

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Klimek v. Lockhart*,
2023 BCSC 582

Date: 20230413
Docket: M193370
Registry: Vancouver

Between:

Linda Patricia Klimek

Plaintiff

And

Gregory John Lockhart

Defendant

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Plaintiff:

T. Dennis

Counsel for the Defendant:

K.S. Rotheisler

Place and Dates of Trial:

Vancouver, B.C.
February 21-24, 2023

Place and Date of Judgment:

Vancouver, B.C.
April 13, 2023

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I. Introduction

[1] At around 6:00 p.m. on April 3, 2017, the plaintiff, Linda Patricia Klimek, was driving northbound on 152nd Street in Surrey, British Columbia, on her way home from shopping after work. As she was preparing to turn right onto 91st Avenue, her vehicle was rear-ended by another vehicle driven by the defendant, Gregory John Lockhart. She brings this action seeking to be compensated for the injuries and associated losses that she claims to have sustained in that accident.

[2] Liability has been admitted. At issue in the action is the quantum of damages that the defendant should have to pay. Ms. Klimek seeks damages totalling \$597,623.10, including general damages (\$148,000), damages for loss of housekeeping capacity (\$55,000), loss of past and future earning capacity (\$10,000 and \$296,074 respectively), cost of future care (\$70,000) and special damages (\$18,549.10).

[3] The defendant argues that Ms. Klimek has grossly overstated her accident-related injuries and their impact on her life. He says that those injuries had largely resolved themselves after no more than 18 months. He attributes most of her historical and all of her current complaints to a pre-existing condition that is divisible from the injuries sustained in the accident. In the result, in his submission, she is entitled to general damages of \$40,000 to \$60,000, \$4,007.12 for past loss of earnings, no more than \$15,000 for loss of future earning capacity and \$1,881 in special damages.

[4] For the reasons that follow, I have concluded that Ms. Klimek is entitled to damages as set out below.

II. The Background Facts

A. Before the Accident

[5] Ms. Klimek was born in 1969 and grew up in Richmond, British Columbia. After graduating secondary school in 1987, she commenced a liberal arts programme at Langara College but decided after half a semester that she was ill-

suiting to academic studies and opted to enter the workforce. She worked in a variety of positions, including at a restaurant, a hardware retailer and a law office but she discovered that she did not enjoy office work.

[6] She became pregnant at 21. Her daughter, Lauren, was born in 1991. Ms. Klimek raised her as a single parent. After a period on social assistance, she went back to work in the hospitality and catering industry but the childcare costs became too high with the long hours that were required of her.

[7] In 2000, she moved from her apartment into a beach house in Tsawwassen with her then boyfriend. The house required work but she enjoyed having access to a yard for Lauren. She enjoyed gardening. She made gradual improvements to the property. In 2008, the relationship with her boyfriend ended amicably.

[8] In 2008, she was 38 and working at a restaurant in Tsawwassen when a friend suggested that she apply to work for BC Ferries. She did so and has been working there ever since. She began as a customer service attendant, initially filling in for other employees. The work was sporadic at first, but eventually she secured a full-time position. Her duties included cleaning, taking orders and providing general support. She recalled that in the spring of 2017, BC Ferries circulated an expression of interest for a vacant position as second steward. She filled in the form but did not submit it before the subject accident.

[9] She continued to reside at the beach house until 2012. By then, Lauren was in her teens and had moved out. Ms. Klimek, now living on her own, decided to move into her parents' former home in Surrey, which had been vacant for about a year following her parents' passing in 2011 and 2012, respectively. She took out a mortgage to purchase her sister's share in the property.

[10] On October 23, 2014, she was injured in a motor vehicle accident when the vehicle she was driving was rear-ended. Although she testified in her examination-in-chief that the injuries she sustained on that occasion did not interfere with her work or recreational activities and had largely resolved by the time of the subject

accident, the contemporaneous medical records, which I find to be more reliable, paint a different picture.

[11] They show that she took a day off work in June 2015 as a result of ongoing pain. She was reporting, as of July 2, 2015, daily bilateral lower back pain that impacted her activities, such as gardening. She was taking Tylenol #3 on a daily basis to help control the pain. On December 7, 2015, she again complained to her doctor of lower back pain from the 2014 accident, which was said to be worse at work.

[12] On February 29, 2016, her back pain was described as “chronic”. On May 9, 2016, she was asking for more Tylenol #3 tablets in order to avoid having to come to the doctor’s office as often. She reported at that time that she was taking one or two tablets per day but denied that she had increased her consumption recently.

[13] Another note dated November 3, 2016 refers to chronic back pain since the 2014 accident with intermittent flare-ups. By then, she was said to be taking Tylenol #3 sparingly, but still taking it some days. She asked for a note to get massage therapy to help with bilateral shoulder pain. She stated that a few weeks prior she was having “severe” shoulder spasms that were “quite bad” and forced her to be off work again. It was suggested that she try to reduce or avoid consumption of Tylenol #3.

[14] On January 30, 2017, she went back to her family physician’s office to refill her prescription for Tylenol #3 and naproxen. She was told again that Tylenol #3 was not a good option for treating chronic back pain and she was encouraged to use less of it and to consider other options.

[15] She began experiencing the most intense flare-up of her back pain yet on February 10 or 11, 2017. On February 13, she went to the emergency ward at Delta Hospital complaining of severe back pain and was given 30 mg of morphine before being discharged.

[16] She attended the British Columbia Back Clinic on the following day. A form that she was asked to complete on that occasion states that she was unsure of the cause of the recent flare-up. She speculated that it might have been triggered by lifting a baby or vibrations on the ship where she worked. She reported having “constant” back pain and that she was aware of it whenever she moved or breathed. In answer to a question about the extent to which her symptoms affected her functioning, on a scale of 0-3, she indicated a “3” (“It seems to drastically affect me”). She was asked to indicate which of the following eight aspects of her life were affected, including:

- a) work;
- b) walking;
- c) recreation/play;
- d) social life;
- e) rest/sleep;
- f) eating;
- g) exercise; and
- h) sitting.

[17] She indicated that all of these were affected. She completed another form indicating that in the previous six months, she had experienced neck pain, muscle spasms in her neck, pain in her shoulder joints, pain across shoulders, tension in her shoulders and lower back pain (that last of which was said to be worse when she was working, lifting, sitting, bending, coughing and lying down). When asked when the pain is relieved, she wrote “not at all (standing)”.

[18] When she attended her family physician again on February 20, 2017, she reported she had, yet again, been off work the previous week. By then, her back was

said to be getting less stiff. She was seeing a chiropractor. There was another discussion about her overuse of Tylenol #3. She was told it should not be used for day-to-day muscle tension, but only for acute pain. She was said to be aware of her dependency, that her usage had gone up significantly in the previous two years and that it needed to be limited.

[19] The note from the next visit on March 6, 2017 stated she had begun a gradual return to work, working four mornings. She was seeing a chiropractor, a physiotherapist and a kinesiologist.

[20] It appears that she returned to full-time duties on March 20, 2017, just two weeks before the subject accident.

B. The Accident

[21] Ms. Klimek was driving home after work and shopping on April 3, 2017 when her vehicle was rear-ended again. She remembers heading northbound on 152nd Street. She had stopped at a red light. She was preparing to turn right onto 91st Avenue and was leaning forward, checking to her left for oncoming traffic with her head rotated, when the collision occurred.

