. I find the emotion she displayed when discussing the effects the MVA has had on her relationship with her husband, her inability to play ice hockey on Sunday mornings or ride a bike with her family, was genuine. I find her to be an intelligent person who was doing her best to truthfully answer the questions asked of her. Her evidence is consistent with the opinions of the experts, consistent with the evidence of her friends and co-workers, and generally consistent with the evidence of her spouse and her sister, all witnesses whose evidence I accept.

[37] I do not find the plaintiff's denial that she had a full range of motion in her neck by March 2010 undermines her credibility, nor does her failure to recall feeling anxiety for her back pain and radiating left leg pain when she spoke with Dr. Korosi or her failure to recall being prescribed Gabapentin.

[38] Why the plaintiff developed lower back and neuropathic symptoms in November 2009 is unclear but that event did not affect the opinions expressed by Dr. Adrian and Dr. Morgan concerning the consequences of the injuries suffered in the MVA by the plaintiff and does not affect my assessment of the relationship between those injuries and her ongoing neck pain and headaches.

[39] I find the plaintiff's case as a whole is consistent: Ms. Ahonen is a person who had a great deal of energy, enjoyed an active life, played the primary role in managing the family home and raising her children, had close relationships with her spouse and children, and worked hard at her job; and all of that has been significantly affected by the MVA.

V. DAMAGES

[40] The plaintiff claims damages in the following amounts:

i. non-pecuniary damages in the range of $85,000 to $115,000;

ii. past wage loss in the amount of $3,623.12;

iii. special damages in the amount of $3,738.25;

iv. past diminished housekeeping capacity in the amount of $10,000;

v. loss of future earning capacity in the amount of $150,000; and

vi. future care costs in the amount of a $40,000 if a lump sum award is made.

[41] The defendants agree with the amounts claimed for special damages and past wage loss so I need not address those heads of damages other than to say I agree with counsel. I will address the four heads of damages in dispute.

A. Non-Pecuniary Damages

Applicable Legal Principles

[42] In *Prempeh v. Boisvert*, 2012 BCSC 304, Dardi J. summarized the applicable legal principles when assessing non-pecuniary damages, at paras. 73-75:

> Non-pecuniary damages are intended to compensate a plaintiff's pain, suffering, and loss of enjoyment of life. The award should compensate a plaintiff for those damages they have suffered up to the date of the trial and for those they will suffer in the future. The essential principle derived from the authorities is that an award for non-pecuniary damages must be fair and reasonable to both parties and should be measured by the adverse impact of the particular injuries on the individual plaintiff: *Hmaied v. Wilkinson,* 2010 BCSC 1074 at para. 55. While fairness is assessed by reference to awards made in comparable cases, it is impossible to develop a "tariff"; each case is decided on its own unique facts: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 136.
>
> The B.C. Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, leave to appeal to SCC refused, 31373 (October 20, 2006), enumerated the factors to be considered in awarding non-pecuniary damages. The non-exhaustive list includes: the age of the plaintiff; the nature of the injury; the severity and duration of pain; the degree of disability; the impairment of family, marital, and social relationships; and loss of lifestyle.

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

Positions of Counsel

[43] The plaintiff's counsel refers me to the factors set out in *Stapley v. Hejslet*, 2006 BCCA 34 and the following decisions from this Court: *Prince-Wright v. Copeman*, 2005 BCSC 1306; *Crane v. Lee*, 2011 BCSC 898; *MacKenzie v. Rogalasky*, 2011 BCSC 54; *Clark v. Kouba*, 2012 BCSC 1607; *Neigel v. Weiler,* 2013 BCSC 1033; *Kilian v. Valentin*, 2012 BCSC 1434; *Combs v. Bergen*, 2013 BCSC 321; *Koshman v. Brodis*, 2013 BCSC 656; *Graydon v. Harris*, 2013 BCSC 182; *Foster v. Kindlan and Pineau*, 2012 BCSC 681.

[44] He highlights the effects of the accident on the plaintiff's relationship with her spouse and children, and her testimony that she feels like she is missing out on spending time doing activities with her family and feels like she is letting them down. He refers me to the evidence of her co-workers, Ms. Randle and Ms. Mackintosh with respect to how the MVA has affected her at work. He submits that the appropriate range is $85,000 to $115,000.

