IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thompson v. Ballantyne,*
2025 BCSC 608

Date: 20250402
Docket: M115497
Registry: Kelowna

Between:

Nicole Lynne Marie Thompson

Plaintiff

And

Andrea Lesley Ballantyne and Terrabella Wineries Ltd.

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	B.E. Fitzpatrick L. Sorge
Counsel for the Defendants:	M.J.E. Boultbee D. Kostovic-Levi
Place and Date of Trial:	Kelowna, B.C. February 4 – 7, 10 - 11, 2025
Place and Date of Judgment:	Kelowna, B.C. April 2, 2025

[1] This trial was to assess the plaintiff's damages arising from a rear end motor vehicle collision that occurred in August 2015, when she was stopped in bumper-to-bumper traffic on the Bennett Bridge heading from West Kelowna to Kelowna on her way to work.

[2] The defendants have admitted liability for the accident. The extent of the plaintiff's injuries and the quantum of damages are in dispute.

The Facts

[3] The plaintiff is now 39 years of age and grew up in Kamloops. She completed high school there, followed by one year in the science program at Thompson Rivers University, before she moved to Kelowna and took an arts degree at UBC Okanagan. She subsequently took a teaching degree and did a couple of practicums but soon decided that she found teaching to be all-consuming and concluded that a job as a teacher was not for her.

[4] She worked for a local franchisee of a ceramic painting establishment enterprise called Colour Me Mine. She started with Colour Me Mine in May 2012. In January 2014, her mother, who was residing in Mexico at the time, was involved in a motor vehicle accident. Because her twin sister was pursuing a doctorate at university, it fell to the plaintiff to go to Mexico to care for her mother. As a result, she took a six-month leave of absence from Colour Me Mine, returning in July 2014.

[5] Some months before the subject accident, the plaintiff decided that she needed to change occupation. She had already decided that she had progressed as far as she could at Colour Me Mine. She was the manager, and short of owning the store, there was no possibility of advancement. She had already decided that teaching was not for her. She considered various occupations and concluded that she wanted to become an electrician. She found the fact that it would allow her to continually learn new things, coupled with the personal satisfaction of seeing the physical progress of her work, was something that appealed to her.

[6] The plaintiff is married to Mr. Derek Gieselman. The couple have been together for approximately 20 years and have lived together for the last 17 years. They do not plan to have children.

[7] Before the accident, she had no difficulty with any of the activities of daily life, and enjoyed various activities including hiking, cycling, skating and long walks with her dog. She was also fully engaged in housework including cleaning, food preparation, yard work, mowing the lawn, and other activities.

The Accident

[8] The subject accident occurred in rush hour when the traffic was bumper-to-bumper on the Bennett Bridge as the plaintiff was crossing from West Kelowna into Kelowna to go to work at Colour Me Mine. A vehicle stopped suddenly in front of the plaintiff. The plaintiff was able to stop, but the defendant, who was driving the vehicle behind her, was not, and collided with her at a low velocity (approximately less than 20 km/h).

[9] The plaintiff exchanged information with the defendant and then drove her vehicle off the bridge into a nearby parking lot and spoke with Mr. Gieselman who came to see her. Afterwards, she went to work for the remainder of the day.

[10] Shortly after the accident, she felt her neck and back tensing up and felt a stabbing pain in the middle of her back. It got progressively stiffer and sorer through the day. She had pain radiating down her right side into her shoulder, and down her arm into her fingers.

[11] Her neck pain feels like an intense knot that she cannot undo. The pain goes by her collarbone to the point of her shoulder, down to her elbow like a funny bone feeling, and tingles in her fingers and thumb. This tingling is intermittent.

[12] She first sought medical attention the following day when she went to a walk-in clinic. She did not have a general practitioner at the time as she had never needed one.

[13] A few days later, she noted pain in her knee. She was not certain as to why because there was no bruising but she noticed her knee hurt when she was climbing stairs, attempting to do anything weight-bearing, or hiking. Her knee pain has long since resolved.

[14] The doctor prescribed muscle relaxants and gave her referrals to both physiotherapy and massage therapy. Because the muscle relaxants had not worked, she inferred that the doctor considered the problem to be primarily muscular, and therefore she went to massage therapy. She was not able to pursue further physiotherapy because the cost of treatments was $40 per treatment, and she did not have the funds to pay for both.

[15] She is less capable of engaging in the activities of daily life following the accident due to pain.

After the Accident

[16] The plaintiff started in the trades program at Okanagan College in the fall of 2016, approximately one year after the accident. She received a bursary for her first year and took the pre-apprentice course for six months. To qualify as a journeyman electrician, the plaintiff needed to complete:

a) four semesters of in-class work at Okanagan College;

b) 6000 hours of apprenticeship; and

c) a final examination.

