

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gark v. Lauzon*,  
2023 BCSC 1930

Date: 20231106  
Docket: M09638  
Registry: Courtenay

Between:

**Lisa Gark**

Plaintiff

And

**Ashley-Marie Lauzon and Gail Lauzon**

Defendants

Before: The Honourable Madam Justice Sharma

## Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

Courtenay, B.C.  
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January 23–27, 2023

Place and Date of Judgment:

Courtenay, B.C.  
November 6, 2023

[1] The sole issue in this trial is the amount of damages to award the plaintiff, Lisa Gark, for injuries she suffered as a result of a motor vehicle accident, which took place on November 10, 2016 (“Accident”). The main dispute between the parties is the degree to which the Accident has contributed to Ms. Gark’s inability to work up to the point of trial, and whether those injuries are likely to prevent her from working into the future, and if so, to what extent and for how long.

[2] The Accident occurred on Vancouver Island near Courtney. Ms. Gark was stopped waiting to merge into traffic on the highway when the defendant Ashley-Marie Lauzon rear-ended Ms. Gark’s vehicle. Liability has been admitted.

[3] As is common in cases where pain is a primary complaint, Ms. Gark’s evidence is very important, which means her credibility becomes a key issue. In this case the defendants challenge the reliability of Ms. Gark’s report of the intensity, frequency, duration, and scope of her injuries. Before making my findings about her injuries, I summarize the evidence.

### **FACTS RELEVANT TO MS. GARK’S INJURIES**

[4] Ms. Gark was 39 years old at the time of the Accident and 45 at the time of trial. She has been a single mother since 2014. She has raised three children, the oldest of whom was 27 years old and testified at trial (Jaiden Hofman). The other two children are much younger.

#### **Ms. Gark’s Life Before the Accident**

[5] Ms. Gark grew up in Alberta. She did not complete high school because she became pregnant at the beginning of grade 12. However, in 1998, she obtained a diploma in esthetics. She started her own business by opening a space in an existing salon doing nails in order to build up her business. She then went back to the school where she obtained her diploma to be an instructor. She transferred from there to become an instructor at an academy for hair design where she helped develop the curriculum. After that, she got training to perform laser-derm and micro-derm abrasion.

[6] It was around this time that she got married and was living with her then husband. For a time, she operated a daycare out of her home looking after as many as four children, in addition to her own child. She decided to operate a day care because it allowed her to spend more time with her daughter than if she worked outside the home. She did that until 2008, when the family decided to move to Comox, British Columbia.

[7] Shortly after moving to Comox, she worked at the spa at the Tigh-Na-Mara resort, but she found the commute was too long. She then worked full time at a beauty school teaching esthetics, but left that job because she found that school's curriculum was not well-developed. By this time, she was living in Courtney and had separated from her husband. She supported herself and her daughter by working full time at a spa in Courtney.

[8] She met Ryan Gark in December 2008, and they started living together very soon after they met. Mr. Gark was a chef at a golf course. From 2010 to 2014, he earned income operating a food truck. She became pregnant, and the couple had two children together about 13 months apart. She took maternity leave and did not work outside the home during that time, except to help with Mr. Gark with the food truck business. He also worked as a chef at camps and would be away from two to three weeks at a time.

[9] The couple separated in the fall of 2014, and at first their two children lived with Ms. Gark most of the time, spending every other weekend with Mr. Gark. Once the youngest child started kindergarten, Ms. Gark decided to go back to work as an esthetician.

[10] Ms. Gark was a very active person who loved the outdoors and engaged in camping, hiking, fishing, kayaking as well as the hobbies including photography, woodworking, and crafts. She tended to hike in campgrounds without official campsites, carrying a 30-liter backpack. For her, a typical hike varied anywhere from three to six hours. She started camping in the spring and would try to go several

times throughout the summer and into the fall. She often went with friends and her children.

[11] She also enjoyed kayaking and tried to go weekly depending on who was available because she did not own her own kayak. She enjoyed fishing, but that was a seasonal activity; she went a couple of times a year. She also enjoyed photography especially landscape photography and would carry her camera equipment on her hikes. She did some woodworking and built a seven-foot live edge table. She also enjoyed socializing with her friends and especially liked hosting them.

[12] Ms. Gark's description of how active she was before the Accident is highly consistent with the testimony of her daughter (Jaiden Hoffman) and sister (Kari Fisher).

### **The Accident**

[13] The parties agreed on a number of facts regarding the Accident, including the that the Accident occurred at the Highway 19A exist onto Ryan Road in Courtenay, BC, and that the defendant Ashley-Marie Lauzon was driving the car owned by her mother, the other defendant, Gail Lauzon (for convenience, I will refer to Ashley-Marie Lauzon as Ms. Lauzon).

[14] There was no dispute that Ms. Gark was travelling northbound on Highway 19A. She wanted to merge onto Ryan Road, and had come to a full stop. The parties agreed that Ms. Lauzon was travelling behind and rear-ended Ms. Gark's vehicle.

[15] Although liability has been admitted, the defendants submit there are material differences between Ms. Gark's description of the Accident and Ms. Lauzon's description, which supports their position that Ms. Gark's credibility and reliability are compromised. They say the Accident was minor, and combined with Ms. Gark's diminished reliability and credibility, the Accident has not injured Ms. Gark to the extent that she claims.

[16] Ms. Gark testified that when the Accident happened, she felt a “bang”, hit her head on her vehicle between the driver’s window and the windshield, and she felt her teeth bang together.

[17] Both women agreed to pull over into a nearby Tim Horton’s parking lot and they exchanged information. Ms. Gark then proceeded to pick up her children from school. She was experiencing a bad headache, pain in her shoulder, neck, hips, and low back. She went to the hospital and was given muscle relaxants and told to follow up with her family doctor.

[18] Ms. Lauzon’s recollection of what lanes the vehicles were in when the Accident occurred differs from Ms. Gark’s recall. She also testified that she saw no damage to either vehicle.

[19] However, during cross-examination, a copy of the online report Ms. Lauzon submitted to ICBC was adduced. She accepted she made that report on the day of the Accident and that her memory of the details would have been better that day than at trial.

[20] That online report is more consistent with Ms. Gark’s description of the location of the vehicles when they collided. When confronted with that document, Ms. Lauzon stated perhaps her description was misconstrued by the ICBC employee who recorded the information. However, the report includes her mentioning damage to the trailer hitch of Ms. Gark’s vehicle. This detail is inconsistent with Ms. Lauzon’s testimony that she saw no damage to either vehicle.

[21] It is difficult to conclude Ms. Lauzon’s statements were misconstrued. It is highly improbable that such a specific detail about damage to Ms. Gark’s vehicle was the result of anything other than Ms. Lauzon giving that information. I also note that a photograph was entered into evidence which showed damage to Ms. Gark’s vehicle’s trailer hitch.

[22] I find it more probable than not that Ms. Lauzon’s memory at trial of the Accident was flawed, and the online report she made was accurate.

[23] To the extent the defendants wanted to rely on the inconsistency between Ms. Gark's and Ms. Lauzon's recounting of the Accident to challenge Ms. Gark's credibility or reliability, I find the opposite.

**After the Accident**

[24] Ms. Gark contends she sustained a number of injuries from the accident, but a number of them have resolved, or improved significantly.

[25] Ms. Gark experienced a bad headache immediately after the Accident, and continued to experience intense headaches that could be debilitating for at least a year after the Accident. She sometimes awoke with a headache that would not subside during the day. She tried to get relief by taking over-the-counter pain medication and attending physiotherapy and massage therapy. She testified that the frequency and intensity of her headaches remained the same until about the end of 2019, when they began to improve. By trial she stated her headaches were sporadic and not as intense.

[26] She also experienced spinning sensation and dizziness after the Accident, which would reoccur if she lay face-down. Sometimes, those sensations were accompanied by ringing in her ears. The occurrence of the sensations did not last long, and improved throughout 2017, eventually completely resolving.

[27] She experienced restricted range of motion in her neck, especially when turning or bending forward. The neck pain negatively impacted her sleep, and made basic tasks such as washing dishes, cleaning the bathtub, or carrying groceries difficult. These symptoms improved over time. At trial, she only experienced neck symptoms a few times a month, lasting anywhere from several hours to a full day.

[28] She had intense left should pain throughout 2017 with reduced range of motion. This negatively affected her driving and ability to do household chores, including carrying groceries. However, these symptoms improved, and physiotherapy and massage helped. By 2018 the symptoms occurred only occasionally and had almost completely resolved by 2020.