[45] The defendants note that the plaintiff's injuries largely resolved within two months of the accident and her main complaint is mechanical neck pain with resulting infrequent headaches. They submit it was more likely than not the plaintiff was experiencing difficulties adapting to her new position prior to the accident and highlight that she was already taking Wellbutrin. They say while the plaintiff experiences some anxiety as a driver and a passenger in a vehicle, that anxiety is not at a clinical level and certainly not post-traumatic stress disorder ("PTSD").

[46] The defendants refer me to *Schmidt v. Hawkins*, 2010 BCSC 1154; *Atker v. Nair*, 2011 BCSC 1877; *Eng v. Titov*, 2012 BCSC 300, and *Dakin v. Roth*, 2013 BCSC 8, and submit that the appropriate award of non-pecuniary damages in this case is in the range of $40,000 to $45,000.

Analysis

[47] The awarding of damages is an assessment, not a mathematical calculation. Decisions of other trial judges are helpful and provide a range, but each case is fact-specific.

[48] I accept the plaintiff's evidence and I find that Dr. Adrian has accurately described the effect the injuries from the MVA have had her. I repeat what I quoted earlier from his report:

> Ms. Ahonen will probably continue to experience difficulty performing activities that place physical forces onto the painful and injured structures involving her neck. Specifically, she will probably continue to experience difficulty performing employment, recreational, and household activities that involve heavy or repetitive lifting; prolonged carrying; repetitive motion of the neck; prolonged static or awkward positioning involving her neck; and impact activities. The prognosis for further recovery of these functional limitations over time is poor. Ms. Ahonen is probably permanently partially disabled as a result of the injuries suffered in the accident.

[49] Ms. Ahonen was 42 years of age at the time of the MVA and had enjoyed a very physically active life. Her life has been profoundly affected by the MVA. She suffered physical and psychological injuries. It has been over four years since the MVA and the plaintiff still suffers from daily neck pain and headaches. She takes medication and frequent rests. She can improve her overall physical condition but her actual injuries are unlikely to get better or her discomfort and pain are unlikely to lessen.

[50] The MVA has affected her relationships with her children and her husband. It has compromised her ability to do many of the activities she used to do as an active person and from which she derived significant pleasure and satisfaction. She will likely live for the rest of her life with neck pain and headaches. She will have difficulty performing many of the activities she used to perform. As Dr. Adrian put it during his evidence: "what's done is done".

[51] I find an appropriate award under this heading is $100,000.

B. Past Diminished Housekeeping Capacity

Positions of Counsel

[52] The plaintiff refers me to *Simmavong v. Haddock*, 2012 BCSC 473, where Greyell J. awarded $5,000 for past loss of housekeeping capacity even though it was the family that did much of that work. She submits that here she was the primary household member doing the cooking, cleaning and laundry and, as a result of the MVA, her family and sister assumed greater roles. She claims $10,000 under this head of damages.

[53] The defendants highlight the evidence of Ms. Taks with respect to the housekeeping tasks she performed for the plaintiff between 2003 and 2008 and then resumed from the time of the MVA to January 2012. They say that Ms. Taks performed essentially the same housekeeping tasks pre- and post-accident and none of the payments to Ms. Taks were listed in the plaintiff's special damages. Further, they submit the plaintiff testified that she is currently able to vacuum and clean her floors with pacing and breaks. Similarly, she is able to do laundry and hang laundry if the lower rack is used. The defendants also submit that where housekeeping services are provided by other household members, a claim for compensation should be scrutinized carefully. The defendants refer me to *Campbell v. Banman*, 2009 BCCA 484.

Analysis

[54] In my view it is appropriate that the plaintiff be awarded damages for past diminished housekeeping capacity. Her ability to clean and care for her house and yard has been affected by the MVA and has resulted in greater assistance being required by her sister, her spouse and her children. I find an appropriate award of damages is $5,000.