[22] She has no memory of the impact itself. At first, she did not know what had happened. She was shocked because her vehicle had been pushed to the opposite side of the intersection and yet she could see no vehicle behind her. Initially, she thought she might have had a stroke. She believes she hit her head on the steering wheel. She remembers a rattling sensation in her head and seeing stars.

[23] Moments later, the defendant, who had already pulled into the driveway of a nearby Dairy Queen restaurant, walked back to her vehicle and informed her that he had hit her. He showed her where he had parked. She drove to the same spot so that they could exchange information. After that, she was able to drive home.

C. After the Accident

[24] In the immediate aftermath of the accident, Ms. Klimek remembered being in considerable pain and discomfort, particularly in her neck, shoulders and back. She experienced frequent headaches. She remembered the base of her skull feeling heavy and strange. She was unable to turn her head. Her lower back felt as if it was “on fire”. She had a salty taste in her mouth. She was sensitive to bright light, to the point that she needed to wear sunglasses outdoors even on cloudy days.

[25] Some of those symptoms resolved over time. Others, such as the pain in her neck and back, and her sensitivity to light, have persisted or grown worse. More recently, she has experienced anxiety and depression. Her daughter has noticed that her memory sometimes fails her.

[26] She recalled her recovery feeling like she was on a rollercoaster. She went to see her family physician for the first time after the accident on April 5, 2017. On that occasion, she reported feeling left-sided neck pain, a mild headache, soreness in her left leg and left-sided lower back pain. Her neck was noted on examination to have a slightly limited range of motion when turning to the left.

[27] She continued to seek physiotherapy and chiropractic treatment, which she has found to be helpful. In her view, although these treatments have not resolved her symptoms, they have helped her to function.

[28] In a note made by one of her doctors on April 20, 2017, she is said to have reported that her condition was “improving”. She stated that she wanted to return to work without restrictions on April 25, 2017. On a subsequent visit on May 5, 2017, however, she is said to have reported that she had tried going back to work but it had aggravated her symptoms. Her chiropractor noted on June 20, 2017 that she was “doing great”. When she was confronted with that note in cross-examination, she acknowledged that she probably did tell him that, but explained that she wanted to believe it. In the end, she took six weeks off work. In retrospect, she says, she believes she returned to work too early. She felt pressure to do so for financial reasons.

[29] After returning to work, Ms. Klimek found the drive from her home in Surrey to the ferry terminal in Tsawwassen difficult. She felt anxious while driving. In order to shorten her commute, she sold her house in Surrey and purchased a condominium in Tsawwassen. A note from a doctor's visit on September 26, 2017 states that she had, at that time, been moving and renovating her new home, which worsened her symptoms.

[30] She says that she spent approximately \$130,000 renovating the condominium. Among other things, she had the cabinets raised and installed higher toilets. However, she ended up selling the condominium after only a few months. She realises now that she purchased the condominium hastily. She came to regret the purchase because she missed having outdoor space for gardening and found the property too noisy. In the end, she sold it for a loss. After she purchased another house, once again with a yard, her daughter returned to live with her and now helps her with household chores.

[31] In late 2018 or early 2019, she acquired her cashier ticket from BC Ferries, entitling her to a pay increase. She has been working as a cashier since then.

[32] On October 10, 2021, she experienced another serious flare-up of her back pain when she tried to lift a 10lb box of napkins at work. She remained off work for nine months following that incident.

[33] She began a gradual return to work in August 2022 and resumed full duties in September. A form completed for that purpose suggests that she was able to perform her duties at work without limitation, except for vacuuming, prolonged bending/crouching or servicing the ice-cream machine. When asked in cross-examination if that assessment was accurate, she responded that she is able to perform her other duties only with the assistance of her co-workers. She says that it upsets her that her co-workers have to cover for her. Because she has difficulty vacuuming, she often switches with her co-workers and does the mopping for them instead. She has abandoned any thought of applying to become a second steward, given the physical demands associated with that position.

III. The Medical Evidence

[34] There was only one expert report adduced in evidence. Dr. Gillian Simonett is a physiatrist. At the request of Ms. Klimek’s counsel, she assessed Ms. Klimek on October 4, 2022. In her report, dated November 16, 2022, she diagnosed Ms. Klimek with, among other things, chronic pain in her neck, right shoulder girdle and lower and mid-back.

[35] During the physical examination, Dr. Simonett noted that Ms. Klimek’s shoulder range of motion was normal but her movements were slow. She was seen to have reduced range of motion in her neck and there was a sensation of pressure noted (Dr. Simonett agreed when asked about this in cross-examination that this was the only pain symptom she could reproduce). She was unable to isolate a specific location of pain on palpation, but noted that Ms. Klimek did refer to a specific location on her back where the pain occurs.

[36] When Dr. Simonett asked Ms. Klimek about her pre-existing conditions, Ms. Klimek was unable to recall the details. Relying on the medical records that she was given, Dr. Simonett concluded that it was more likely that not that the subject accident “resulted in/materially contributed to her neck and shoulder girdle pain.”

With respect to the cause of those injuries, the report states as follows:

Causation depends on understanding her pre-MVC symptoms in the same region. If she had an increase of pre-existing pain (such as frequency or intensity), this would support an aggravation. If she now has pain in a different location (distinct to her pre-MVC location), then this would support a new onset of injury.

[37] The same difficulty was seen to obscure the cause of Ms. Klimek’s back pain.

Dr. Simonett summarised her conclusions on that subject as follows:

Ms. Klimek has a history of chronic low back pain prior to the currently discussed MVC. She could not recall the specific details. Clinical records indicate that she had received treatments and was filling prescriptions for naproxen and Tylenol #3 (or similar) prior to the 2017 MVC. It was noted in her February 20, 2017 assessment that there was concern regarding escalating use of Tylenol #3. Entry marked March 6, 2017 referenced recently completing a gradual return to work, with vibrations irritating her back.

Ms. Klimek reports that she had more diffuse low back pain following the April 3, 2017 MVC, with pain travelling up into her midback. Unfortunately, specific comparisons are challenging due to her lack of recollection of pain prior to the currently discussed MVC. Worsening of pain (such as increased frequency or intensity) would support aggravation of her chronic low back pain by the April 3, 2017 [accident]. If this was in a new location (distinct from her previous pain), then there would be support that she sustained a new injury.

Ms. Klimek reports that she was having ongoing pain. While at work, she lifted a box resulting in a flare of low back pain and time off work.

Based on the current information provided, Ms. Klimek had chronic low back pain which was likely aggravation [sic] following the 2017 MVC and the October 2021 work injury. She would have had a poor prognosis of her low back pain prior to the currently discussed 2017 MVC, as evidence[d] by her reportedly escalating use of pain medications. Although the 2017 MVC likely aggravated this pain, I cannot determine to what degree the 2017 MVC contributed to her long-term prognosis / change in trajectory.

[38] Dr. Simonett explained in cross-examination that what she meant by this is that she cannot say if the aggravation that occurred as a result of the subject accident is still ongoing today.

[39] In answer to a question about Ms. Klimek's current and future levels of function, the report states as follows:

Ms. Klimek will continue to be at risk for flares of pain due to her job. Clinical records indicate that she [was] having ongoing low back pain [prior] to the currently discussed MVC, including report of aggravation with vibrations of the ship. This risk pre-dated the MVC, and was likely further aggravated following the 2017 MVC.