[17] Following the first part of the in-class schooling, the plaintiff secured a job with Project Electric, a small electrical company. The position was full time from March to December 2017. As a first-year apprentice, she got all the harder physical tasks to do, such as digging holes.

[18] She returned to Okanagan College for her second year of classroom work from January to March 2018. Unfortunately, the job at Project Electric was no longer

available and she was unable to find work through the entirety of the summer in the electrical field. She was on EI for a while and, towards the end of the year, took a couple of brief minimum wage type jobs to help pay the bills.

[19] She returned for the third-year schooling in January 2019. Again, this was a 10 to 12-week program, and she needed to find employment in the electrical field thereafter.

[20] It took a couple of months, but she was ultimately able to find a position working on a specific project that involved building greenhouses. The employer told her that he did not hire women but nonetheless she got the job. She assembled prefabricated light boxes that needed to be waterproofed, in addition to laying large cables in the dirt. She rendered herself more valuable over time compared to some of her colleagues, because she was reliable. She also prepared diagrams or blueprints for each of the greenhouses so that they could be assembled without errors.

[21] Notwithstanding the employer's earlier comments about not hiring women, the plaintiff survived an initial round of layoffs. However, she was laid off as the job came towards a close as she was not qualified to do some of the final work. Fortunately, she was able to find replacement employment with a larger electrical company, Kruger Electric, shortly afterwards. The company is well known in the Kelowna area and does various work. The plaintiff was exposed to commercial work for the first time. That said, her work was primarily as the extra pair of hands for the more qualified and experienced electricians. It included a lot of overhead work which was particularly painful.

[22] At the end of her working day, the plaintiff found she was often in excruciating pain. She resorted to hot showers, ice packs, and heating pads, together with various stretching and strengthening exercises, Tylenol, and laying on the floor in order to obtain some relief. This continues to this day.

[23] She left Kruger Electric in December because she was returning to school for the last time in January 2020. Upon completion of the schooling, she had two examinations. The first examination allows the person to practice in British Columbia, whereas the second is an interprovincial examination that serves as qualification for across the country. On the first examination, she got the highest mark in the class, notwithstanding her lack of field work hours. In the interprovincial examination, even though she was unable to finish it, she nonetheless got sufficient answers correct to pass that exam at the first opportunity. What remained was to complete the 6000 hours required for her journeyman certification - unfortunately, she was approximately 2000 hours short.

[24] Almost immediately upon completing the second of her two final examinations, the COVID pandemic struck, and everything was essentially shut down. She made decisions taking into account that the roommate she and her husband had lived with for over 20 years was immunocompromised, and did not seek electrical work.

[25] In January 2021, she decided she was ready to return to electrical work and sought a position to continue with her apprenticeship. She found work with Mazzei Electrical, a larger company that seemed to her to be more open to women in the trades. She did not disclose her injuries at the beginning of the job as she was not asked and was determined to persevere.

[26] She worked in a four-building high-rise residential development, beginning with splicing wires, and assembling and connecting plugs and switches. From a physical perspective, this work was ideal for her – it was not heavy, it did not involve working overhead, and a particular advantage was that the other electricians, most of whom were older males, disliked the work because it involved being on their knees.

[27] She endeavoured to bring added value to the job by preparing diagrams or blueprints of how the townhouses ought to be done, with details regarding where all of the various plugs and switches would go.

[28] In 2022, she finally had enough hours to be certified as a journeyman electrician. She is currently employed as a journeyman electrician at Mazzei.

[29] She recently sought a promotion to sub-foreman, but was told that she did not have the distribution experience. While she wanted the promotion, she agrees that she did not have that experience and therefore she had nothing to complain about. Distribution is getting the power to the main panel from the transformer or from the road depending on the circumstances.

[30] One of the reasons she does not have distribution experience is that the work is much heavier than the feeder work, which involves the wires that run from the panel to other places in the building. In a residential development, each residential unit has its own panel, and there are other panels for common facilities. The distribution work includes the much larger and therefore heavier cables that come into the main panel. Distribution also includes manipulating large cables through small holes in the vicinity of the panel.

[31] She currently makes $36 per hour plus benefits and RRSP contributions as a journeyman electrician. The sub-foreman role earns in the range of $38-$40 per hour, and a foreman earns $42-$44 per hour.

[32] The plaintiff testified that a foreman with whom she has done a significant amount of her work, Mr. Dwayne Reynolds, has treated her very well during her time at Mazzei Electric. She has advised him through the years of the sorts of work that she would struggle with and as a result, he assigns her the tasks where she excels. For example, she does not have to worry about things such as full days of overhead work.

[33] In the four years or so that she has been at Mazzei Electric, there have been various rounds of layoffs that have not included the plaintiff.