C. Loss of Future Earning Capacity

Applicable Legal Principles

[55] In *Rozendaal v. Landingin*, 2013 BCSC 24, Holmes J. succinctly summarized the applicable legal principles at paras. 93-95:

> A claim for loss of future earning capacity raises two key questions: first, has the plaintiff's earning capacity been impaired by his or her injuries; and second, if it has, what compensation should be awarded for the financial harm that will accrue over time as a result? As far as possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.
>
> The essential task of the Court is to compare the likely future of the plaintiff's working life had the accident not happened with the likely future given the accident. This is a matter of judgment based on the evidence; it is not a purely mathematical calculation. The appropriate means of assessment will vary from case to case ….
>
> Low J.A. summarized the principles that apply in assessing loss of future earning capacity in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:
>
> > The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring: *Athey v. Leonati, supra*, at para. 27, *Steenblok v. Funk* (1990), 46 B.C.L.R. (2d) 133 at 135 (C.A.). The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 93 (S.C.). However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11; *Ryder v. Paquette*, [1995] B.C.J. No. 644 (C.A.) (Q.L.). Moreover, the task of the Court is to assess the losses, not to calculate them mathematically: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 (C.A.). Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong: *Milina v. Bartsch, supra*, at 79.

[56] These principles for determining future earning capacity were reiterated by Garson J.A. in *Morgan v. Galbraith*, 2013 BCCA 305 at para. 53:

> As already noted, in *Perren*, this Court held that a trial judge must first address the question of whether the plaintiff had proven a real and substantial possibility that his earning capacity had been impaired. If the plaintiff discharges that burden of proof, then the judge must turn to the assessment of damages. The assessment may be based on an earnings approach (rejected by the trial judge here) or the capital asset approach, as described in *Brown* (the approach adopted by the trial judge) to determine Mr. Morgan's lost earning capacity, given Mr. Morgan's career path was uncertain at the time of the accident. The trial judge stated at para. 56:
>
> > *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), cited above, and cited elsewhere by our Courts many times, provides the approach to use for a person whose path is unclear. The plaintiff's injury is treated as the loss of an asset. Finch J., as he then was, listed the following as considerations in *Brown* for awarding loss of future income:
> >
> > 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> >
> > 2. The plaintiff is less marketable or attractive as an employee to potential employers;
> >
> > 3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> >
> > 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[57] Accordingly, the threshold question is whether the plaintiff has proven a real and substantial possibility that her earning capacity has been impaired by the injuries suffered in the MVA. If so, what is the appropriate award? The second question should be answered either by using the earnings approach or the capital asset approach.

Positions of Counsel

[58] Counsel for the plaintiff refers me to Greyell J.'s decision in *Simmavong v. Haddock* at paras. 95-101, and submits that while she has returned to her usual full-time employment, she is not the employee she once was. He submits there is a real and substantial possibility of a future loss of income. He reviews her employment history with SHS and the evidence describing her prior to the accident as a person of very high energy but who since the accident is now often tired and "runs out of gas". He highlights the evidence of Ms. Randle that the plaintiff does not have the same stamina now and has slowed down and needs to take breaks and go home early,

often twice a week; and highlights the evidence of Ms. Mackintosh that at the weekly three-hour Wednesday meetings the plaintiff will often leave the meetings three or four times and be out of the meeting for five to seven minutes. Counsel reminds me of the plaintiff's evidence that this is because of pain in her neck and headaches she gets when she sits in meetings.

[59] Counsel for the plaintiff submits that because her loss cannot be easily quantified, the capital asset approach as explained in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), should be used. She submits that she is 45 years of age, has three children and has been working full time throughout. It is likely she would have worked until at least 65 possibly 70. She submits an appropriate award under this head of damages is $150,000.

[60] The defendants submit that the evidence falls short of establishing a real and substantial possibility of actual loss occurring. They submit there should be no compensation for loss of earning capacity where the plaintiff has shown only a merely theoretical loss and refers me to *Steward v. Berezan*, 2007 BCCA 150. The defendants submit the plaintiff has not adduced evidence that she would not likely remain at SHS. They submit the plaintiff has not tendered any evidence that she has sustained a loss of future opportunity or that her future income would have been higher had the accident not occurred. They refer me to *Mayenburg v. Lu*, 2009 BCSC 1308, and submit that the plaintiff's alleged disability is akin to that in *Mayenburg* and no award should be given under this head of damages.