[29] She reported aching and tightness in her hip flexors. She got relief from pool therapy with a kinesiologist, and there has been improvement to the point that at trial, she only occasionally experiences tightness in her hip flexors.

[30] Ms. Gark testified that she had hot, burning, and aching pain in her lower back which has been constant since the Accident. This pain makes sitting difficult, as well as bending and twisting and standing to do household tasks such as dishes or meal preparation. Lifting is also difficult. The pain disrupted her sleep, and negatively affecting her mood.

[31] She started having pain radiated down her left leg in 2017. The intensity and range of the radiating pain continued to worsen throughout 2017 and 2018. Over time, the pain began to be accompanied by numbness in her leg, foot, and pelvis, and muscle weakness.

[32] Her situation became urgent when she reported urinary incontinence, and she underwent emergency surgery. On June 22, 2019, Ms. Gark underwent left L5-S1 microdiscectomy surgery.

[33] That surgery provided relief for a time. Unfortunately, her leg pain returned in late 2020. By 2021 and 2022, she began to, again, experience the pain radiating down her left leg, as well as numbness and cramping in her feet. She reported that the radiating pain from sitting is constant, while the range to which it radiates varies.

[34] Ms. Gark said that that she has struggled with her mood since the Accident. Although the relief she obtained from the June 2019 surgery gave her some optimism, the return of symptoms has caused a further deterioration in her outlook. She worries about the permanent nature of her limitations. She testified that she feels defeated and expressed sorrow at how the Accident and injuries has diminished her relationship with her children as she was unable to provide them with stability. She believes that she lost custody of her children because of the instability in her life. She worries about the lasting impact of that on her relationship with her children.

**Summary of Non-Expert Testimony**

***Jaiden Hoffman***

[35] Ms. Hoffman is Ms. Gark's oldest daughter, who lives in Courtney. She recalled growing up in Alberta, and she was about 12 when the family moved to Courtney. She describes her family at that time as being very loving and very close. She remains close to her mother, and they talk about almost daily. She described her mother as having a bubbly personality and being very social, always having solid, core group of friends.

[36] Since the Accident, Ms. Hoffman noticed that it is harder for her mother to do many things and that she perceives her mother's condition to have progressively gotten worse. Ms. Hoffman has observed her mother being in discomfort, especially if she has been sitting for a long period. She has seen her constantly shifting and repositioning herself while seated. When standing, Ms. Hoffman noticed Ms. Gark shifting her weight a lot.

[37] With regard to her personality, Ms. Hoffman noticed that Ms. Gark is more run down and exhausted since the Accident. She perceived her mother to struggle physically. In Ms. Hoffman's view, Ms. Gark has had a more difficult time coping with stress in her life than before the Accident.

[38] In terms of activities, she confirmed Ms. Gark's evidence that they tended to spend more time at the beach rather than going on hikes since the Accident.

***Kari Fisher***

[39] Ms. Fisher is the Ms. Gark's older sister. They grew up together in Alberta and have lived in Courtney at the same time over two different periods. Ms. Fisher first lived in Courtney from 2008 to 2010, and moved back in early 2020.

[40] She and Ms. Gark were very close because they were both raising young children at the same time. She described Ms. Gark having a great level of energy as a working mother before the Accident. She believed Ms. Gark had a strong work ethic because she tended to distinguish herself at each place of employment.

Ms. Fisher said her sister was resilient and able to navigate a busy life with young children.

[41] Her evidence about Ms. Gark's condition after the Accident was highly consistent with Ms. Gark's testimony. Ms. Fisher flew back from Alberta to support and assist Ms. Gark after the emergency surgery in June 2019. She stated that even now, any time she is in the car with Ms. Gark, she notices her sister shifting position in her seat as if she has difficulty finding a comfortable position.

[42] Ms. Fisher sometimes helps Ms. Gark with errands such as driving her to do grocery shopping and unloading groceries, both of which can cause discomfort for Ms. Gark. She described occasionally seeing Ms. Gark's residence in a state of disarray, such as having dirty dishes in the sink and laundry left undone in baskets. To Ms. Fisher, this is an example of Ms. Gark's difficulty coping with typical daily activities that was absent before the Accident.

[43] Ms. Fisher became emotional in the stand when she was talking about having to leave the plaintiff a few days following the surgery; she recalled being very concerned about Ms. Gark's condition. Ms. Gark was in a very low state at that time; Ms. Fisher said to her eyes, Ms. Gark appeared very fragile.

[44] More generally, her impression is that the biggest impact of the Accident has been how easily the plaintiff gets overwhelmed. Ms. Fishers has seen Ms. Gark's physical symptoms continually worsening, and she worries about her ability to cope.

### ***Craig Speed***

[45] Mr. Speed is a former partner of the Ms. Gark. They met online in the summer of 2020. He said they instantly "hit it off", and they decided to live together because it would make everyone's lives easier to be in the same household. He also understood that this would help the plaintiff financially because he did not think she could afford where she was living at the time.

[46] He said that Ms. Gark immediately told him about her injuries from the Accident. He described her as fundamentally a very positive person, but he said she always wished that she could work more than she did. He perceived her condition to deteriorate as their relationship continued. His impression was that she tended to hold her stress in because she was trying to keep everyone happy and calm.

[47] They enjoyed many outdoor activities together. She introduced him to camping, especially at Cortes Island. One of its advantages was that it was very easy to get to and the journey was broken up by waiting for the ferry and being able to walk around on the ferry. They also went on short hikes between 30 and 45 minutes, but would have to make sure they were on even ground. He confirmed she cannot do any heavy lifting because bending or leaning over caused her pain. He also said that she never slept well because she was constantly changing position to get comfortable.

[48] They loved the water, and he confirmed that they did a bit of paddle boarding. They only went on a smooth lake and would paddle for about 15 or 20 minutes and then go back into the beach so that Ms. Gark could get some relief.

[49] He enjoyed going to Uculet, but they would take their time driving there by making stops along the way. He stated Ms. Gark would be in too much pain if she had to sit continuously for three hours at a time.

***Dr. Trevor Shoesmith***

[50] Dr. Shoesmith was Ms. Gark's family physician from 2010 to 2019.

[51] He had no recollection of her reporting to him back or neck pain from 2014 to 2016.

[52] He saw her within a week of the Accident. He recommended she take some time off work, but try to remain active so as not to get too stiff. He advised her to take over-the-counter pain medications as necessary. He recalled she always wanted to return to work, but seemed to experience set-backs in doing so.

[53] His practice was to follow up with patients about once a month after a car accident. His recollection is that her primary complaints after the Accident were headaches and pain in the back, arm, shoulder, and neck. Overall, most of the injuries showed improvement except for her back pain. In September 2018 he referred her to an MRI because her back pain had been consistent and was disrupting her daily activities.

[54] During cross-examination it was suggested to him that some of the things Ms. Gark did after the Accident (specifically hiking specific trails, or going to a hike that was a three- or four-hour-drive away) was inconsistent with Ms. Gark's report of pain, and inability to work. Dr. Shoesmith said it would depend on how many breaks a person took, and what type of vehicle it was. He also emphasized that for people with back pain, being sedentary can be problematic, whereas staying active is a "good thing".

***Dr. John Sun***

[55] Dr. Sun recalled Ms. Gark was referred to the ER based on urgency. He concluded, after taking her history and performing a physical exam, that she had left sciatica secondary to an L5-S1 disc herniation. He determined that a microdiscectomy was required. That operation generally has about an 80% success rate in relieving leg pain.

[56] He described that that nerve pain (pain radiating down to the leg) is a different issue from back pain, and specialists typically do not view them the same. The two types of pain may be related, but not necessarily. They often require separate diagnosis and separate treatment.

[57] The purpose of performing a discectomy is to alleviate the nerve pain. In Ms. Gark's case, this was considered urgent because she had incontinence and symptoms of numbness around her pelvic area. If it was not dealt with immediately, there was a risk that she could have permanent damage.

[58] He confirmed that he had no expectation that the operation would necessarily result in a decrease of her back pain and stated there was even a chance that it

could get worse. Specifically, an increase in back pain and instability at the side of the operation is a risk inherent with the operation.

[59] The operation proceeded without complications. He observed that her nerve was severely compressed, which was consistent with his impressions from the MRI.

[60] Recovery from the operation takes time. He had a follow-up consultation with Ms. Gark in March 2020 (over the phone because of COVID restrictions) and recalled she reported some low back pain and numbness in her left toe. At that point he was not concerned because symptoms tended to gradually improve over the course of a year after the surgery.