[34] She has considered looking for sub-foreman work elsewhere but has not dropped off any resumes. She recognizes that there are benefits to working where she works, including some of the people she works with. She has been fortunate

enough to work in buildings with heat and with crews that are aware of some of her limitations.

[35] The plaintiff came to realize that the accident had affected her mentally as well. She noticed a gradual increase in her anxiety levels, resulting in panic attacks. A panic attack is triggered when she has a feeling of being out of control and feels stuck and unable to get out of a particular situation. She described it as a similar feeling to claustrophobia.

[36] The panic attacks show up in different ways, including shortness of breath. She provided an example of experiencing a panic attack when going for a bike ride with friends on the Kettle Valley Railway. She became anxious about going to grocery stores and avoids doing so. She also feels it is necessary to drive by new job sites in advance to get a sense of the geography, and where she will find parking, for example.

[37] She has been diagnosed with a generalized anxiety disorder. Whether this was caused by the accident is an issue for the court to decide.

[38] In terms of her ongoing symptoms, her neck continues to feel like it has a knot in it that will not go away. When she is extremely tense, it will radiate into her back on the right side. She has been taking duloxetine which has taken away the burning sensation, in addition to having other collateral benefits. As for her shoulder, this is similar.

[39] She finds it difficult to fall asleep, although once asleep, she tends to stay asleep. She has various pillows and ice packs that she may need depending on the day.

[40] She has not had to miss time from work but regularly ends her workday in pain.

Credibility and reliability of the plaintiff's evidence

[41] This is not a case that turns on the credibility of the plaintiff. She provided her evidence in a straightforward manner and provided consistent responses throughout. She did not magnify or overstate her evidence. Her testimony was consistent with the information and opinion set out in the various expert reports. The defendants agree that she is a credible witness.

[42] The issues for the court to determine do not therefore depend on whether the plaintiff should be believed. Rather, the assessment of the plaintiff's damages depends on an assessment of the evidence as a whole, including matters of causation.

[43] For example, it is not contested that the plaintiff suffers from an anxiety disorder and a chronic mental health disorder that is maintained by her chronic pain. Rather, the issue is whether the plaintiff has proven on a balance of probabilities that the subject motor vehicle accident caused these various issues.

Other witnesses at trial

[44] The plaintiff's husband, Mr. Gieselman, testified and corroborated the plaintiff's evidence, including with regard to the reallocation of domestic chores, the plaintiff's pain relief regimen at the end of the working day and his observations of her anxiety.

[45] Dr. Eugene Okorie provided medical expert evidence, and was qualified as an expert in psychiatry and in the diagnosis of mental health conditions and their treatment. He diagnosed the plaintiff with an unspecified anxiety disorder and a chronic mental disorder maintained by chronic pain, which makes her vulnerable to other mental disorders such as posttraumatic stress disorder and major depressive disorder.

[46] Dr. Okorie made the following recommendations:

a) Increasing the dose of her Duloxetine to the maximum of 120 mg daily barring any side effects;

b) 12-16 sessions of cognitive behavioural therapy; and

c) 10 sessions of driver rehabilitation, pending review.

[47] The court also heard from a physiatrist, Dr. Tony Giantomaso. He diagnosed the following:

a) posttraumatic cervical sprain/strain injury consistent with WAD-2 [Whiplash Associated Disorder] injury, which is chronic; and

b) posttraumatic thoracic sprain/strain injury, grade 1 to 2, which is also chronic.

[48] Dr. Rui Zhang, another physiatrist consulted by the plaintiff, and the defendants' only witness, Dr. Steven Sylvester, an orthopedic surgeon, concurred.

[49] As such, there is no dispute as to the plaintiff's physical injuries, her diagnosis, and that the accident caused them.

Causation

[50] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of *de minimus*. Causation "need not be determined by scientific precision": *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17.

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

[52] The defendants suggested during submissions that any number of previous events could have caused the plaintiff's anxiety disorder. In particular, the defendants suggested that the subject accident was a less significant event than other events, including a previous accident where the plaintiff was driving and a pedestrian was killed, and another when she was hit while driving with her mother. The defendant also pointed out that some of the triggers to her anxiety, such as sirens and honking horns, were not present during the accident.

[53] Dr. Okorie's opinion was that the accident caused the anxiety disorder. Dr. Okorie was aware of the various previous events identified by the defendants when he prepared his opinion, including the plaintiff's previous accidents. He was also aware of the triggers to the plaintiff's anxiety, and the circumstances of the subject accident. While Dr. Okorie quite reasonably agreed that there were certain issues or information that could have impacted his opinion, he was not invited to change his opinion during cross examination, and I accept his conclusion.

[54] The defendants' only witness was Dr. Steven Sylvester, an orthopedic surgeon. Dr. Sylvester conceded on cross-examination that he would defer to a psychiatrist with respect to any mental health related diagnoses arising from the accident and would further defer on the issue of the interrelation between chronic pain and mental health.