IV. Causation and Divisibility

A. The Parties' Arguments

[40] The defendant argues that Ms. Klimek's claim is fundamentally flawed for want of expert medical evidence demonstrating, to the requisite standard, a causal link between the accident and her current symptoms. In particular, whatever ongoing symptoms she may be suffering from today, they are, in the defendant's submission, the product of a divisible pre-existing condition. He says that the court must approach that aspect of her claim with caution, owing to the absence of any or very little objective evidence of any symptoms after 18 months, citing *Price v. Kostyba*, 1982 CanLII 36, [1982] B.C.J. No. 1518 (S.C.).

[41] The defendant points to the following factors to support his argument that Ms. Klimek had recovered from the effects of the current accident within 18 months:

- a) statements made by her and those treating her that she was, after only a few weeks off work, doing well and already ready to return to full duties;
- b) her reduced use of pain medications, particularly Tylenol #3 and naproxen (the defendant has calculated that she took a total of 710 pills, or one every 1.02 days, in the two years preceding the subject accident, but only 420, or one every 1.74 days, in the two years following it); and
- c) less frequent complaints about her pain symptoms to those treating her than in the pre-accident period.

[42] In support of his submission that Ms. Klimek's injuries are divisible, the defendant cites: *Sandhu v. Morris*, 2023 BCSC 35; *Schnurr v. Insurance Corporation of British Columbia*, 2015 BCSC 1630 and *Vintila v. Kirkwood*, 2016 BCSC 930.

[43] Ms. Klimek responds that she has met her burden to show the requisite causal link between the accident and her current symptoms, relying particularly on the report of Dr. Simonett and the law in relation to divisibility, as set out primarily in *Bradley v. Groves*, 2010 BCCA 361. The defendant's arguments to the contrary are, she says, based on a selective and incomplete account of the evidence, which, when viewed as a whole, does not demonstrate that there was a diminution in the severity of her symptoms in the two years following the subject accident.

[44] However, she acknowledges that her pre-existing condition justifies a reduction of 20% from the damages award to reflect the real and substantial possibility that she would have experienced her current symptoms anyway. She says that a reduction of 25% should be considered the "high-water mark", citing *Corness v. Ng*, 2022 BCSC 334.

B. Discussion

[45] In *Brooks v. Habib*, 2019 BCSC 1398, Dardi J. conveniently summarised the general nature of the plaintiff's burden to prove causation in a negligence case, stating as follows:

[222] The primary test to be applied in determining causation is commonly articulated as the "but for" test. The plaintiff bears the burden of showing that "but for" the negligent act or omission of the defendant, the plaintiff's injury would not have occurred. The "but for" test is not to be applied too rigidly and need not be determined with scientific precision. Rather, causation is a practical question of fact which can be best answered through the application of ordinary common sense: *Snell v. Farrell*, [1990] 2 S.C.R. 311 at 328.

[46] In this case, the question of causation is complicated because the evidence discloses at least three potential causes for Ms. Klimek's current condition, including:

- a) injuries sustained in the first accident;
- b) injuries sustained in the subject (second) accident; and
- c) ongoing aggravation of those injuries by other non-tortious factors, most notably, ship vibration.

[47] Justice Dardi went on to summarise how that test is to be applied in cases like this, where some or all of the harm may be attributable to more than one cause:

[226] A plaintiff need not establish that a defendant's tortious conduct is the sole cause of the injury. As long as the plaintiff establishes a substantial connection between the injuries and the defendant's negligence beyond the *de minimus* range, a defendant will be fully liable for the harm suffered, even if other causal factors, for which the defendant is not responsible, were at play in producing the harm. Put another way and to the same effect, apportionment does not lie between tortious causes and non-tortious causes of injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he or she is not responsible also helped to produce the harm: *Farrant v. Laktin*, 2011 BCCA 336 at paras. 9 and 11; *Athey; Resurface Corp. v. Hanke*, 2007 SCC 7; *Clements v. Clements*, 2012 SCC 32.

[48] However, where the plaintiff has been injured on more than one occasion and it is possible to identify which part of the plaintiff's condition is attributable to the

defendant's conduct, rather than other causes, the injury is said to be "divisible" and the defendant will be liable only for that part of the injury that he caused.

[49] In *Morrell v. Lippucci*, 2022 BCSC 977, Thomas J., summarised the potential impact of the divisibility question on both liability and damages, stating as follows:

[147] Where there are multiple causes of a plaintiff's injuries, the court must determine whether the injuries are divisible or indivisible. Generally speaking, divisible injuries are injuries capable of being separated and having their damages assessed independently, whereas indivisible injuries cannot be separated into their constituent causes: *Bradley v. Groves*, 2010 BCCA 361 at para. 20.

[148] The issue of divisibility of injuries is relevant to the analyses of both causation and damages. Our Court of Appeal set out the applicable principles as follows in *Moore v. Kyba*, 2012 BCCA 361:

[36] Thus, whether a defendant is liable to a plaintiff for an injury is a matter of causation; the amount of compensation the defendant must pay is a matter of assessment of damages.

[37] The concepts of divisible and indivisible injury are relevant at both stages of the analysis. At the stage of determining causation, the characterization of the plaintiff's injury or injuries as divisible or indivisible is relevant in determining what the defendant is liable for. As explained in *Athey* (at paras. 24-25):

The respondents submitted that apportionment is permitted where the injuries caused by two defendants are divisible (for example, one injuring the plaintiff's foot and the other the plaintiff's arm): *Fleming*, supra, at p. 201. Separation of distinct and divisible injuries is not truly apportionment; it is simply making each defendant liable only for the injury he or she has caused, according to the usual rule. The respondents are correct that separation is also permitted where some of the injuries have tortious causes and some of the injuries have non-tortious causes: *Fleming*, supra, at p. 202. Again, such cases merely recognize that the defendant is not liable for injuries which were not caused by his or her negligence.

...

[Emphasis added.]

...

[41] At the stage of assessment of damages, the question is what compensation the plaintiff is entitled to receive from the defendant.

[42] If the injury is divisible, then the plaintiff is entitled to be compensated for the injury caused by the defendant. ...

[43] If the injury is indivisible, then the plaintiff is entitled to be compensated for the loss flowing from the indivisible injury. However, if the plaintiff had a pre-existing condition and there was a measurable risk that that condition would have resulted in a loss anyway, then that pre-existing risk of loss is taken into account in assessing the damages flowing from the defendant's negligence. ...

[149] Whether injuries are divisible or indivisible is a question of fact. If the trier of fact can determine the extent to which each defendant caused or contributed to the plaintiff's injuries on the available evidence, the injuries are divisible.

[50] One of the leading cases in British Columbia on the question of divisibility is *Bradley*. As Ms. Klimek argues, this case resembles *Bradley* in many respects. That case, like this one, involved two successive motor vehicle accidents, the second aggravating injuries sustained in the first. The defendant in that case, who was responsible for the first of those accidents, argued at trial that the plaintiff's injuries were divisible, and in particular, that the damages for each injury should be assessed against the two tortfeasors separately. The trial judge rejected that argument, holding both tortfeasors jointly and severally liable for the combined effect of both accidents.