[61] He confirmed that Ms. Gark had an appointment to see him again in April based on a referral from June 2022. He understood that request was made because of a recurrence of pain and a sudden worsening of pain, including in the leg and back, and some incontinence. Because he had already treated her, she was able to get an appointment sooner than might otherwise have been the case. Typically, patients wait up to two years for non-urgent cases.

[62] Given what he understood her symptoms were, he said there is a possibility she will need lumbar fusion surgery.

***Dr. Vanessa Brcic***

[63] Dr. Brcic has a family practice and has done some advanced training on treating chronic pain. She was the plaintiff's doctor for about six months starting around March 2022. She is interested in treating patients who have greater needs, so she tends to work with marginalized patients. Because other doctors were aware of that, Ms. Gark was referred to her from a walk-in clinic.

[64] Dr. Brcic had a clear memory of her first visit with Ms. Gark. She recalled that Ms. Gark had a long list of issues that had not, in Dr. Brcic's view, been adequately addressed. Specifically, she was concerned Ms. Gark's pain had not been

adequately treated. Dr. Brcic was aware of some social stressors Ms. Gark experienced, and she noted no mental health screening had been done for her.

[65] In her view, Ms. Gark's unmanaged pain and difficulty doing daily activities was of the highest priority. She was very concerned about the potential for cauda equina. This is a condition where a nerve in the spinal cord is pinched, and it can lead to a neural dysfunction causing incontinence, potentially permanently. She sent Ms. Gark for another MRI and asked for a referral to Dr. Sun.

[66] She advised Ms. Gark to stop working because it would worsen her pain. She noted Ms. Gark was not sleeping well, and in that situation, pushing someone to do work, even if only on a volunteer basis, was not advisable. She wrote a letter recommending that the plaintiff be considered totally disabled.

#### **Summary of Expert Evidence**

[67] I rely on my discussion of Brent Armstrong's expert evidence discussed below (paras. 148 to 152). A summary of the material aspects of other experts whose evidence was relevant to Ms. Gark's injuries follows.

#### ***Dr. John le Noble***

[68] Dr. le Noble is a physiatrist, and was qualified to give opinion evidence relating to the diagnosis, prognosis, management, and treatment of neuromusculoskeletal injuries, including relating to concussion and chronic pain. He completed two reports dated January 21, 2018, and December 9, 2020.

[69] In his first report, he diagnosed Ms. Gark with chronic post-traumatic headaches and soft tissue injuries to the cervical and paraspinal areas of her spine. He noted that before the accident, any headaches she reported were migraines and those headaches of a different nature. He opined that her neck pain was because of soft tissue injuries.

[70] In his second report, he confirmed the diagnoses from his first report. He also opined that it was more likely than not that the Accident was a contributing factor to her low back pain, including the radiating pain into her leg.

[71] Without sustained improvement, he indicated that she would remain symptomatic and limited for the foreseeable future, likely the next several years and possibly longer. He did not find there were treatments that could predictably provide significant relief and, therefore, the prognosis was guarded. He also said that she was at increased risk for future consequences arising from any other injury.

[72] It was suggested to Dr. le Noble in cross-examination that Ms. Gark's disc protrusion and subsequent extrusion were degenerative issues, meaning changes could have started before the Accident, and deterioration had happened over time. He disagreed. In his view, he had no information to suggest she had low back pain or sciatica before the Accident and therefore no reason to suspect her disc had been compromised before that.

[73] He found that she was less capable with work, recreation, and household tasks and that her disability was causally related to the Accident. He recommended that she engage in multidisciplinary rehabilitation including fitness and strength training and that she work with a kinesiologist to design the appropriate program. He also recommended pain modulating medication as well as physiotherapy. He could not say how long those treatments should last but recommended that liberal access to an exercise facility be provided.

***Dr. Daniel Mendelsohn***

[74] Dr. Mendelsohn was qualified as an expert in neurosurgery, able to give expert opinion on the conditions and treatment of brain and spine injuries. He interviewed and examined the plaintiff on January 14, 2021, and his first report is dated January 19, 2021. He prepared a second report dated October 10, 2022, based on his interview and examination of the plaintiff on September 8, 2022.

[75] Dr. Mendelsohn's evidence was that the Accident resulted in the following injuries: headaches; myofascial neck pain; left shoulder pain; mechanical low back pain; left S1 radiculopathy; cauda equina syndrome (which was resolved by the surgery); L5-S1 spondylolisthesis causing back pain to worsen; and recurrent left S1 radiculopathy and left and right L5 radiculopathy.

[76] With regard to prognosis, he opined that the plaintiff will continue to have episodes or flareups of her low back pain indefinitely and that she will continue to be prone to lower back pain from strenuous and non-strenuous activities. He also noted that her left leg pain did not completely resolve following the surgery and is of the opinion she will continue to have some degree of left leg pain and may experience acute exacerbations.

[77] He said that five to 10 percent of patients who have lumbar discectomy will develop a symptomatic recurrence of leg radiculopathy requiring another operation. She is also at increased risk for requiring further surgical intervention for her lumbar spine, and it is likely she will continue to be prone to left leg radiculopathy episodes.

[78] He recommended that she continue to use over-the-counter pain medication and that she develop an independent exercise program to maintain fitness. He also recommended a clinical Pilates program and noted she could benefit from physiotherapy and kinesiology.

[79] He recommended she undergo a lumbar fusion surgery. He said the results tend to indicate about 50 percent of people have a significant reduction in pain and about 70 percent will experience relief in the radiating leg pain. Back pain has a lower rate of improvement from that surgery because there are many causes for back pain, unlike pain radiating down the leg, where one can be quite sure that is caused by a pinched nerve. Back pain may or may not be directly related to what caused the pinched nerve. If it is related, then one would expect to see pain relief.

[80] However, about 20 percent of patients who undergo lumbar fusion surgery require further surgery in the future. That is because once the fusion is done, the

biomechanical load on the area in the spine above the fusion is placed under increased pressure, which tends to cause more progressive degeneration.

[81] He did not anticipate that she could perform the same physical tasks for the same number of weekly hours as an aesthetician because she is unable to sit or stand for prolonged durations. He predicted those physical limitation will continue to affect her ability to complete the activities of daily living (such as heavy cleaning) and recreational activities, and that these limitations may persist indefinitely. He was unable to say if she would see improvement after the lumbar fusion surgery.

***Dr. Navraj Heran***

[82] Dr. Heran was qualified as an expert in neurosurgery. He completed two reports. The first, dated February 24, 2021, was a rebuttal report to Dr. Mendelsohn's first report. His second report is dated August 12, 2022, based on an examination he conducted.

[83] Dr. Heran was in overall agreement with Dr. Mendelsohn's opinion.

[84] Dr. Heran opined that the Accident caused: cervicogenic headaches; myofascial neck pain; mechanical low back pain arising from structural spinal elements L5-S1; left S1 radiculopathy; post-traumatic vestibulopathy and cognitive dysfunction likely as a consequence of pain, sleep disturbance, functional limitations, and social stressors.

[85] He agreed that she is a candidate for lumbar fusion. He said that the likelihood of success following surgical remediation could be around 70 to 85 percent of significant improvement, including a degree of improvement to the leg, and he also found there ought to be a 70% reduction of pain.

[86] Dr. Heran's opinion did differ from Dr. Mendelsohn's opinion in regard to the prognosis of Ms. Gark's injuries. Dr. Heran concluded there was still room for improvement, although he acknowledged that her improvement was going slowly. He did not agree with Dr. Mendelsohn's opinion that she may continue to have

frequent exacerbations or aggravations. However, he also noted it is unlikely she will ever have complete resolution of her symptoms, given the extent and duration of symptoms before and after surgery.

[87] With regard to her return to work, he stated he was not as pessimistic as Dr. Mendelsohn. He did not agree that her ability to return to previous employment was unlikely. He concluded she would be able to return to portions of her previous employment, noting that there could be some work that would be at eye level and not require the same bending and stooping. He opined she could return to full-time employment with adjusted duties, although he agreed assessments from vocational experts would add more information.

[88] Overall, he agreed with Dr. Mendelsohn's recommendations for treatment, but he would add neuro modulating medications for chronic pain management.

***Dr. Jonathan Hawkeswood***

[89] Dr. Hawkeswood was qualified as a physiatrist. His report is dated January 14, 2021, and he examined Ms. Gark on December 7, 2020.