[55] I find that the plaintiff's anxiety disorder was caused by the accident.

Adverse inference

[56] The defendants argue that the court should draw an adverse inference from the plaintiff's failure to call two of her coworkers to testify. The plaintiff gave evidence about a lengthy job in which she worked alongside her foreman, Mr. Reynolds, and a fourth-year apprentice, Mr. Tomas Simac, while the plaintiff was a second-year apprentice. During that job, the three co-workers came to an informal arrangement that provided the plaintiff with an accommodation regarding her work duties. To some degree, those accommodations continue.

[57] In particular, the defendants say the plaintiff should have called Mr. Reynolds and Mr. Simac to corroborate her testimony regarding her employment at Mazzei, more specifically:

a) her accommodations at work where her supervisor and other coworkers do most of the overhead work, such as installing lights, whereas she will perform lower level tasks such as installing sockets; and

b) that she was unsuccessful in obtaining a promotion to a sub-foreman position due to her lack of experience with distribution work.

[58] The defendants argue that it was also Mr. Reynolds who had advised the plaintiff why she had not been successful when she recently applied for the sub-foreman position.

[59] The defendants concede they were aware that Mr. Reynolds was the plaintiff's supervisor but had never previously been provided with Mr. Simac's name.

[60] In *Kahn v. School District No. 39*, 2021 BCSC 49 at para. 201, the Court reiterated the test for an adverse inference, which engages a trial judge's discretion. The factors are:

a) whether there is a legitimate explanation for the failure to call the witness;

b) whether the witness is within the exclusive control of the party or equally available to both parties; and

c) whether the witness has key evidence to provide or is the best person to provide the evidence in question.

[61] I decline to draw the adverse inference as suggested by the defendants.

[62] As the defendants concede, they were aware of Mr. Reynolds from the plaintiff's examination for discovery. He remains employed at Mazzei Electric. The defendants were equally able to call Mr. Reynolds as a witness.

[63] As for Mr. Simac, it is not apparent that he has any important evidence. He was simply another apprentice, as was the plaintiff, who was working as part of a team on a job under the supervision of Mr. Reynolds. It follows that Mr. Simac would have nothing to add to what Mr. Reynolds could have said, had he been called to testify.

[64] Corroboration is not necessary for all evidence called by a party at trial. If a defendant wishes to challenge a plaintiff's evidence, there are avenues for it to do so. On the issue of what were referred to as the “soft accommodations” that the plaintiff receives, these were not seriously challenged, nor are they necessarily significant. Trials would take significantly longer if plaintiffs had to call every co-worker in order to avoid adverse inferences.

[65] All of that said, there was one important aspect of the plaintiff's case that required evidence that Mr. Reynolds or someone else at Mazzei would have needed to provide, namely some proof that the plaintiff was declined a promotion because she did not have experience with distribution work.

[66] The only evidence before the court that the plaintiff was denied a promotion because she did not have experience in distribution work was the plaintiff's own evidence, which was based on a conversation she had with Mr. Reynolds. This evidence is clearly hearsay evidence. Such evidence could perhaps be admissible for the non-hearsay purpose of explaining why the plaintiff took certain steps, but it is not admissible to prove the truth of the contents of the statement, namely to prove why she did not receive the promotion.

[67] This is not a matter of drawing an adverse inference but is rather an absence of proof through admissible evidence.

Damages

Past loss of earning capacity

[68] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained. A plaintiff is entitled

to recover damages for only their past net income loss, which means the court must deduct the amount of income tax payable from lost gross earnings.

[69] The plaintiff's claim for past loss of income, which is more properly described as a past loss of opportunity claim, pertains to the 2018 year. As the plaintiff completed her second year of schooling, which was ending in March 2018, she had expected to return to work for Project Electric to build up her hours, consistent with the fall of 2017. However, when she contacted Project Electric as her semester of classwork was finishing, she was told that they did not have work for her because they were going in a “different direction” and needed journeymen, rather than apprentices. The plaintiff then submitted numerous applications for work and secured a few interviews.

[70] The plaintiff testified that she was shocked at some of the questions and comments she received, including questions about whether she had any injuries. She did not lie during any of her interviews but received no calls back from those to whom she had made disclosures. She was unable to secure any apprenticeship work during 2018, and although she was able to secure various other jobs, those did not count towards her apprenticeship.

[71] She also did not work after she completed her semester of class work in March 2020, but for a different reason, which was the onset of the COVID pandemic. Not only was there significantly less in-person work available, she also had her own concerns about the pandemic, both for herself but primarily because her roommate was immunocompromised. As a result, she did not seek an electrical job at that time.

[72] She did not secure all of the hours she needed for her journeyman qualification until a couple of years after her schooling was completed.