[51] In its decision upholding the trial judgment, the Court of Appeal offered the following guidance on the issue of whether two tortious acts will give rise to divisible or indivisible injuries in those circumstances, stating as follows:

[37] We are also unable to accept the appellant's submission that "aggravation" and "indivisibility" are qualitatively different, and require different legal approaches. If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for"

approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a “but-for” test, as “there is more than one potential cause in virtually all litigated cases of negligence” (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[52] Nevertheless, as noted by Marzari J. in *Ham v. Dhaliwal*, 2022 BCSC 520, there have been cases, decided since *Bradley*, in which this court has indeed “divided up” the worsening of a single injury in precisely that manner. She summarised the kinds of cases in which that has occurred as follows:

[99] The principle of divisibility applies most obviously to injuries to different parts of the body. Divisibility may also be possible where a tort aggravates a pre-existing injury, where the evidence is sufficient to establish the extent to which the subsequent accident exacerbated the injury: *Khudabux v. McClary*, 2018 BCCA 234 at paras. 29–35; *Deol v. Sheikh*, 2016 BCSC 2404 at paras. 17–19; *Fleming v. McAllister*, 2017 BCSC 753. It can also be possible in relation to sequential injuries, where the evidence is sufficient to establish a baseline: *Uppal v. Judge*, 2016 BCSC 642 at para. 86; *Dunne v. Sharma*, 2014 BCSC 1106 at para. 99.

[53] *Sandhu* is another example of a case in which the evidence was seen to be sufficient to establish the extent to which a later accident exacerbated a pre-existing injury. In that case, Funt J. accepted the finding of one of the expert witnesses that the plaintiff had experienced, as a result of the subject accident, only a “temporary worsening” of her pre-existing condition.

[54] In this case, Dr. Simonett concluded that the subject accident likely aggravated Ms. Klimek’s pre-existing conditions in her neck, shoulder girdle and lower back. However, she was unable to offer any opinion as to the extent to which the subject accident, by itself, has contributed to Ms. Klimek’s current back symptoms, or how long its effects may have lasted into the future. That evidence simply does not allow me to “divide up” her injuries in that manner, as Funt J. could in *Sandhu*.

[55] Although Dr. Simonett could offer no opinion as to the extent to which the subject accident altered Ms. Klimek's long-term prognosis or the trajectory of her back injury, the causation question before me is not quite the same, and, in any event, the body of evidence available to me is greater. In *Brooks*, Dardi J. also had occasion to comment on the use to be made of medical evidence in resolving questions of causation, stating as follows:

[223] When assessing medical evidence, the court must be mindful that in the legal context, the "but for" test need only be established on a balance of probabilities; a plaintiff must show that it is more likely than not that, without the tort, the injury or medical condition would not have occurred. In contrast, medical experts often endeavour to apply a far more rigorous causation standard that approximates the threshold of scientific certainty: *Midgley v. Nguyen*, 2013 BCSC 693 at para. 172 [*Midgley*]; *Woelders v. Gaudette*, 2016 BCSC 1066 at para. 116 [*Woelders*].

[224] The Court in *Tsalamandris v. MacDonald*, 2011 BCSC 1138 at paras. 145-146, var'd on other grounds, 2012 BCCA 239, provides the following instructive caution regarding the assessment of medical evidence:

[144] Because the "but for" test is to be proved on a balance of probabilities, rather than a standard of scientific certainty, great care must be had in assessing medical evidence...

[145] In determining causation in the legal context, courts must be mindful to assess the import and substance of the expert opinion evidence, and to be cautious about the wording used by the experts so as to not unduly discount or over-weigh the expert's choice of language when describing medical causation. Ultimately causation is a question for the court, taking into account the evidence.

[146] It is important for the court to keep in mind that all that is required to determine these complex medical issues in the context of causation is for the plaintiff to prove what is more likely than not. This is what is meant by the "but for" test: it is more likely than not, that without the tort, the injury or medical condition would not have happened.

[Emphasis added by Dardi J.]

[56] I agree with the defendant that Ms. Klimek is, in many respects, an unreliable historian with respect to her pre-existing conditions. Her medical records suggest her back pain had, as early as 2016, become chronic, rendering her susceptible to periodic flare-ups. However, I disagree with the defendant's corollary that Ms. Klimek's accident-related injuries had probably resolved within 18 months.

[57] Rather, I accept Ms. Klimek's explanation that she was eager to get back to work for financial and other reasons, which affected how she was assessing and reporting her progress at the time. She says, and I accept, that she wanted to believe she could push through her symptoms so she could continue working and get on with her life.

[58] The relative reduction in her rate of consumption of naproxen and Tylenol #3 in the two years following the accident can be explained by the advice that she was regularly receiving from 2016 onward to limit her consumption going forward, coupled with her belief, borne of years of over-use and frustration, that the pills were no longer helping. The same dynamic also explains why she made fewer visits to her family physician to complain about the pain and seek further refills in the two-year period following the subject accident.

[59] I do not agree with the defendant's submission, based on *Price*, that greater scrutiny of the claim is called for because Ms. Klimek's accident-related symptoms were said to have lasted longer than one might expect and were not "objectively" verified after 18 months. In *Deol v. Sheikh*, 2016 BCSC 2404, Griffin J. (then of this court) questioned whether *Price* continues to be authoritative, stating as follows:

[108] Since many people experience a minor injury at some point in their lives and get better from it, the idea that someone else might have lasting severe and debilitating pain from a minor injury has long been met with skepticism.

[109] In the legal system the argument was typically advanced that patients complaining of this kind of disorder were exaggerating for the sake of an ongoing legal claim, given that medical science could not understand why someone would have pain in the absence of an objective ongoing injury.

[110] It was in this context and the then state of medical science that more than 34 years ago McEachern C.J.S.C. (as he then was) wrote the judgment of *Price v. Kostyba*, 1982 CanLII 36 (BC SC), [1982] B.C.J. No. 1518 and these oft-cited words:

In *Butler v. Blaylock*, [1981] B.C.J. No. 31, decided 7th October 1981, Vancouver No. B781505, I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful

when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[111] As was pointed out by Mr. Justice Kent in *Kallstrom v. Yip*, 2016 BCSC 829 at para. 335, the *Butler v. Blaylock* decision relied upon in *Price* was overturned on appeal; see [1983] B.C.J. No. 1490 (C.A.). There is no principle by which plaintiffs suffering chronic pain ought to be subject to a higher standard of proof or a higher degree of skepticism.

[112] Medical science and technology have advanced since the *Price* decision. Medical science has come to accept that some people can suffer an increased and prolonged sensitivity to pain from what to others appears to be a minor injury.

[60] In any event, the defendant's submission fails to account for the intermittent nature of the condition brought about by Ms. Klimek's injuries. She is susceptible to periodic flare-ups which, by their nature, will wax and wane over time. This is not a case in which there is no objective evidence of lingering symptoms. Dr. Simonett's report lends support to their existence, as does the testimony of Ms. Klimek's daughter, a co-worker and a close friend, each of whom have observed her in pain and were not challenged on those observations. There was also evidence, including from Ms. Klimek herself, that the pain became qualitatively worse after the subject accident.