[90] He diagnosed Ms. Gark with the following: myofascial neck pain that has largely settled; thoracic pain that was largely resolved; mechanical low back pain, post-traumatic and postsurgical in nature; left shoulder symptoms which resolved; and post-traumatic headaches which have improved but not resolved. He stated it was unlikely she would experience complete recovery of her low back pain, but he was of the view that she had not yet reached maximal medical improvement.

[91] He opined that the Accident probably aggravated a pre-existing neck and headache condition. He accepted that her intervertebral disc disruption was caused by the Accident. However, he concluded it was probably a relatively small disc injury, so there was a low probability that the Accident was entirely responsible for the development of the radiating pain in her leg. Nevertheless, he opined that the Accident “would probably still bear material relevance – as she clearly injured her low back in the accident”.

[92] Notably, he opined that Ms. Gark's time missed from work thus far had been reasonable and medically appropriate. However, he stated she was competitively employable, although she has a permanent partial vocational disability.

[93] Dr. Hawkeswood also opined that Ms. Gark had a "history of familial and financial stressors" giving her a medical profile consistent with someone who would tend to experience worsened symptoms when under stress, and would render her more vulnerable to trauma. He based this on studies that he said suggested a lower socioeconomic profile and limited education influences pain.

[94] Ms. Gark submits Dr. Hawkeswood's evidence should be given no weight because he was advocating with regard to "controversial views" linking lower socio-economic status and less education to increased psychological symptomology, pain and decreased ability to cope. I did find that Dr. Hawkeswood's evidence on this topic at times had the flavour of advocating in defence of his opinion. For that reason, I placed no weight on that portion of his evidence that relied on any purported links between socio-economic status and education to experiences or vulnerabilities to pain or any other medical condition.

[95] He was challenged during cross-examination about comments in his report of the possibility Ms. Gark had disc abnormalities prior to the Accident. He confirmed he could not say whether she had any degeneration because there was no pre-Accident imaging and she had no history of low back pain. Thus, he agreed there was no good reason to suggest she would have suffered back pain absent the Accident.

## **NON-PECUNIARY DAMAGES**

### **Legal Principles**

[96] The parties agreed on the controlling legal principles, which are well known.

[97] With respect to non-pecuniary damages, it is well settled that the amount awarded should put Ms. Gark in the same position she would have been but for the defendants' negligence. In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal

articulated a non-exhaustive list of common factors to be considered (para. 46) when awarding non-pecuniary damages, which includes: the plaintiff's age; the nature of the injury; severity and duration of the pain; the degree of disability; emotional suffering; any loss or impairment to life, family, marital or social relationships or physical and mental abilities; and loss of lifestyle (see also *Karim v. Li*, 2015 BCSC 498 at paras. 120–122).

[98] There is no dispute that Ms. Gark bears the burden to prove on a balance of probabilities that there is a substantial connection between the Accident and her injuries. This requires her to demonstrate that “but for” the Accident, she would not have sustained the injuries: *Clements v. Clements*, 2012 SCC 32; *Farrant v. Laktin*, 2011 BCCA 336 at paras. 8–11.

[99] As with many personal injury cases, Ms. Gark's credibility is a key issue. The summary of the appropriate approach to follow in assessing credibility is set out in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides. The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally. Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[Citations omitted.]

[100] I am also mindful to be careful about the significance I attach to inconsistencies between a plaintiff's evidence at trial, and evidence at her examination for discovery and statements recorded in clinical notes. In *Carvalho v. Angotti*, 2007 BCSC 1760, the defendants challenged the plaintiff's credibility based on contradictions and inconsistencies. Justice N. Smith noted at para. 15 that “[b]y the time a personal injury case gets to trial, the plaintiff typically will have provided

information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years". He continued to note at para. 16 that "[t]he danger of giving too much weight to such inconsistencies was noted by Parrett J. in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104":

I make two observations at the outset about Dr. Keyes' criticism for the variations he finds exist in the versions of symptoms given to various doctors. First of all, the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. As Dr. Samad made very clear his chart and records were a long way from being a verbatim record, indeed, some of his entries from a full appointment and an examination consisted of three or four phrases. I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[101] To the extent the defendants suggest less weight should be placed on Ms. Gark's descriptions due to the subjective nature of her evidence, Ms. Gark relies on *Rabiee v. Rendleman*, 2015 BCSC 595 where I discussed a similar argument:

[64] The defendants emphasize that Ms. Rabiee's injuries were very mild and that there is little "objective" evidence of her injuries. They rely on *Price v. Kostyba* (1982), 70 B.C.L.R. 397 at 399 (S.C.) where McEachern C.J. quoted his own words in *Butler v. Blaylock*, [1981] B.C.J. No. 31 (B.C.S.C.) 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" and that no one can expect citizens to be responsible for compensating a plaintiff "in the absence of convincing evidence."

[65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B.C.J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages."

[66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendant's negligence on a balance of probabilities. I have concluded that Ms. Rabiee

has met that burden. Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the *Stapley* factors.

[102] As noted in *Hau v. Patterson*, 2020 BCSC 1069, the assessment of non-pecuniary damages will be influenced on the plaintiff's personal experiences in dealing with injuries and their consequences, and the ability of the plaintiff to articulate those experiences (citing *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25).

### **Ms. Gark's Credibility**

[103] The defendants accept that Ms. Gark was injured in the Accident but question the precise nature, extent, and duration of other injuries. They submit the reliability of her evidence was eroded by the following factors.

### ***Continuation of Activities***

[104] The defendants point to a number of activities Ms. Gark undertook after the Accident, suggesting those are incompatible with her description of the injuries, specifically her continuation of hiking and taking long trips by car to reach hiking trails as well as camping in 2017 and 2018.

[105] As a general point, someone doing the same activities after an accident as they did before is, on its own, not incompatible with them being injured, perhaps even seriously. Pain can be progressive, and people might believe at first, the pain they experience is only temporary. Also, people can tolerate pain while doing activities, especially ones they enjoy, because they can make modifications. Moreover, remaining active to the extent one can is considered healthy whereas abstaining from all activity is not.

[106] These points are common sense, and grounded in the evidence. Ms. Gark testified her ability to undertake her recreational activities was greater in 2017 and 2018 than it was in 2019, but that it improved again after her surgery. She said that she would take stops during drives to get relief from discomfort. This was consistent with Mr. Speed's testimony.

[107] During cross-examination, Dr. Shoemsmith was specifically whether some activities Ms. Gark did after the Accident such as taking a three-or four-hour car trip was consistent with her report of pain and inability to work. In addition to saying it would depend on the type of vehicle and number of breaks taken, Dr. Shoemsmith emphasized that being sedentary is not advised for people with back pain and being active was recommended.

### ***Significant Life Stressors***

[108] The defendants also point out that Ms. Gark experienced significant stressors in her life after the Accident to the degree that it would be inaccurate to attribute any anxiety or low mood she experienced to the Accident. They point out that no evidence was adduced from a psychiatrist or psychologist regarding mood disorder. That point is overtaken by the fact that the defendants' own expert (Dr. Heran) opined that Ms. Gark had "cognitive dysfunction likely as a consequence of pain, sleep disturbance, functional limitations and social stressors" and those (along with his other diagnoses) were attributable to the Accident.

[109] The defendants refer to challenges in Ms. Gark's life, including a sister's terminal illness and eventual demise in 2017. Ms. Gark also experienced difficult family law litigation, including losing custody of her children. She moved residences several times, experiencing a flood in her residence in late 2021.

[110] There is no doubt these events were stressful, and Ms. Gark did not suggest otherwise. However, I agree with Ms. Gark that she has demonstrated considerable resilience with other major stresses. She became pregnant at a very young age yet managed to establish herself in a career and support herself and her daughter. She gave up a child for adoption at a young age. She moved from Alberta to British Columbia, got separated, and then started a new relationship within a short time period. Despite that, the evidence was consistent that she remained productive and active.

### ***Recollection of Past Injuries***

[111] The defendants submit that the plaintiff's reliability was diminished because of her questionable memory of former medical history. I do not agree.

[112] In support of their position, the defendants could point to only two inconsistencies between her trial testimony and her examination for discovery evidence. At her examination for discovery, she denied suffering headaches before the Accident, she did see a doctor about a migraine in 2016. I accept her explanation that at the examination for discovery, she had simply forgotten about that doctor visit. They also claim she stated her hip pain had resolved in 2010, but note she reported hip pain to a doctor in 2014. I do not consider that to be an inconsistency.

[113] Neither purported inconsistency affects Ms. Gark's credibility or reliability.