[73] The plaintiff's claim for her past loss of earning capacity is based upon an assumption that she would have worked for 1800 hours towards her apprenticeship during 2018.

[74] The difficulty with the plaintiff's claim based upon an assumption of full-time hours as an apprentice between the end of March and the end of December 2018, is one of causation. The primary reason the plaintiff was not employed following the completion of her schooling was because she was counting on returning to Project Electric, but they did not rehire her. It was not apparent on the evidence as to the nature of any commitment she had received from Project Electric, only to be told that there was no longer a position for her, nor any evidence of what steps she took before the end of her exams to secure alternative employment if the Project Electric position was uncertain.

[75] However, I assume that the plaintiff was at a disadvantage when she commenced her job search at the end of March 2018, because her classmates would have had a significant head start in terms of securing positions. This disadvantage has nothing to do with the accident.

[76] The defendants argue that the plaintiff has not proven a loss. They say, even based on the plaintiff's own evidence, that there is significant sexism in the trades such that the plaintiff was always going to have a more difficult time finding work in any event.

[77] It is always difficult to speculate as to why someone may or may not obtain a job following an interview. However, I draw the following conclusions or inferences:

a) sexism is still prevalent in the trades (the plaintiff gave this evidence);

b) electrical apprenticeship work includes heavy physical labour (this was also the plaintiff's evidence);

c) all things being equal, an employer may choose the physically stronger candidate, which would generally be a male (the plaintiff agreed if she were hiring, she might do the same thing);

d) employers will only conduct interviews if there is a reasonable likelihood that they will be hiring someone; and

e) an employer would be more reluctant to hire a person for a physically demanding position if they were aware the person had physical injuries that might impact their ability to do the work.

[78] In all of the circumstances, because the plaintiff did not start her job search until the very last minute and after all of her classmates, there was likely going to be a delay in her obtaining employment, even if it were not for her injuries. I do accept, however, that potential employers who interviewed her would have been prepared to hire her, but by having to disclose her injuries, she was less marketable to those potential employers who made that inquiry.

[79] The evidence shows that in future years, when the plaintiff was searching for work as an electrician in similar circumstances, the plaintiff was able to secure positions with employers who did not inquire about her injuries, despite the apparent sexism in the trades.

[80] I conclude that if not for the disclosure of her injuries, the plaintiff would have found work after at least three months in 2018. Therefore, she would have worked as a second-year apprentice for six months during 2018, if it were not for her injuries she felt compelled to disclose when she was asked.

[81] The plaintiff called an economist, Ms. Christiane Clark, as a witness at trial. Based on Ms. Clark's calculations, the amount of the loss would have been $59,359 for the entire nine months from March to December, inclusive, in 2018. This calculation accounts for the plaintiff's actual income in 2018 from EI and other temporary positions, and accounts for the economic impact of the plaintiff losing the opportunity to work hours towards her apprenticeship.

[82] Because I have found that she would not have found employment for an initial period of three months, the plaintiff is entitled to two-thirds of this amount, or $39,570.

Loss of future earning capacity

[83] The central task before the court in considering damages for loss of future earning capacity is to 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; *Rab v. Prescott*, 2021 BCCA 345 at para. 65. A plaintiff is not entitled to an award for loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 14.

[84] The Court of Appeal issued a trilogy of decisions in 2021 regarding the proper approach to assessing a claim for damages for loss of future earning capacity: *Dornan v. Silva*, 2021 BCCA 228; *Rab*; and *Lo v. Vos*, 2021 BCCA 421. The Court identified a three-step process for assessing damages in *Rab* at para. 47:

> 1. whether the evidence discloses a potential future event that could lead to a loss of capacity;
>
> 2. whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and
>
> 3. if such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring.

[85] The plaintiff says that the evidence from all of the experts is that she has chronic pain which is unlikely to resolve. Additionally, she has an unspecified anxiety disorder maintained by the chronic pain. She has a supportive employer at present, but there can be no guarantee that her current employment will remain indefinitely and therefore she may have difficulty in finding work.

[86] Further, because her physical limitations have precluded her from obtaining the necessary distribution work experience, she has been passed over for promotions to better paying positions. Counsel for the plaintiff suggests that her

chronic pain will eventually take a toll on her ability to perform her job duties and an appropriate method of determining her loss is based on a 50% reduction of her income to age 65.

[87] The defendants concede that there is a real and substantial possibility that the plaintiff will suffer a future pecuniary loss. As such, the only issue for the court to decide is the valuation of that possible future loss.

[88] The defendants correctly point out that both the plaintiff's occupational therapist, Ms. Peters, and Dr. Giantomaso, confirm that the plaintiff meets all the physical capacity to perform the job requirements for an electrician, as evidenced by the fact that she has not had to take any time off work. Dr. Giantomaso's comments regarding her abilities were subject to his observation that she had limitations regarding overhead reaching.