[61] *Schnurr* is another example of a case in which the court found the evidence sufficient to establish a pre-accident baseline, but it does not assist the defendant either. At issue in that case was the cumulative impact of six accidents over an 11-year period. Justice Skolrood (then of this court) distinguished that case from *Athey v. Leonati*, [1996] 3 S.C.R. 458 1996 CanLII 183, and *Bradley* on the grounds that no evidence was adduced in his trial about the earliest of these accidents or their

ongoing impact. The plaintiff's claims in relation to the first group of accidents had been settled eight years before the trial. In addition, he described the case as "unusual" because it was possible to determine the plaintiff's original position when the first of the subject accidents occurred. Several of the plaintiff's injuries, he found, did not originate from the subject accidents but were likely exacerbated by them (including her chronic pain condition, headaches, depression and cognitive difficulties). On the other hand, her other injuries were found to be related to afflictions that predated the earliest accident in 2001, including degenerative disc disease in her lower back, and bladder and urinary issues.

[62] In that context, he concluded as follows:

[169] Considering all the evidence, I find that Ms. Schnurr's complaints resulting from the accidents that were settled in October 2007 had already become a chronic condition when the first subject accident occurred on November 10, 2007. At that point, several of her afflictions had been in effect for years, and the expert evidence indicates that her afflictions were likely to be of a long-term, ongoing nature. Significantly, the evidence does not indicate that Ms. Schnurr's condition was unstable or significantly improving, or that there was a realistic chance that she would begin a new program or treatment or experience some other change of circumstances that would affect her injuries or chance of recovery.

[170] In short, by October 2007 Ms. Schnurr's condition had plateaued. The afflictions she complained of prior to that point were no longer a series of ongoing injuries, but rather chronic conditions. To use the terminology of *Athey*, the chain of events caused by the first three accidents had ended.

[63] This case is different because it is impossible to isolate the effects of Ms. Klimek's pre-accident baseline condition and distinguish them from her accident-related symptoms, as Skolrood J. was able to do in *Schnurr*. The subject accident occurred only two weeks after Ms. Klimek had returned to full-time duties following the latest, and, until then, the most serious, flare-up apparently caused by the first accident. According to Dr. Simonett, Ms. Klimek's injuries were, both before and after the subject accident, constantly being aggravated as well by ship vibrations while she was at work.

[64] In any event, despite his finding as to divisibility, Skolrood J. concluded the subject accidents had indeed contributed to those ongoing conditions that he found

to have been aggravated by them (namely, the plaintiff's chronic pain condition, depression, cognitive issues and headaches), so as to render the defendant liable for those conditions as well.

[65] *Vintila* is also distinguishable. In that case, it was said (at para. 39) to be common ground:

(a) that the force of the impact from the accident was relatively minor; (b) that Ms. Vintila had a pre-accident history of severe, long-term and chronic disabling conditions and pain, for which she was deemed unemployable and in receipt of a CPP disability pension; (c) that Ms. Vintila continuously collected full CPP benefits from 2005 to the present; and (d) that CPP's disability pension is restricted to contributors who are unable to work because of a severe and prolonged disability.

[66] Here, as I have already noted, Ms. Klimek had just returned to full-time duties shortly before the subject accident occurred.

[67] For those reasons, I am satisfied, after considering all of the evidence, that the injuries that are the subject of Ms. Klimek's claim (particularly, the chronic pain in her back, neck and shoulder girdle, and associated anxiety and depression) are indivisible and that she has established the requisite substantial connection between them and the subject accident beyond the *de minimus* range.

[68] Although Ms. Klimek has established causation to the requisite standard, her pre-existing condition continues to be relevant to the assessment of damages and justifies a substantial reduction of the award to account for it, as she acknowledges.

V. Damages

A. General Damages

[69] General or non-pecuniary damages are intended to compensate a plaintiff for pain and suffering, and the loss of enjoyment of life and its amenities. The factors to be considered in assessing damages in this category were set out by Kirkpatrick J.A., writing for the Court, in *Stapley v. Hejslet*, 2006 BCCA 34. She listed the following factors as relevant to the analysis:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) extent of the disability;
- (e) emotional suffering;
- (f) loss or impairment of life;
- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities; and
- (i) loss of lifestyle.

[70] Ms. Klimek was 53 at the time of the trial. She suffered an aggravation of pre-existing chronic pain in her neck, shoulder and lower back. She also experienced some post-concussive symptoms in the immediate aftermath of the accident, but these have largely resolved. Although she continues to experience sensitivity to light, the causal connection of that symptom to the accident is tenuous and unsupported by any medical evidence.

[71] The most enduring of her symptoms involve her ongoing vulnerability to flare-ups from the injuries to her neck, right shoulder girdle and back. These have impacted her ability to enjoy her work, fulfil her career aspirations and maintain her home to the same standard. She is unable to enjoy gardening or social activities as she did before. She no longer goes camping and cannot endure long road trips. Her symptoms have led to sleep disruption, anxiety and depression. Her depression has led to despair about her condition and life in general. Her family and friends have noticed that she is no longer her former “bubbly” self.

[72] She seeks an award of \$185,000, less 20% to account for pre-existing conditions, for a net total of \$148,000, relying on the following precedents:

- a) *Khosa v. Kalamatimaleki*, 2014 BCSC 2060 (\$140,000 or \$175,000 after adjusting for inflation);
- b) *Rattan v. Li*, 2022 BCSC 648 (\$160,000); and
- c) *Sebaa v. Ricci*, 2015 BCSC 1492 (\$180,000 or \$222,864 after accounting for inflation).

[73] The only case cited by the defendant as a precedent for the award of general damages that did not involve divisible injuries more limited in duration is *Johal v. Conron*, 2013 BCSC 1924. In that case, the plaintiff was found to have sustained “mild to moderate soft tissue injuries to her cervical and lumbar spine” that aggravated her pre-existing conditions and caused new conditions in her lumbar spine and lower body. The court awarded general damages of \$35,000, or \$44,406 after accounting for inflation. In that case, however, the plaintiff had suffered from far more serious pre-existing conditions, including regional pain syndrome, which, among other things, had already left her unable to work outside the home before the accident occurred.

[74] On the other hand, the cases cited by Ms. Klimek generally involved more extensive injuries and impacts.

[75] In *Khosa*, the plaintiff was, as a result of the subject accident, unable to return to work in her previous position as a licensed nurse despite numerous attempts. In addition, her relationship with her husband and children had been seriously damaged.

[76] In *Rattan*, Horseman J. (then of this court), in assessing general damages in a case involving similar physical injuries, found the cases cited by the plaintiff (ranging from \$140,000 to \$200,000) to be more apposite than those cited by the defendants (ranging from \$100,000 to \$130,000) on the basis that in none of the defendants’ authorities was the plaintiff permanently disabled from work, as was Ms. Rattan. Applying that criterion, this case sits on the opposite side of that line.

[77] In *Sebaa*, the plaintiff had sustained more extensive injuries. In addition to the injuries to her neck and back, there were serious injuries to her hand, knee and foot, as well as more extensive psychological impairment, including a diagnosis of post-traumatic stress disorder, supported by extensive medical evidence.

[78] Having considered those authorities in light of the evidence in this case, I am awarding general damages in the gross amount of \$115,000. However, I am reducing that award by 25% to account for the real and substantial possibility that the same or similar symptoms would have manifested themselves anyway. I am satisfied that the likelihood of that possibility is higher than the 20% Ms. Klimek has proposed and belongs closer to the higher end of the range, given the history recounted above.

[79] On that basis, the net award is \$86,250.

B. Past Loss of Earning Capacity

[80] Ms. Klimek is entitled to be compensated for past loss of earning capacity based on the difference between the amount that she would have earned, had she not been injured, from the date of the accident until the date of the trial, and what she actually earned during that same period.