[114] More generally, the defendants contended that the Court and medical professionals "are forced to rely upon [Ms. Gark's] evidence concerning her past medical history in order to assess whether she had a prior low back condition which was quiescent in the period immediately before the accident". There is nothing unusual or notable about that: *Stapleton v. Andrew*, 2019 BCSC 678 at para. 56. Nor does that fact necessarily impair the plaintiff's credibility or reliability.

### ***Conclusion on Credibility***

[115] I find Ms. Gark to be a candid and forthright witness. She was clear to indicate when she could not recall specific details. She was honest about frailties in her memories and did not attempt to embellish her evidence. I do not find at any point that her inability to recall an event or circumstances was anything other than a reasonable consequence based on the character of human memory. She was not evasive, nor defensive.

[116] There was no indication by any medical or non-medical expert of a concern that she was exaggerating her symptoms. I also observed her frequently shifting her

position in the witness stand consistent with other people's observations. I am satisfied she was genuinely in discomfort and not feigning.

[117] With regard to her description of her pain and limitations, I find her evidence was highly consistent with people who had opportunities to observe her before and after the Accident. I do not find any of the non-expert witnesses' testimony to be weakened during cross-examination.

[118] Ms. Gark's description of her symptoms, including the improvements she experienced, was also highly consistent with reports she gave to the medical experts and non-expert medical witnesses. As a consequence, the expert evidence was highly consistent.

[119] Rather than diminished reliability, I find Ms. Gark to have a high degree of both credibility and reliability. For those reasons, I place great weight on her testimony about her injuries and how they have affected her life.

#### **Conclusions about Injuries Caused by the Accident**

[120] Apart from the consistency of Ms. Gark's testimony with evidence from experts and other witnesses, the expert evidence is remarkable consistent. There are a few differences, but, overall, all the expert evidence was highly consistent about the injuries caused by the Accident and the impact they have had on Ms. Gark.

[121] Dr. Heran and Dr. Hawkesworth were more optimistic about her future symptomology and therefore, possibly, her capability to work compared to the other experts. However, when I take into account the evidence from doctors that have treated Ms. Gark, I find their optimism should be tempered.

[122] It is also significant that the evidence was clear that even if she undergoes lumbar fusion surgery, she remains at risk for further surgeries after that. In terms of symptom improvement following that surgery, there were differences between the

experts. However, all agreed the possibility of her experiencing symptoms in future, even worsening symptoms, was not speculative but real.

[123] Based on all the foregoing, I find the Accident caused Ms. Gark to suffer the following:

- a) Spinning sensation and dizziness which would worsen if she lay down, and occasional ringing in her ears. These symptoms improved throughout 2017 and completely resolved.
- b) Left shoulder pain with reduced range of motion, which improved such that by 2018, she only had symptoms occasionally and it completely resolved by 2020.
- c) Cervicogenic headaches, whose frequency and intensity did improve by the end of 2019 and at trial, were sporadic.
- d) Chronic, myofascial neck pain. Although there has been some improvement, at trial she still experienced the pain a few times a month lasting anywhere from several hours a full day.
- e) Chronic pain in her low back, which has been constant since the Accident impacting her tolerance for standing, bending twisting and lifting, and disrupts her sleep and mood.
- f) Spinal disc injury at L5-S1 resulting in pain, specifically left sided radiculopathy. Beginning in either 2017 or 2018, she began to experience radiating pain in her left leg which continued to progress. In 2018, she noticed weakness in her leg which continued to worsen. She then experienced numbness in her leg, foot, and pelvic area. She experienced urinary incontinence indicating cauda equina syndrome, which is an urgent situation and prompted her to undergo emergency spinal surgery. She had a period of improvement of the radiculopathy, but pain has

returned and by 2022, she was again experiencing numbness in her left leg and foot, as well as radiating pain into her right side.

- g) I also find her chronic pain from the injuries caused by the Accident has led to sleep disturbance, and both cognitive and mood dysfunction.

[124] I am not satisfied that the evidence established the Accident caused injuries to her hips.

[125] Overall, I find the injuries have had a drastically negative impact on her life.

### **Quantum of Damages**

[126] The defendants submit the appropriate range for non-pecuniary damages is \$125,000 to \$160,000. They relied on three cases: *Tabet v. Hatis*, 2013 BCSC 1167; *Chawla v. Lambright*, 2017 BSC 1884; and *Xu v. Balaski*, 2020 BCSC 940.

[127] Ms. Gark submits an appropriate award is in the range of \$200,000 to \$225,000, based on the following cases: *Bhatti v. Jones*, 2020 BCSC 1935; *Broad v. Clark*, 2018 BCSC 1068; *Ali v. Padam*, 2017 v. BCSC 1849; *Khashei v. Pirro*, 2020 BCSC 1048; and *Hoang v. Dean*, 2021 BCSC 2211.

[128] Of the cases references by the parties, I find the factual underpinning and the court's assessment of the facts in the cases cited by the plaintiff more closely matched Ms. Gark's situation than the cases relied on by the defendants. In particular, I find *Bhatti*, *Khashei*, and *Ali* to be most helpful.

[129] Given those cases, and in light of my conclusions about Ms. Gark's injuries and the impact they have had on her life, I award her \$220,000 for non-pecuniary damages. I confirm this award incorporates my analysis relating to loss of housekeeping capacity (see below, paras. 197 - 204)

**LOSS OF EARNING CAPACITY****Summary of Evidence**

[130] I rely on the discussion of evidence, the conclusions about credibility, and the conclusions about Ms. Gark's injuries caused by the Accident in the preceding portion of this judgment. In addition, the parties filed an agreed statement of facts, which included facts relevant to the claim for loss of earning capacity, including:

- a) Ms. Gark did not graduate from high school. She completed grade 11.
- b) Ms. Gark obtained an esthetics diploma from Marvel College in 1998.
- c) Ms. Gark worked at Kingfisher Oceanside Resort & Spa ("Kingfisher") between November 1, 2015, and February 3, 2019, with a period of absence between November 10, 2016, and May 4, 2018.
- d) On May 5, 2018, Ms. Gark started a graduated return to work at Kingfisher, but her last day of work there was February 3, 2019.

[131] The parties agree that the following represents her reported income over the years: for 2013, nil; for 2014, \$5,520; for 2015, \$4,701; for 2016, \$14,110; for 2017, \$3,920; for 2018, \$8,380; for 2019, \$2,340; for 2020, nil; and for 2021, \$8,283.

***Ms. Gark's Testimony***

[132] At the time of the Accident, she was working at the Kingfisher, typically about 10 to 15 hours per week, usually from 9 am to 2 pm, so she could pick up the children from school. She would work an eight-hour shift when the children were with their father every other Sunday. She did not work immediately after the Accident, but began a gradual return to work on May 5, 2018. However, she has stopped working because of her pain. Her last day of work was February 3, 2019.

[133] There was no disagreement that her work as an esthetician requires a significant amount of bending and stooping, and period of sitting. All of those activities caused pain.

**Amanda Lohman**

[134] Ms. Lohman first met Ms. Gark when she joined staff at a spa where Ms. Gark was already working. Ms. Lohman had worked as an esthetician, and worked with Ms. Gark both at Kingfisher and another spa. She said Ms. Gark was experienced and well qualified for the work. Ms. Gark got along with staff and was great with her clients; she had many clients who would specifically request services from her.

[135] Ms. Lohman became a manager at Kingfisher in October 2014. She is responsible for the day-to-day operation of the spa, and she handles the human resources tasks including hiring, training, and coaching employees as well as reviewing their performance. Occasionally, she will perform treatments if needed.

[136] Ms. Lohman confirmed that Ms. Gark worked at Kingfisher since November 2015 on a part-time basis, but her availability was increasing to 30–35 hours per week as of December 1, 2016. Her testimony on this point was supported by a document entered into evidence.

[137] Ms. Lohman had reviewed Kingfisher's payroll records and testified about the average hourly rate of pay for estheticians: in 2019 it was \$23.46; in 2020 it was \$24.95; in 2021 it was \$26.04; and up to June 2022, it was \$31.04. However, the rates for 2022 is likely too high as it was only five months and included the two busiest months of the year.

[138] Those average hourly rates are based on the hourly salary, and include commissions that estheticians earn on services and retail sales as well as their tips.

[139] Ms. Lohman described the tasks that an aesthetician would have on a typical day working at that spa. Specifically, she said the esthetician needs to open the room, check the bookings for the day, prepare the room which may include bringing in any equipment needed, and between clients doing the turnover which requires removing any linens on the table and disinfecting it. She confirmed that a spa attendant spends most of their time on their feet.