[89] There are two approaches to assessing a loss of future earning capacity: the earnings approach and the capital asset approach.

[90] The earnings approach involves an analysis of a number of factors, including expected earnings, the likelihood that future events will cause a pecuniary loss, and probable retirement dates. The court must also decide whether to consider "risk only" contingencies, which account for the probability that a person will be forced from the labour market into unemployment or part-time work, or "risk and choice" contingencies, which include the possibility of a person choosing to either retire sooner than the normal retirement age or to elect part-time work as a matter of choice as distinct from necessity.

[91] While an award for damages for loss of future income capacity is always a matter of assessment as opposed to mathematical calculation, the assessment under the earnings approach is done with reference to various hypothetical mathematical scenarios generally generated by economists. The economist does not provide an opinion of the loss but rather provides the court with mathematical

calculations in the form of spreadsheets based on a variety of scenarios posited by counsel.

[92] The capital asset approach involves consideration of the factors described in *Brown v. Golaiy*, 26 B.C.L.R. (3d) 353 at 356 including whether the plaintiff:

a) has been rendered less capable overall of earning income from all types of employment;

b) is less marketable or attractive as a potential employee;

c) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and

d) is less valuable as a person capable of earning income in a competitive labour market.

[93] The capital asset approach will often be preferred when the future loss is not as easily measured: *Perren v. Lalari*, 2010 BCCA 140 at para. 12. The assessment is often in the form of one or more years of income.

[94] In this case, the plaintiff argues that the earnings approach is more appropriate, while the defendants say that the capital asset approach should be preferred.

[95] I turn now to the contingencies and other factors that must necessarily inform the analysis.

[96] First, it is significant that the plaintiff has not yet missed any time off work, even though she has now been either learning to be, or working as, an electrician for approaching eight years. In so saying, I recognize that there were times when she was not working – the periods of time when she was in school, 2018 when she could not find work, and in 2020 during the COVID pandemic. However, she has now had full-time employment for approximately four years, and not only has she not had to take time off, she has also worked overtime when it was available.

[97] I accept the plaintiff's evidence that she receives soft accommodations at her current employer, and that obtaining such accommodations at another employer, should she need to find alternative work, may not be a simple matter. However, while no private sector employment is guaranteed to remain for the duration of a person's working life, there is no suggestion that the plaintiff's current employment will not continue. For the evidentiary reasons I mentioned earlier, I cannot conclude that the plaintiff's injuries have resulted in the loss of an opportunity to secure a promotion.

[98] I accept that the plaintiff continues to experience pain at the end of the working day, and that she will continue to need to follow her regimen of heat, ice, stretching, lying on the floor and other self-help steps in order to manage that pain. I also accept that even if a person's pain symptoms do not deteriorate over time, the ability to tolerate those symptoms will reduce as the person ages.

[99] In *Morlan v. Barrett*, 2012 BCCA 66, the Court addressed a situation where the plaintiff's condition had stabilized and she was still able to work. The Court stated the following at paras. 39 to 41:

> [39] As previously mentioned, the trial judge gave two reasons for finding that there was a real and substantial possibility that fibromyalgia would shorten Ms. Morlan's working career. The first reason was based on what he described as "common experience" that a person with a stable but persistent energy-draining condition will find it more difficult to continue working as he or she grows older. The second reason, based on Dr. Beck's evidence, was that there was a substantial possibility that Ms. Morlan's condition would worsen over time.
>
> [40] With respect to the first reason, the appellants submit that it was not open to the trial judge to have regard to "common experience" as there was no evidence to support this being so. I disagree.
>
> [41] Accepting that, to use the expression used at trial and at the hearing of this appeal, Ms. Morlan's condition had "plateaued", the fact remains that she would forever suffer from debilitating chronic pain along with headaches, symptoms that could be reduced, but not eliminated, by medication. In other words, throughout each and every day of her life, Ms. Morlan would have to cope with some level of discomfort. In my view, it was open to the trial judge to find—essentially as a matter of common sense—that constant and continuous pain takes its toll and that, over time, such pain will have a detrimental effect on a person's ability to work, regardless of what

> accommodations an employer is prepared to make. Indeed, with regard to Ms. Morlan, this is reflected in Ms. Craig's report: see para. 34 above.

[100] In *Davies*, and also in *Bal v. Makichuk*, 2022 BCSC 1695, the Courts concluded that the capital asset approach was the preferred approach where the plaintiffs had consistently worked full time after their accidents with no loss of income.

[101] I accept that the capital asset approach is the preferred approach in this case, for largely the same reasons. While there is a real and substantial possibility that the plaintiff will suffer future loss of income as a result of her injuries suffered in this accident, the contingencies are broad and varied and the evidence as to the likelihood of each would render the earnings approach largely speculative.