[81] The legal principles to be applied in assessing damages for that aspect of her loss were conveniently summarised by Goepel J.A. in *Grewal v. Naumann*, 2017 BCCA 158, as follows:

[48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.

[49] The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the

assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, 2016 BCCA 211 at para. 21.

[82] Ms. Klimek seeks to be compensated for the wages lost during her time off work prior to trial, over two periods:

- a) April 4, 2017 to May 26, 2017 – \$2,342.91, reflecting the wages lost during her time off work immediately following the accident; and
- b) October 11, 2021 to April 22, 2022 – \$7,242.55, reflecting her time off work following her injury on October 10, 2021, on the assumption that the workers' compensation income she received for that period, \$21,727.66, was 75% of the salary she would otherwise have earned.

[83] These items total \$9,585.46, yielding a rounded-off proposed award of \$10,000.

[84] The defendant acknowledges the loss of \$4,007.12 in gross income (\$3,800 net) during the initial period but dispute that Ms. Klimek's later absence from work in 2021/2022 was attributable to the accident and therefore that the associated wage loss is properly recoverable.

[85] I agree with the defendant's higher calculation of \$4,007.12 more accurately reflects the true value of the loss during the first period off work (this is the sum of the "total wage loss" – \$1,664.21 – and the "BC Ferries Subrogated Amount" - \$2,342.91 – shown on her wage loss record prepared by BC Ferries), and is properly recoverable.

[86] With respect to the second period, I have found that Ms. Klimek has demonstrated the requisite causal connection between the accident and subsequent flare-ups of her pain, including that which followed the incident at work on October 10, 2021. However, in light of her pre-existing condition, I am reducing the amount claimed for that incident by 25% to account for the real and substantial

possibility that the same or similar symptoms would have manifested themselves anyway by that time.

[87] I am therefore awarding her the gross amount of $\$4,007.12 + (\$7,242.55 - 25\% = \$5,431.91) = \$9,439$.

C. Future Loss of Earning Capacity

[88] In *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258, Blok J. conveniently summarised the test to be applied in assessing damages for future loss of earning capacity, stating as follows:

[129] The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Husseni*, 2016 BCCA 422:

[17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [*Perren*]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[130] In a trilogy of cases, the Court of Appeal recently clarified the law relating to the assessment of future losses of earning capacity: *Dornan v. Silva*, 2021 BCCA 228 [*Dornan*]; *Rab v. Prescott*, 2021 BCCA 345 [*Rab*]; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the court articulated a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. 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 – see the discussion in *Dornan* at paras 93-95.

[131] *Rab* states that the first step (i.e. the evidentiary inquiry) gives rise to the four considerations set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [*Brown*]. The questions are whether:

- 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 her, had she not been injured; and
- 4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[132] In considering the second and third steps set out in *Rab*, hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, citing *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 27. See also *Dornan* at paras. 93-94.

[89] Ms. Klimek argues that she has satisfied the first two steps of the test. In order to quantify her loss, she has compared her projected earnings for the remainder of her career, with and without injury.

[90] To estimate the value of the latter, she has assumed that there was a 50% chance that she would have been promoted to second steward. On that basis, she has calculated her future annual earnings at \$62,500, being the average between her current salary as a cashier (\$60,000) and that of a second steward (\$65,000). She then posits a “without injury” career lasting until age 67. Applying the prescribed multiplier for the 14 years between now and then (12.5434), she arrives at a figure of \$783,962.50 for her projected future earnings without injury.

[91] To estimate the present value of her future “with injury” earnings, she has assumed that she will retire four years earlier, at age 63, and incur a 10% loss of income from ages 53-56 and a 50% loss of income from ages 56-63. Using the weighted averages of those totals, as was done in *Rich v. Hamilton*, 2022 BCSC 1134, she arrives at a net value of \$422,963.75, or a 7.5% diminution in capacity.

[92] After accounting for contingencies (20% for her pre-existing condition and 10% to reflect the likelihood of her leaving the workforce regardless of the accident), she arrives at a net award calculated as follows: $\$422,963.75 \times .7 = \$296,075$, which she suggests be rounded off to an even \$300,000.

[93] The defendant opposes any award in this category, arguing that Ms. Klimek has not met the first branch of the test to show a possible future event that could lead to a loss of capacity. In the alternative, the defendant says that if such a loss is made out, the corresponding award should be no more than \$15,000 or 25% of her current income.

[94] For the reasons set out earlier, I agree that Ms. Klimek has satisfied the first step of the test, in the sense that the evidence discloses a potential future event, namely, the aggravation of pre-existing chronic pain in her neck, shoulder and back, that could lead to a loss of capacity, in the form of the need to take more extensive or frequent time off work than would otherwise have been required. I am also satisfied that there is a real and substantial possibility that the future event in question will cause a pecuniary loss, as indeed it probably already has.

[95] However, I also agree with the defendant that many of the assumptions underlying Ms. Klimek's proposed award are not supported by the evidence.

[96] First, Dr. Simonett's report suggests that Ms. Klimek's condition would likely have been aggravated by ship vibrations and other factors unconnected to the accident, such as her reported dystonia, which, according to the report, "may impact her long-term function." It follows that the more exposure Ms. Klimek has to ship vibrations and other hazards, the more likely it becomes that she would have experienced debilitating flare-ups regardless of the accident. This justifies an even larger contingency reduction than the one that she has suggested. The cumulative effect of these justifies a 40% reduction, rather than the 30% used.

[97] Moreover, given her vulnerability and poor prognosis apart from the accident, there is little prospect that Ms. Klimek would have been able to take on the role of a

second steward even if the accident had never occurred. On the other hand, the additional salary contemplated by the promotion is modest and should be included in the calculation to account for any increase in salary that may be forthcoming over the remainder of her career, even without the promotion.

[98] The defendant argues that a further reduction in the award should be made to account for the possibility that Ms. Klimek might avail herself of long-term disability (“LTD”) benefits under the collective agreement currently in place with her employer. In particular, the defendant says that if Ms. Klimek becomes unable to work due to a disability for more than 180 days, she will be entitled to LTD payments. If she becomes totally disabled, she will be entitled to the following:

- a) 70% of the first \$2,300 of basic pay; and
- b) 50% of the basic pay above that amount.

[99] On that theory, assuming she continues to earn \$30 per hour for the remainder of her career (the equivalent of \$60,000 annually), her actual loss, even if she is totally disabled, will be limited to \$24,480 per year, with the remainder of her lost wages paid to her in the form of LTD benefits.

[100] Ms. Klimek does not dispute that the collective agreement tendered in evidence is the version currently in force and that it includes provision for such LTD benefits to be paid. However, she argues that the document is inadmissible pursuant to Rule 7-1(3) and (4) of the *Supreme Court Civil Rules*. That Rule states as follows:

Insurance policy

(3) A party must include in the party's list of documents any insurance policy under which an insurer may be liable

- (a) to satisfy the whole or any part of a judgment granted in the action, or
- (b) to indemnify or reimburse any party for any money paid by that party in satisfaction of the whole or any part of such a judgment.

Information not to be disclosed

(4) Despite subrule (3), information concerning the insurance policy must not be disclosed to the court at trial unless it is relevant to an issue in the action.