Analysis

[61] SHS is an organization that provides support for persons in the community with developmental disabilities. The plaintiff has been with the organization for approximately 18 years and has been employed at various jobs over that time. More recently, she has been elevated to administrative and managerial positions. Her income has risen but so have her responsibilities. She was appointed Program Manager in July 2008. Her responsibilities include overseeing all programs and

dealing with families of those persons that SHS is supporting. She supervises a staff of 25 employees. Last year she earned almost $50,000 gross annual income.

[62] She found her new position stressful and on April 1, 2009, a few weeks before the MVA, saw Dr. Morgan and told him that she was feeling overwhelmed by her new position and the demands of it, that she had to displace some people and that was very stressful for her, that she was anxious all the time and that she was not sleeping well. Dr. Morgan suggested counselling and setting boundaries for herself and her work, and prescribed a daily dosage of 150 mg of Wellbutrin. The plaintiff saw Dr. Morgan again on April 15 and reported that she doing much better. The MVA happened two days later.

[63] Since returning to work full time, the plaintiff has been able to carry out her responsibilities as Program Manager but has had to adapt how she performs her work. She testified that the number of groups homes at SHS had dropped from 13 to 7 and a few managers had left and not been replaced. She said because working causes her pain and discomfort as a result of the MVA, she may leave the work force early. She also said that prior to the MVA she had considered leaving SHS and obtaining other employment.

[64] The threshold question is whether there is a real and substantial possibility that the plaintiff's earning capacity had been impaired. I find it has. She is not the same employee she was before the MVA. She is doing the same job but she and her employer have had to make accommodations to permit her to do so. She leaves meetings for brief periods at times, she leaves work early at times, and she does not have the same energy for her work that she once had. Her evidence is supported not just by the medical evidence but also her co-workers.

[65] The second question is what is the proper award of damages? I am satisfied that a capital asset approach is appropriate in the circumstances.

[66] I do not have much information about the financial viability or stability of SHS but, as with most organizations and businesses, there is always a risk that either the organization or the plaintiff's position may cease to exist.

[67] The plaintiff was, at the time of the MVA, in her prime years in the labour market. She had experience as a manager but was still relatively young. Although she said she had considered looking for other employment such as at Community Living BC, she had not done so and I was provided no information about what jobs might be available, what the requirements were to obtain those jobs, or what the salaries might be for them. However, I accept that the plaintiff is an ambitious person who would likely apply for another position with another business if opportunities for advancement did not present themselves in the future at SHS.

[68] I find that the plaintiff is less marketable or attractive as an employee to both SHS and other potential employers, she has lost some of her ability to take advantage of job opportunities that might have been open to her had she not been injured, she has been rendered less capable of earning income, and she is less valuable to herself as a person capable of earning income in a competitive labour market. I also find that she is more likely to retire early because of the injuries she suffered and how that has and will continue to impact in the future on her desire and ability to work.

[69] The plaintiff suggests and award of $150,000 based on the likelihood she would have worked until she is 65 or 70 years of age. However, by the time she is 60 years of age her children will be in their 30s and she and her spouse may have decided to retire even if the MVA had not occurred.

[70] I find that an appropriate award is $120,000.

D. Cost of Future Care

Applicable Legal Principles

[71] The applicable legal principles concerning damages for the cost of future care were explained in *Simmavong v. Haddock* at paras. 124-128:

> The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition in so far as that is possible. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar et al. v. Beazley et al.*, 2002 BCSC 1104.
>
> In his text *The Law of Damages*, loose-leaf ed. (Toronto: Canada Law Book, updated November 2011, release 20), Professor Waddams states, at 3-63:
>
> > . . . the tenor of Dickson J.'s judgment in *Andrews v Grand & Toy* makes it clear that the court will lean in favour of the plaintiff in judging the reasonableness of his claim. The court made it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for insuring the adequacy of pecuniary compensation.
>
> The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. For an award of future care: (1) there must be a medical justification; and (2) the claims must be reasonable: *Milina*, at 84. Furthermore, future care costs must be likely to be incurred by the plaintiff. The award of damages is thus a matter of prediction as to what will happen in future. If a plaintiff has not used a particular item or service in the past it may be inappropriate to include its cost in a future care award: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
>
> Contingencies must also be considered when assessing cost of future care. In *Gilbert*, the court discussed adjusting for contingencies at para. 253:
>
> The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required: see *Spehar (Guardian ad litem of)*. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required: see *Morrison (Committee of)*. Each case falls to be determined on its particular facts.
>
> An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[72] In *Campbell v. Banman*, the court noted that a relatively minor adjustment of duties within a family will not justify a discreet assessment of damages.

[73] In *O'Connell v. Yung*, 2012 BCCA 57, the court dealt with awards of damages for the loss of homemaking capacity and the cost of future care and noted the importance of keeping those two concepts distinct.

Positions of Counsel

[74] Counsel for the plaintiff refers me again to *Simmavong v. Haddock* and submits that the necessary medical link is made by the medical reports indicating the plaintiff is permanently partially disabled and will experience difficulty with household tasks involving repetitive motion of the neck, and that Ms. Bonsen has made appropriate allowances for contingencies.

[75] Counsel for the defendants notes that the plaintiff required assistance with housekeeping tasks for a period of five years before the MVA other than from January to April 2009, and with her new position at work had reached her threshold in managing the demands of family, career, and work. In other words, she needed assistance regardless of the MVA. Further, counsel submits she can do some work if she paces herself and other family members should be expected to carry an appropriate share of the work. Counsel emphasize the importance of separating an award for future cost of care and the need for medical evidence to support such an award.

Analysis

[76] Ms. Bonsen provides the following assessment at page 12 of her Functional Home Assessment & Cost of Future Care Report:

> Results of formal investigation of the reliability of Ms. Ahonen's pain and disability reports indicate that her perception of functional limitations related to pain in her neck, head and upper back is reasonably consistent with observations of her musculoskeletal abilities and behaviors in a functional setting. Thus her self reports of disabling pain are generally reliable. Ms. Ahonen demonstrates a reasonably accurate perception of her current functional capacities. No inconsistencies were identified in her presentation and she provided high effort within the constraints of her symptoms.
>
> Ms. Ahonen participated in approximately 3 hours and 45 minutes of home assessment activity. Her symptoms of neck pain and headache were

> consistently aggravated by sustained neck flexion, brief exposure to neck extension and outer range reaching. While Ms. Ahonen is able to perform individual tasks, her need for postural adaptation, assistance from family members and pain relief medication to manage her symptom reactivity suggests poor durability and reduced productivity. She requires the ability to pace herself in order to complete her family and household responsibilities which increases the time needed to accomplish tasks, reduces the time available for performing regular exercise and diminishes her quality of life for other pleasurable or enjoyable activities.
>
> Assessment findings indicate that given the postural limitations already explained, Ms. Ahonen has poor tolerance for regular housecleaning tasks, seasonal cleaning, gardening and assisting her spouse with landscaping or home renovations. Her ability to participate in vigorous or jarring recreational activities is limited by her experience of pain in her neck and head.

[77] I accept Ms. Bonsen's assessment. She also provides a detailed Cost Summary for future care. It includes housecleaning, yard work, home maintenance projects, and ergonomic equipment and medication.

[78] I am satisfied the plaintiff has established that an award for loss of future care is appropriate, primarily for work in and around the family home and yard for which she will need some assistance.

[79] I agree with counsel for the plaintiff that if an award is to be made it should be a lump sum amount.

[80] I have concluded a fair and proper award is $30,000.

VI. CONCLUSION

[81] For the reasons stated, I award the plaintiff damages as follows:

Non-pecuniary damages	$100,000.00
Past wage loss	3,623.12
Special damages	3,738.25
Past diminished housekeeping capacity	5,000.00
Loss of future earning capacity	120,000.00
Future care costs	30,000.00
TOTAL	**$262,361.37**

[82] The plaintiff is also entitled to costs.

"SMART J."