[102] I turn now to assessing the plaintiff's loss using the capital asset approach.

[103] In *Davies*, the plaintiff was 58 years old and the Court found that she would retire at age 67. As such, the Court awarded one year of income to someone with nine years of work remaining prior to retirement. In this case, the plaintiff is 39 years-of-age and therefore would presumptively be expected to work for much longer before retirement.

[104] The court is not limited to one year of income loss if the capital asset approach is employed. In *Stempowicz v. Dobbs*, 2023 BCSC 1951, the plaintiff was also relatively young and was awarded two years, although in rejecting the plaintiff's request for two-and-a-half years, the Court commented that "on her current career path, it does not seem very likely that her limitations will have a pecuniary effect": at para. 106.

[105] In *Jarrett v. Wold*, 2021 BCSC 302, the Court awarded a young plaintiff with an uncertain career path the equivalent of two-and-a-half years' income. In *Miller v. Lawlor*, 2012 BCSC 387, and *Flores v. Burrows*, 2018 BCSC 334, the plaintiffs were awarded three years' salary to compensate for the loss of earning capacity.

[106] If the plaintiff had to find another job, I would expect it may take her a little longer to find one that was suitable for her in all of the circumstances. However, I have little doubt that she would be successful. As a mature, stable, hard-working employee, she is someone a potential employer could count on. One might expect that a potential employer would find her to be less physically capable than some, but more intelligent than most, as evidenced by the fact she finished first overall in her class on her final examination at the conclusion of her last year.

[107] On the other hand, the plaintiff is still relatively young, with many years of work ahead of her. The work of an electrician is extremely physical, and there may come a time where the plaintiff's ability to tolerate the demands of the work will wane.

[108] The plaintiff's evidence is that she presently makes $36 per hour, which equals $74,880 per year ($36 per hour x 40 hours x 52 weeks).

[109] Because of the physically gruelling nature of her work coupled with the time remaining to retirement and the risk of her anxiety disorder evolving into something more significant, I conclude that two-and-a-half years' income is an appropriate award for loss of earning capacity, which I round to $187,500.

Cost of future care

[110] The plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the accident had not occurred. The test for awarding costs of future care comes from *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, which provides that: (1) there must be a medical justification for claims for cost of future care; and (2) that the claim must be reasonable.

[111] I will start with the recommendations made by Dr. Okorie. The defendants' position was that the accident did not cause the anxiety disorder but they did not take issue with Dr. Okorie's recommendations.

[112] The costs associated with Dr. Okorie's recommendations are allowed as follows:

a) 12-16 sessions of cognitive behavioural therapy, at a cost of $1800 to $2400; and

b) 10 sessions of driver rehabilitation, at a cost of $985 to $1200.

[113] The defendants also acknowledged the recommendations for active rehabilitation and passive treatment recommended by Dr. Giantomaso and Ms. Peters are appropriate. Dr. Giantomaso and Ms. Peters relied on Dr. Zhang's report, which recommended six to 16 initial sessions, plus one or two sessions per year until the plaintiff stops working as an electrician.

[114] Ms. Peters testified that her 2020 cost of future care recommendations would be subject to inflation to 2024 dollars. Active rehabilitation in 2024 dollars would cost $91.51, with six sessions equaling $549.06 and 16 sessions totaling $1464.16. For the one to two sessions per year until retirement, Ms. Clark's cost of future care multiplier provides for a value of $1,820.68 to $3,641.47 to age 65, which is when I would expect the plaintiff will retire.

[115] Ms. Peters also recommended five or six sessions of physiotherapy (or massage therapy) per year at $75 per session in 2020 dollars, for as long as the plaintiff works as an electrician. Using Ms. Clark's multiplier, the cost of such treatment is $8,314.24 to 10,505.08.

[116] Ms. Peters also recommended a tool to assist the plaintiff for her work as an electrician. The cost in 2024 dollars, inclusive of tax, is $54.41. The defendants concede this is appropriate.

[117] Dr. Zhang recommended occupational therapy, and Ms. Peters opined that five to ten hours over the plaintiff's lifetime at an average cost of $115 per hour plus travel time would be appropriate ($575 to $1150, based on present dollars).

[118] As for Ms. Peters' recommendations for other adaptive tools, such as a self-propelled lawnmower, a food processor, battery powered garden tools, I do not allow those claims. The plaintiff has continued to do some portion of the yard work and meal preparation as she did previously, and she continues to complete routine household chores.

[119] I will allow the claim for an automatic vacuum cleaner, primarily because the plaintiff has actually purchased one. Based on Ms. Peters' report, I assume a cost of $299 plus tax, or $340.86. I do not allow the housecleaning services because the plaintiff remains capable of doing them, and she has not retained any outside services to complete any of those tasks since the accident.