[101] Regardless of whether the obligation of BC Ferries to pay LTD benefits under the collective agreement can be equated with a policy of insurance (an issue I will address next), it certainly does not render BC Ferries liable as an insurer to satisfy, or indemnify anyone for, the judgment granted in this action. The Rule simply has no application here, and even if it did, it would only prohibit disclosure of the “policy” to the court if it was entirely irrelevant to the action. This merely begs the question. If the prospect of receiving LTD benefits is properly considered in the assessment of Ms. Klimek’s damages, that would make the agreement relevant.

[102] In arguing that the agreement should be considered for that purpose, the defendant relies on *Ratyck v. Bloomer*, [1990] 1 S.C.R. 940, 1990 CanLII 97. In that case, McLachlin J. (as she then was), writing for the majority, canvassed various competing considerations of policy and precedent in Canada and elsewhere, and concluded as follows:

These considerations suggest the following rule. As a general rule, wage benefits paid while a plaintiff is unable to work must be brought into account and deducted from the claim for lost earnings. An exception to this rule may lie where the court is satisfied that the employer or fund which paid the wage benefits is entitled to be reimbursed for them on the principle of subrogation. This is the case where statutes, such as the *Workers' Compensation Act*, expressly provide for payment to the benefactor of any wage benefits recovered. It will also be the case where the person who paid the benefits establishes a valid claim to have them repaid out of any damages awarded. Absent legislation or a third party claim, the only device available to the court to effect transference to the third party would be trust. Given that the third party has effective ways apart from trust of enforcing the claim, I would not extend the trust doctrine applied in *Teno* and *Thornton* to collateral benefits in the usual case. At the same time, I would not rule out that a judge might use this device to transfer payment to a third party where the judge is satisfied that this is both necessary and appropriate in the interests of justice. Generally speaking, however, some sort of obligation, moral if not legal, to repay the third party would need to be established to permit application of the trust device.

These comments should not be taken as extending to types of collateral benefits other than lost earnings, such as insurance paid for by the plaintiff and gratuitous payments made by third parties. Those issues are not before the Court and must be left for another day.

[103] More specific guidance on this point can be found in the subsequent decision of the Supreme Court of Canada in *Cunningham v. Wheeler*, [1994] 1 S.C.R. 359,

1994 CanLII 120. In that case, Cory J., writing for the majority, clarified the nature of the proof required from the plaintiff in order to avoid deduction where the benefit is paid pursuant to a collective agreement, stating as follows:

In my view *Ratyck v. Bloomer, supra*, simply placed an evidentiary burden upon plaintiffs to establish that they had paid for the provision of disability benefits. I think the manner of payment may be found, for example, in evidence pertaining to the provisions of a collective bargaining agreement just as clearly as in a direct payroll deduction.

...

In *Ratyck v. Bloomer*, there was no evidence put forward that the plaintiff had paid for the disability benefits. What type of proof will be required to show that the benefits are in the nature of insurance? It is my opinion that what is required by the *Ratyck* decision is that there be evidence adduced of some type of consideration given up by the employee in return for the benefit. The method or means of payment of the consideration is not determinative. Evidence of a contribution to the plan by the employee, whether paid for directly or by a reduced hourly wage reflected in a collective bargaining agreement, will be sufficient.

Generally speaking, any of the following examples, by no means an exhaustive list, provide the sort of evidence that could well be sufficient to establish that the employee paid for the benefit:

(1) Evidence that there were trade-offs in the collective bargaining process, which demonstrate that the employee has forgone higher wages or other benefits in return for the disability benefits. In such a case, the employee has paid for the benefits through wages foregone.

(2) Evidence of some money foregone by the employee in return for the benefits. For example if the employees gave up the return of a percentage of their Unemployment Insurance Plan premiums in return for the benefits.

(3) Evidence of a direct contribution by the employee, in a form such as payroll deductions, in return for the benefits. Such a contribution need not be 100 percent of the premium.

(4) Evidence of payments by the employer for the benefits made on behalf of the employee which shows that those payments were part of the employee's wages, and thus the employee provided work for the employer in order to have the premium paid. For example, if the employer's contribution is listed on the employee's pay slip or statement of benefits, it can reasonably be inferred that the contribution is part of the employee's wage package.

...

In this appeal, there is evidence that the plaintiff paid for the benefits pursuant to his collective agreements through the trade-off of a reduced hourly wage rate. For this reason, this case is distinguishable from *Ratyck v. Bloomer*, since there is evidence to bring him within the insurance exception.

[104] Relying on *Cunningham*, some judges of this court have treated benefits, including LTD benefits, as equivalent to insurance for the purpose of the exception and refused to deduct benefits in that category from the damages award on that basis: see *Thompson v. Helgeson*, 2017 BCSC 927 and *Wiles v. Seabrook*, 2019 BCSC 13. In those cases, however, the court received evidence from a member of the union who had participated in the collective bargaining process and could describe the consideration given in exchange for the benefits.

[105] In *Goss v. Sull*, 2021 BCSC 1853, Blok J. refused to make any deduction despite not having any such direct evidence on the point, although there was at least indirect evidence from the plaintiff herself and an economist. In ruling that the evidence before him, sparse as it was, was sufficient, Blok J. explained his conclusion as follows:

[164] Although there is no express evidence showing a specific trade-off between wage level and STIIP benefits for ambulance paramedics, I am satisfied that this follows as a matter of common sense and so it is an inference that is properly drawn here. I conclude that STIIP days attributable to the accident must therefore be accounted for in assessing damages for past income loss.

[106] More recently still, in *Mak v. Blackman*, 2022 BCSC 931, Majawa J. deducted short-term disability benefits from the damages awarded for past loss of earning capacity, because no evidence was adduced as to the consideration paid in exchange for the benefit. He explained his conclusion in that regard as follows:

[153] Ms. Mak seeks the entire gross earnings she would have been entitled to during the period she was not working (i.e. \$14,532) to compensate for her past loss of income earning capacity. She submits that the short-term disability benefits she received were part of her negotiated employment package and that the defendants should not benefit from their use. Therefore, she argues that she is entitled to the entire amount of gross earnings during the time she was not working.

[154] The defendants submit that if Ms. Mak is entitled to any amount under this head of damages, it must be reduced by the amount of short-term disability benefits she received. They submit that Ms. Mak would only be entitled to compensation for the full amount of her gross earnings during the period if she is able to show that the short-term disability benefits fall within the insurance exception described in *Cunningham v. Wheeler*, 1994 CanLII 120 (SCC), [1994] 1 S.C.R. 359 at 403-407, [1994] 4 W.W.R. 153.

[155] While it appears that Ms. Mak received short-term disability benefits, and that those benefits were part of her employment package with Central 1, the evidence falls short of establishing that these benefits fall within the insurance exception. There is no evidence as to the amount Ms. Mak paid for these benefits, if any, and there is no evidence of any consideration given up by the plaintiff in return for the benefits. While the Court in *Cunningham*, at 403, held that an employee could establish their contribution to the benefits by way of a trade-off against higher wages by tendering evidence that the employer takes the cost of those benefits into account in determining the wages paid to the employee, no such evidence was tendered in this case. This is not a situation where one can infer such a negotiation had occurred from the existence of a collective bargaining process. Consequently, I am unable to find that the short-term disability benefits paid to Ms. Mak are in the nature of the insurance exception as described in *Cunningham*.