[140] She confirmed that estheticians typically work according to their availability. In other words, they can choose how much they will work. However, they are not entitled to benefits unless they work at least 25 hours a week, which is about four days a week.

[141] Before the Accident, Ms. Gark was able to perform all esthetic services offered at the spa although she did not perform massages.

[142] She commented on Ms. Gark's attempt to return to work in May 2018. Ms. Gark worked shorter shifts based on her doctor's advice, and she could only provide some treatments. Ms. Lohman prefers to hire estheticians who can do a full range of services, so taking on Ms. Gark, when she could not perform all tasks, was an accommodation.

[143] Ms. Lohman also confirmed that because of the COVID-19 pandemic, the spa was fully closed from about March 16, 2020, until June 1, 2020, and that many estheticians were laid off. There was also a closure and/or reduction in services because of renovations in 2018, and a fire in January 2020.

### ***Karen Cross***

[144] Ms. Cross is a vocational rehabilitation consultant, and has worked in that field since 2000. Ms. Gark was referred to Ms. Cross in late 2021. Her first meeting with Ms. Gark was in early November 2021.

[145] Ms. Cross received some functional capacity reports about Ms. Gark and two vocational assessments. Between those and talking to Ms. Gark, and applying her experience, she came up with a recommendation that Ms. Gark start some volunteer work to re-enter to the work force. She saw that as a mechanism to have Ms. Gark re-engage in a type of vocational activity in order to get used to building a routine, and to understand her own capacities in a non-clinical setting. In her view, Ms. Gark was not yet ready for education or re-training because of how long she had been out of the work force.

[146] After a delay caused by the COVID-19 restrictions, Ms. Gark did complete six or seven two-hour shift volunteering at an organization, although she still reported experiencing some pain.

***Expert Evidence***

[147] I rely on my discussion of the expert evidence above at paras. 67 - 95.

***Brent Armstrong***

[148] Brent Armstrong was qualified as a kinesiologist able to give opinion evidence with regard to functional capacity evaluations (and cost of future care plans, which is discussed later in this judgment). He prepared a functional capacity evaluation report dated January 7, 2021, based on tests he asked the plaintiff to perform on January 4, 2021.

[149] In his opinion, Ms. Gark is not employable as an esthetician either on a full-time or part-time basis based on his opinion as to her limitations. The following is a summary of some of his findings regarding Ms. Gark's physical capacity:

- a) A sitting tolerance of about 20 minutes, but that this was reduced to 10 to 15 minutes over the course of the day;
- b) She had standing tolerance of approximately 60 to 90 minutes although she still had symptoms in the lower back and left leg.
- c) Significant limitations in her ability to bend or stoop, and she is not suited for any tasks that require bending forward either from sitting or standing posture on more than an occasional basis for short periods. Lifting, pulling, or pushing while bent or stooped should be avoided.
- d) She was not suitable for tasks requiring long periods of crouching or squatting because that increase the left leg and lower back symptom load resulting in significant weight shift and poor stability.

[150] Mr. Armstrong opined that Ms. Gark will be limited in her ability to work in jobs that require sustained sitting or stationary standing especially if that is combined with bending. She would be suitable for work within the sedentary or limited strength demands category where frequent positional change is available.

[151] The defendants submit Mr. Armstrong's report has significant flaws, suggesting he "ignored" the results of various tests. However, Mr. Armstrong explained that for those tests, the results were not what was important. Rather, he was asking her to perform certain tasks to observe her sitting tolerance while distracted. The defendants submit because Mr. Armstrong relied on observations, his opinion should have no more weight than the observations of lay witnesses.

[152] I disagree. Mr. Armstrong was qualified as an expert specifically in conducting functional capacity evaluations. His observations are grounded in his specialized skill, knowledge, and experience. To suggest his observation are not more valuable than a lay person misconstrues his field of expertise. I am not persuaded that cross-examination weakened his opinion.

***Darren Benning***

[153] Darren Benning was qualified as an economist able to state opinion and statistical evidence to estimate future losses. He prepared a report regarding past and future income loss dated June 10, 2021.

[154] His performed calculations to estimate Ms. Gark's expect past and future without accident income, based on the assumption that absent the Accident, she would have worked full time as an esthetician at Kingfisher, up to age 65. He relied on her actual earnings from 2016 taken from her paystubs, and an amount of income loss for December 2016. He calculated a figure for 2017 based on an assumption that she would have worked 35 hours a week.

[155] With regard to his calculations for the future, Ms. Benning made adjustments based on an assumption that Ms. Gark's attachment for the labour force over her lifetime would have been greater than for the average female of her age and level of

education. Mr. Benning explained this was not based on any assessment of Ms. Gark's work history, but rather an assumption that was applied because he was instructed to assume full-time work and not apply contingencies related to part-time work.

[156] The defendants submit that Mr. Benning's conclusion that Ms. Gark was more attached to the workforce than the average female is "obviously not true" because she never had employment at a particular place longer than two years. I disagree. Mr. Benning is given certain assumptions which he then applies to a large body of statistical data. Given my conclusions about Ms. Gark's work, I find it reasonable that Mr. Benning would have assumed she had a great attachment to work for average females of her age with her level of education.

#### **Legal Principles Relating to Loss of Earning Capacity**

[157] The standard of proof for both past and future loss of earning capacity is not the balance of probabilities, but a real and substantial possibility: *Smith v. Knudsen*, 2004 BCCA 613 at para. 29; *Schenker v. Scott*, 2014 BCCA 203 at para. 82; and *Grewal v. Naumann*, 2017 BCCA 158 at para. 48.

[158] In *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at paras. 25–31, the court set out the principles applicable to determining the appropriate amount to award a plaintiff for past loss of earning capacity. The principles from those cases can be distilled as follows:

- a) The loss of earning capacity is a lost asset, and the appropriate valuation is to determine what the plaintiff would have earned if the injuries had not occurred.
- b) The claim is the loss of learning capacity, meaning the loss of the value of the work the plaintiff would have performed but was unable to because of the injury, not just "loss of income".

- c) The damages are meant to represent the value of the plaintiff's earnings that she would have received over time had the tort not been committed, not merely a loss incurred entirely at the time of the tort.
- d) The loss may be measured in different ways including reference to actual earnings the plaintiff would have received.

[159] With regard to assessment of future loss of earning capacity, the legal principles were recently re-affirmed by the Court of Appeal's trilogy of cases: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. From those cases, I distill the following principles:

- a) The burden to establish entitlement to future wage loss is not a balance of probabilities. Instead, the plaintiff must show a real and substantial possibility of loss that amounts to something more than speculation.
- b) The award for future loss of earning capacity is an assessment, not a mathematical calculation.
- c) The assessment involves a comparison of the plaintiff's likely future if the accident had not happened, with what the plaintiff's likely future will be after the accident.
- d) The first step of the assessment requires the court to determine whether the evidence discloses a potential future event that could lead to a loss of capacity. One example is the possibility that accident-related injuries will worsen.
- e) If the first step is satisfied, the second step asks where there is a real and substantial possibility that the future event will cause a pecuniary loss.
- f) A number of factors are examined to determine if the second step is met, including:
  - i. the plaintiff's intention to keep working and what they intend to do;

- ii. the plaintiff's inability to devote the same energy or hours to the pre-accident occupation;
  - iii. the plaintiff's work history;
  - iv. the plaintiff's medical conditions; and
  - v. the plaintiff's intentions concerning future lifestyle, and risks inherent in those plans.
- g) If the second step is met, the third step is to determine the value of that potential future loss, which requires assessing the relative likelihood of the possibility occurring. The third step can be accomplished by employing either the "earnings" approach, or the "capital asset approach".
- h) The earnings approach is more useful when the loss is easily measured. While that determination is not a mathematical exercise, the court should be guided by mathematical anchors.
- i) The capital asset approach should be used where the loss is not measurable in a pecuniary way. In that case, the court asks whether the plaintiff:
- i. has been rendered less capable overall from earning income from all type of employment;
  - ii. is less marketable or attractive as an employee to potential employers;
  - iii. has lost the ability to take advantage of all job opportunities which might have been open to her had she not been injured; and
  - iv. is less valuable to themselves as a person capable of earning income in a competitive market.