[120] The future care items I have allowed are set out on the table that follows:

ITEM	High	Low
Cognitive therapy	$ 1,800.00	$ 2,400.00
Driver rehab	$ 985.00	$ 1,200.00
Active rehab – initial	$ 549.06	$ 1,464.16
Active rehab – continual	$ 1,820.68	$ 3,641.47
Physio/MT	$ 8,314.24	$10,505.08
Work tool	$ 54.41	$ 54.41
Occupational therapy	$ 575.00	$ 1,150.00
Automatic vacuum	$ 340.86	$ 340.86
TOTAL	$14,439.25	$20,755.98

[121] I award the plaintiff the sum of $17,500 for cost of future care.

Non-pecuniary damages

[122] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *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 in

each case will vary depending on the specific circumstances of each case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

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

> [46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:
>
> (a) age of the plaintiff;
>
> (b) nature of the injury;
>
> (c) severity and duration of pain;
>
> (d) disability;
>
> (e) emotional suffering; and
>
> (f) loss or impairment of life;
>
> I would add the following factors, although they may arguably be subsumed in the above list:
>
> (g) impairment of family, marital and social relationships;
>
> (h) impairment of physical and mental abilities;
>
> (i) loss of lifestyle; and
>
> (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff.

[124] The most significant of the *Stapley* factors in this case are the plaintiff's relatively young age, and the severity and duration of her pain, which is chronic. She continues to have to lay on the floor when returning home from work in order to manage her pain at the end of a workday. Her chronic pain is also maintaining her unspecified anxiety disorder.

[125] Although she initially had difficulty hiking, this was related to her resolved knee pain. She has not played tennis or basketball since the accident, but acknowledged she was an infrequent participant in these activities before the accident and did them primarily because her husband enjoyed them.

[126] She continues to perform the majority of her household chores and activities of daily living, but with pain and modifications, including taking breaks.

[127] The plaintiff argues for an award of $160,000. She refers to the cases of *Woloschuk v. Neuman*, 2021 BCSC 940 ($125,000, but $140,000 in present dollars); *Tolea v. Huang*, 2021 BCSC 260 ($150,000); and *Yang v. Lockhart*, 2022 BCSC 32 ($140,000).

[128] The defendants suggest an award of $75,000 to $80,000 and rely on *Rao v. Lagimodiere*, 2024 BCSC 1269 ($75,000); *Avishek v. ICBC*, 2023 BCSC 1856 ($80,000); and *Stempowicz v. Dobbs*, 2023 BCSC 1951 ($75,000).

[129] It is not necessary for me to review each of these authorities because an assessment of non-pecuniary damages is necessarily fact specific and no two cases are identical. Rather, the authorities provide the court with a range of what could constitute an award that is fair to both parties. Because the plaintiff is largely able to pursue all of her prior activities, albeit with pain, I conclude that the circumstances in the defendants' authorities are generally more similar to the facts here.

[130] However, there are a couple of other factors that upwardly influence the award of non-pecuniary damages in this case. In some circumstances, it may be appropriate to augment a non-pecuniary award with an award for loss of housekeeping capacity. The Court of Appeal provided guidance on whether a discrete award should be made, as opposed to considering it a factor in the assessment of non-pecuniary damages in *McKee v. Hicks*, 2023 BCCA 109:

> [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] Because the plaintiff is able to perform her housekeeping activities, a separate award is not necessary, but the difficulties she experiences while performing those tasks should be considered in the assessment of non-pecuniary damages.

[132] Similarly, because the plaintiff is a stoic individual who would rather persevere and continue to work full time, even though there are physical consequences that manifest themselves at the end of the day when she needs to recuperate, the defendants have realized benefit from what might have been a higher claim for loss of past income. In the circumstances, it is appropriate to compensate the plaintiff who experiences pain that is both more frequent and more severe because she chooses to work through her difficulties by way of a higher award of nonpecuniary damages: see *Giang v. Clayton, Liang and Zheng*, 2005 BCCA 54 at para. 53.

[133] I award the plaintiff the sum of $110,000 for non-pecuniary damages.

Special damages

[134] The parties agreed prior to trial that the plaintiff was entitled to an award of $6,838.63 on account of special damages.

Summary

[135] In summary, damages are awarded to the plaintiff as follows:

Past loss of earning capacity	$ 39,570.00
Loss of future earning capacity	$187,500.00
Cost of Future Care	$ 17,500.00
Non-pecuniary damages	$110,000.00
Special damages as agreed	$ 6,838.63
TOTAL	$361,408.63

Costs

[136] The plaintiff would ordinarily be entitled to her costs. However, if either of the parties wishes to speak to the issue, they may contact Supreme Court Scheduling within 21 days of the date of these reasons to make those arrangements.

"Wilson J."