[156] Even though I have found that the short-term disability benefits were not in the nature of insurance, they will not be deducted from Ms. Mak's past loss of income award if she is able to establish that the third party who paid the benefits (in this case, Canada Life) has a right of subrogation in respect of the amounts paid: *Cunningham* at 415. However, there was no evidence led that Ms. Mak has an obligation to repay these benefits and no evidence was tendered that would support Canada Life's right of subrogation in respect of the benefits Ms. Mak received.

[157] As a result of the foregoing, Ms. Mak's short-term disability benefits will be deducted from her past loss of income award. ...

[107] In this case, as in *Mak*, I received no evidence of those things. It follows that a reduction should be made to account for the availability of LTD benefits.

[108] This is not a case in which the value of the future loss of earning capacity is easily calculated. It follows that a capital asset approach should be used. After accounting for those further reductions that I have identified, I have concluded that the appropriate award is half of the amount claimed, or \$150,000, which is just over two years of Ms. Klimek's posited increased salary.

D. Loss of Housekeeping Capacity

[109] In *Kim v. Lin*, 2018 BCCA 77, the Court of Appeal had occasion to consider the issue of when a pecuniary award for loss of housekeeping capacity should be made, stating as follows:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true

loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

[110] More recently, Marchand J.A. writing for the Court in *McKee v. Hicks*, 2023 BCCA 109, clarified that such an award is not appropriate where the plaintiff is able to perform housekeeping tasks but with discomfort or difficulty, stating as follows:

[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.

[111] Ms. Klimek seeks compensation for the loss of three hours of housekeeping at the rate of \$20 per hour, or \$3,120 annually, to age 75, an approach, and hourly rate, that was recently upheld in *Steinlauf v. Deol*, 2022 BCCA 96. Applying the prescribed multiplier of 17.6580, she arrives at a proposed award of \$55,092.96, rounded to \$55,000.

[112] I agree that the evidence supports such an award in this case. Ms. Klimek has lost her capacity to do heavier housework and relies on her daughter for many tasks. On the other hand, it is also appropriate to apply the contingency reduction discussed above to account for the possibility that she would have required

housekeeping assistance anyway, given her pre-existing condition, a need that would likely have arisen in any event long before she turned 75.

[113] After accounting for those factors, I am awarding her \$30,000.

E. Cost of Future Care

[114] The principles to be applied in assessing damages for the cost of future care were set out in *Pang v. Nowakowski*, 2021 BCCA 478 as follows:

[56] The legal framework that is relevant to a future cost of care award is well-established. Recently in *Quigley*, this Court said:

[43] The purpose of the award for costs of future care is to restore the injured party to the position she would have been in had the accident not occurred: *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.) at p. 462; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 29. This is based on what is reasonably necessary on the medical evidence to promote the mental and physical health of the plaintiff: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33, adopted in *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41.

[44] It is not necessary that a physician testify to the medical necessity of each item of care for which a claim is advanced. However, an award for future care must have medical justification and be reasonable: *Aberdeen* at para. 42; *Gao* at para. 69.

[57] Several additional principles are relevant:

- i) The court must be satisfied the plaintiff would, in fact, make use of the particular care item: *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 40 and 54; *Hans v. Volvo Trucks North America Inc.*, 2018 BCCA 410 at paras. 86–87.
- ii) The court must be satisfied that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred: *Shapiro v. Dailey*, 2012 BCCA 128 at paras. 54–55;
- iii) The court must be satisfied that there is no significant overlap in the various care items being sought: *Johal v. Meyede*, 2015 BCSC 1070 at para. 9(f); *Brodeur v. Provincial Health Services Authority*, 2016 BCSC 968 at para. 356; *Myers v. Gallo*, 2017 BCSC 2291 at para. 231.

[58] Assessing damages for future care has an element of prediction and prophecy. It is not a precise accounting exercise; rather, it is an assessment: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21; *O'Connell v. Yung*, 2012 BCCA 57 at para. 55. Nevertheless, the award should reflect a reasonable expectation of what the injured person would require to put them

in the position they would have been in but for the incident. This is an objective assessment based on the evidence and must be fair to both parties: *Shapiro* at para. 51; *Krangle* at paras. 21–22. Once the plaintiff establishes a real and substantial risk of future pecuniary loss, they must also prove the value of that loss: *Perren* at para. 32; *Rizzolo v. Brett*, 2010 BCCA 398 at para. 49. See also *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 245–248, 1978 CanLII 1.

[115] Ms. Klimek seeks to be compensated for the following:

Kinesiology/chiropractic treatments (\$82 x 48)	\$3,936
Pain medications	\$25
Pain management (pillows/heat pad)	\$20

[116] These items total \$3,981 annually (in her argument, Ms. Klimek also listed \$200 for mileage but she did not include that figure in her suggested annual sum). Applying the prescribed multiplier to age 75 (17.6580), she arrives at a proposed award of \$70,296.50, rounded to \$70,000.

[117] The defendant opposes any award in this category, on the basis that there is no support in Dr. Simonett’s report for any of the items claimed.

[118] I agree with the defendant that there was no evidence adduced to support the justification for, or reasonableness of, any of these items. Dr. Simonett was asked, in preparing her report, to respond to the following question:

Do you feel that [Ms. Klimek’s] injuries will require any sort of treatment in the future? If so, please explain what treatment will be necessary, the length of time over which it will be required, and any information you have as to the cost of the treatment.

[119] Her response was as follows:

Ms. Klimek is actively being assessed for dystonia type symptoms. Input from her neurologist will help outline safe treatment options, notably exercise based. In general, she should avoid exercises that put her at increased risk of falls (eg., if she has in turning her leg). Given this consideration, ongoing low impact strengthening exercises (such as floor work) will be appropriate for the foreseeable future. She has reported that this has been the most beneficial

treatment. She may need to acquire appropriate exercise equipment so that she can progress her home based exercise program.

[120] I am therefore making no award in this category.

F. Special Damages

[121] Ms. Klimek seeks special damages of \$6,049.10 plus \$12,500 for a total of \$18,549.10. The first figure reflects conventional treatments she incurred, plus mileage. The second figure reflects the cost of renovations performed on the condominium she purchased, as well as a cold pack (\$50) and a heat pad (\$40).

[122] The defendant submits that only \$1,881 should be awarded, which is the amount incurred between April 5, 2017 and December 6, 2018, following which Ms. Klimek did not attend treatment again until April 1, 2021. At that point she was on her second post-accident leave of absence from work, for reasons that, the defendant says, were unrelated to the subject accident.

[123] I have already rejected the defendant's causation argument and therefore accept that, at least in principle, Ms. Klimek is entitled to be reimbursed for expenses reasonably incurred after December 6, 2018 as a result of her injuries.

[124] However, I disagree that her claimed renovation expenses are adequately attested (no receipts were adduced, for example) or that they were reasonably incurred. In addition, I am applying a 25% contingency reduction for expenses incurred after December 6, 2018 to reflect the possibility that she would have incurred these expenses in any event regardless of the accident, given her pre-existing condition.

[125] I am therefore awarding her $\$1,881 + (\$6,049 - \$1,881 = \$4,168 - 25\% = \$3,126) = \$5,007$.

VI. Summary and Conclusion

[126] In summary, I am awarding Ms. Klimek damages as follows:

- a) \$86,250 in general damages;
- b) \$9,439 (gross) in past loss of earning capacity;
- c) \$150,000 for future loss of earning capacity;
- d) \$30,000 for loss of housekeeping capacity; and
- e) \$5,007 in special damages.

[127] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

“Milman J.”