### Analysis

[160] The defendants submit that the award for loss of past earning capacity is properly assessed by calculating her net income loss, per year. They point out that her earnings in 2016 were minor because they were “suppressed by virtue of being a stay-at-home mother”. They submit it is “open to question the extent to which the Plaintiff would have worked absent accident in the period December 1, 2016 to June 30, 2019” due to a variety of personal issues.

[161] Their position is that the starting point is a figure of \$125,012.88, but submit that figure is generous because it does not account for “the real possibility that unrelated psychosocial factors delayed [Ms. Gark] re-entering the workforce before May 2018”. The defendants identified those factors as “issues of grief, unidentified home stresses, and family custody proceedings issues”.

[162] They also submit Ms. Gark did not mitigate her damages by exploring other job options. They point out that she went “hiking and travel[ed] as examples of her ability to sit and stand/walk and function in 2017 and 2018”.

[163] The defendants’ written submissions on this issue comprise 13 pages including detailed, and precise calculations of Ms. Gark’s post-accident, pre-trial earnings history on an almost weekly basis, including identifying days she missed work and for what reason. They also centre their approach on assumptions about her child custody arrangements. They place considerable emphasis on what they say are stressful events in her life.

[164] Similarly, with regard to Ms. Gark’s future income loss, the defendants submit the court should account for the fact that, in their submission, the family law litigation would have limited her working capacity. They acknowledge that absent the Accident and as her children get older, Ms. Gark could have increased her working hours from her typical pre-Accident schedule, but submit that she may have increased her working hours “if she were inclined” (emphasis in original). They also accept the possibility that her potential need for surgery and rehabilitation may

impact her future earning capacity. However, they still resort to an approach based heavily on the possible custody scenarios based on her pre-Accident income.

[165] Ms. Gark’s written submissions suggest the defendants’ approach is unseemly because it is based on “outdated notions of the reasons women choose to stay at home to care for children” while ignoring the financial realities of life in the current day. Ms. Gark also submits the defendants’ approach is highly speculative and not well grounded in the evidence.

[166] I make no comment about the propriety of the defendants’ submissions other than to remark that I find that Ms. Gark’s response is reasonable given the tenor of the defendants’ final submissions. Regardless of that, I find the defendants’ approach to be flawed for two reasons. It is basically a mathematical calculation, rather than an assessment, contrary to the established case law. The mathematical calculations they include in their submission are not mere anchors, but the very foundation of their position. I also agree with Ms. Gark that the defendants’ position is not as well grounded in the evidence adduced at trial as her position.

[167] For those reasons, I reject the defendants’ approach to both past and future loss of earning capacity.

***Assessment of Past Loss of Earning Capacity***

[168] Ms. Gark submits her earnings history is not the best representation of what she would have earned, but for the Accident, because she had only recently re-entered the workforce before the Accident.

[169] Ms. Gark submits it is reasonable to conclude that as her children got older and more independent, she would have increased her hours up to working full time in the field of esthetics. On that point, she emphasizes her evidence confirmed by Ms. Lohman that prior to the Accident, Ms. Gark had planned on increasing her hours as of December 2016.

[170] The defendants suggest Ms. Gark's work history does not justify Mr. Benning's assumption that her attachment to the work force would be greater than women her age with her education. I disagree.

[171] For one thing, Ms. Gark chose to stay at home for periods of time to look after her young children but significantly, when she did not have a partner, she worked to support her family.

[172] Ms. Gark acknowledges she faced several challenges in her personal life after the Accident, but points out that she has had similar stresses for most of her adult life. Despite that, she always provided for her children. I also find that before the Accident she was obviously a person who coped well with significant challenges, and had resilience. A consistent comment from those who observed her after the Accident was a major change in her ability to cope, and I find that is primarily because of the impact of the injuries on her life.

[173] Based on the whole of the evidence, I find Ms. Gark has a solid history of earning income and supporting her children, including doing so in the face of an unplanned pregnancy at a very young age. She showed considerable initiative in creating a business for herself and pivoting to another business in order to accommodate her duties as a young mother who wanted to stay at home with her child (see above paras. 5-6). Accordingly, I find Mr. Benning's view that she has a strong attachment to the workforce to be supported by the evidence.

[174] Based on the whole of the evidence, I do find it probable that absent the Accident, Ms. Gark would have increased her hours of work starting in December 2016.

[175] As noted, the defendants submit that Ms. Gark did not mitigate her loss (although they did not provide legal argument on mitigation). In any event, on the evidence, I find Ms. Gark made a concerted and genuine effort to return to work, but doing so aggravated her symptoms. She participated in vocational counselling in late 2021 but, again, had to stop her volunteering activities because it increased her

symptoms and pain. I note the defendants' own expert, Dr. Hawkeswood, opined that Ms. Gark's time off work was reasonable and medically appropriate.

[176] I also note that Dr. Mendelsohn opined that Ms. Gark was not capable of working without further treatment, and Mr. Armstrong confirmed she was not employable as an esthetician because of her physical limitations. I also find Dr. Brcic's testimony particularly relevant. She was concerned that Ms. Gark's pain and mental health had not been adequately, medically addressed. She concluded Ms. Gark should not return to work.

[177] For all those reasons, I place weight on Mr. Benning's opinion. He opined her past net income loss was just over \$184,000. However, Ms. Gark acknowledges Mr. Benning did not incorporate periods of time when it is likely Ms. Gark would have lost income not because of her injuries but because of closures at the spa. She submits an award just over \$163,000 is appropriate (this amount applies the applicable tax rates for each year pursuant to *Laxdal v. Robbins*, 2010 BCCA 565).

[178] That award incorporates the rates of pay provided by Ms. Lohman for various time periods, takes into account period of spa closures, and also assumes Ms. Gark would have worked 35 hours per week starting in December 2016.

[179] While I agree with Ms. Gark's approach, and find Ms. Gark would have increased her working hours starting in December 2016, I am not persuaded the evidence supports a finding that she would have immediately increased to 35 hours per week, and would have consistently worked that many hours weekly from that point forward. Accordingly, it is appropriate to discount the figures to account for that.

[180] Based on the foregoing, I award Ms. Gark \$125,000 for past loss of earning capacity.

***Parties' Positions on Future Loss of Earning Capacity***

[181] Ms. Gark's position is that her injuries have resulted in her having a permanent, partial disability. She contends there is a real and substantial possibility that she will remain unable to work until she undergoes surgery and rehabilitation. Her position is this will delay, for at least one year, her ability to undertake any work. Further, she submits she will, for an indefinite period of time, require accommodation in the workplace, which will negatively impact her ability to take advantage of job opportunities.

[182] She acknowledges there is a reasonable likelihood that she will experience some degree of improvement in her symptoms following surgery, but that realistically, she would still be limited to part-time work either as an esthetician restricted to only doing certain procedures, or to work in another field following a period of retraining. I note that Ms. Lohman stated she preferred to hire estheticians who could do all procedures, so it is probable Ms. Gark will need to seek accommodations in any employment situation. I agree that will reduce the opportunities available to her.

[183] The defendants' position are that the following factors should be taken into account in assessing the award for future loss of earning capacity:

- a) Ms. Gark typically worked approximately 15 to 18 hours per week as an esthetician before the Accident.
- b) Ms. Lohman confirmed that the most common schedule for estheticians was to work about 28 hours per week.
- c) The assessment should assume Ms. Gark, at least for the next five years, would work less during the weeks when she had full custody of her children.
- d) It is reasonable to assume she may not work for two years because of the possibility of surgery and recovery, but there is a chance she could work

28 hours per week after recovery of surgery, meaning she would experience no loss.

[184] The defendants submit \$67,234 represents her loss if she does not work for two years because of surgery and recovery. Beyond that time, they submit she may experience a loss because of the possibility she will not be able to work the full 28 hours as an esthetician, but may have a lower paying job. They estimate that loss on an annual basis to be \$8,601, and using the appropriate multiplier, they submit it is appropriate to award \$93,951.04. Thus, the total amount for future loss of earning capacity is \$161,185.

[185] Ms. Gark submits there is a real and substantial possibility she will suffer a significant and indefinite impact on her earning capacity because of her injuries. She submits the evidence supports following conclusions:

- a) She is permanently, partially disabled. She will be unable to work full time at any point.
- b) There is a real a possibility she will undergo further surgery or surgeries, which will require her to be out of the workforce for the operation and recovery.
- c) While there is a real and substantial possibility that surgery will provide her with improvements to her conditions, she will remain limited to part-time work, either as an esthetician only performing some services, or in another industry after a period of retraining.
- d) She will require accommodation in the workplace which impacts her ability to pursue job opportunities.

[186] Ms. Gark submits the income approach is appropriate. She relies on three cases which she asserts are similar and therefore provide helpful guidance: *Morena v. Dhillon*, 2014 BCSC 141; *Myers v. Gallo*, 2017 BCSC 2291; and *Ratelle v. Barton*, 2022 BCSC 22. I agree those cases are helpful.

[187] To determine what she would have earned but for the Accident, she contends the present rate of pay at Kingfisher should be used, assuming she would have worked 35 hours per week, 52 weeks per year, which is an annual salary of \$56,492.80.

[188] Using Mr. Benning's multipliers, Ms. Gark submits the following scenarios are helpful. If she remains totally disabled and incapable of working, the present value of her income loss would be \$925,293.07. If one assumes her loss amounts to 50 percent of her potential future full-time capacity, the loss is \$462,619.53, and a 25% loss of capacity equals \$693,929.30.

[189] Ms. Gark submits negative contingencies such as employment availability and other illness or injuries are balanced by the positive contingencies of increased availability of work and increased salary from increased hourly rates.

[190] She submits an award of \$700,000 is appropriate.

***Assessment of Future Loss of Earning Capacity***

[191] Based on the whole of the evidence, I find:

- a) Ms. Gark is permanently, partially disabled.
- b) It is probable that she will have periods of time out of the workforce because of surgeries and recovery.
- c) There is a real and substantial possibility she will have some improvement to her symptoms, but it is improbable that she will ever be able to return to her pre-Accident capabilities. Nor is it likely she will ever work full time.
- d) There is a real and substantial possibility her symptoms will worsen, even if she does undergo surgery.

[192] With regard to her likely future if the Accident had not happened, I am not persuaded either parties' position is fully supported by the evidence. For the reasons already discussed, I do not rely on the defendants' approach. While I find the

plaintiff's approach appropriate, I am not persuaded the evidence supports a conclusion that absent the Accident, Ms. Gark would immediately have increased her work hours to 35 hours per week, 52 weeks per year from December 2016 to age 65. I do find she would have increased her work hours, but in a more gradual way. I agree, however, that it is likely she would have remained in the field of esthetics, and that when her children were older, she would likely consistently work full time.

[193] Based on the whole of the evidence, I find there is a real and substantial possibility that the future events identified will result in a pecuniary loss. I am satisfied that she will pursue any work that she is capable of doing, demonstrated by her attempts to return to work in 2018, and pursuing volunteering as recommended. I also find she has a solid history of a good work ethic. However, I place weight on the expert medical evidence that consistently stated she will continue to have limitations.

[194] In terms of determining the value of her pecuniary loss, both parties based their position on the earnings approach, and I agree that is appropriate.

[195] As noted, I find the plaintiff's approach of assuming absent the Accident, she would have worked 35 hours per week, 52 weeks per year to age 65 was not consistent with the whole of the evidence. I agree she will not be able to work full time, and it is most likely she will be limited to something less than 50 percent of her pre-Accident capacity.

[196] Taking into account all the evidence, including Mr. Benning's calculations as guidance, I award her \$475,000 for loss of future earning capacity.

### **LOSS OF HOUSEKEEPING CAPACITY**

[197] The test for award for loss of housekeeping capacity was set out by the Court of Appeal in *McTavish v. MacGillivray*, 2000 BCCA 164. The key points are that an award is for the loss of an asset (capacity to perform housework) and that an award

can be pecuniary or non-pecuniary damages, and if the latter, there is no reason not to segregate the award.

[198] In *O'Connell v. Yung*, 2012 BCCA 57 at para. 67, the court of appeal confirmed an award for loss of housekeeping capacity is different from awarding the cost of future care:

[67] ... As I understand the principle, it is the loss of a capacity – an asset – that is compensated. Accordingly, because the award reflects the loss of a personal capacity, it is not dependent upon whether replacement housekeeping costs are actually incurred. Damages for the cost of future care serve a different purpose from awards for loss of housekeeping capacity. Unlike loss of housekeeping capacity awards, damages for the cost of future care are directly related to the expenses that may reasonably be expected to be required (*Krangle* at para. 22). ...

[199] In *Ali v. Stacey*, 2020 BCSC 465 at para. 67, Justice Gomery set out the elements to meet to warrant a separate award for loss of housekeeping capacity:

[67] Read together, these two judgments establish that a plaintiff's claim that she should be compensated in connection with household work she can no longer perform should be addressed as follows:

- a) The first question is whether the loss should be considered as pecuniary or non-pecuniary. This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; *Kim* at para. 33.
- b) If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; *Riley* at para. 101.
- c) A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; *Kim* at para. 31. It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; *Kim* at para. 44.
- d) Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; *Riley* at para. 102.

[200] Ms. Gark submits she is entitled to a separate award for loss of housekeeping because of her profound lack of capacity. She relies on Mr. Armstrong's opinion. He noted that she was able to do chores only because she would spread out the tasks because she was not working outside the home. However, he opined she would not

be able to complete tasks that require her to get into a lower sustained position (such as scrubbing bathtub or floors). He stated that she would need assistance with vacuuming, mopping, window cleaning, and any yard work if she were to move into a bigger home at some point that had a yard requiring mowing or gardening.

[201] Similarly, Dr. Mendelsohn opined that her limitation will affect her ability to complete the activities of daily living and heavy cleaning. I also note testimony from lay witnesses that Ms. Gark kept a clean and tidy home before the Accident, and her physical limitations negatively impacted her ability to do so after the Accident. Ms. Gark testified that before she attempted her return to work, she had two hours per week of housekeeping which she found helpful. She submits a global assessment is appropriate, and seeks an award of \$50,000.

[202] The defendants submit no separate award is justified. They submit given Mr. Armstrong's opinion, Ms. Gark should be able to manage her housekeeping chores if she simply continues to spread them out. However, this ignores the tasks she opined she should avoid, and does not account for the evidence that on occasions, she was not able to keep up with daily tasks such as doing dishes. They also point to evidence from Ms. Speed that she cooked for their blended family, although she needed help with dishes.

[203] They acknowledge it may be appropriate to have housekeeping assistance for a period after surgery, and that she may require some assistance into the future, but only with heavier and seasonal cleaning and maintenance. Relying on Mr. Armstrong's evidence, they submit just over \$9,000 is appropriate, but not as a separate award; they submit that should be awarded as a cost of future care.

[204] I am not satisfied the evidence supports a finding that Ms. Gark is entitled to a pecuniary award for loss of housekeeping capacity. While her physical injuries do certainly negatively impact her ability to complete housekeeping tasks, there were periods of time, when she was able to cope, especially when living with Mr. Speed. I find it more appropriate to include this item within the award for non-pecuniary damages, and confirm I have done so.

**COST OF FUTURE CARE**

[205] Mr. Armstrong complete a cost of future care award dated October 23, 2022, and Mr. Benning's October 24, 2023 report provided a table of multipliers to estimate the present value of various amounts according to Ms. Gark's age.

[206] The parties agreed on the applicable legal test, helpfully summarized in *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244:

[244] The principles applicable to the assessment of claims and awards for the cost of future care might be summarized as follows:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, et cetera) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township*, 2008 BCCA 420; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd.* (1996), 19 B.C.L.R. (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.

[207] Based on the experts reports, and the whole of the evidence, Ms. Gark seeks an award assessed as a global amount of \$300,000.

[208] Mr. Armstrong recommended the following one-time cost items, which total between about \$36,720 and \$37,770:

- a) Private psychiatry evaluations: \$1,500–\$2,000;
- b) Physiotherapy for once a week for eight months: \$2,400, and post surgery twice a week for three months: \$1,800;
- c) Massage therapy once a week for eight months: \$2,880; post-surgery once a week for eight months: \$2,880;
- d) Kinesiology sessions post-surgery, twice a month for about 20 sessions: \$1,080;
- e) Occupational therapy twice a month for six months: \$1,440; and post-surgery, twice a month for eight months: \$1,920;
- f) Equipment and items for health and strength maintenance: \$2,376;
- g) Pilates classes for three years post surgery, 30 sessions per year: \$2,376;
- h) Aides for independent function to maximize work capacity: \$1,016;
- i) Vocational assessment and services: \$3,550 to \$4,100;
- j) Orthopedic equipment: \$690;
- k) Housekeeping once a week for seven months: \$2,380;
- l) Post surgery housekeeping two hours twice a week for eight weeks: \$2,720;
- m) Care-aide post-surgery, two hours daily for eight weeks: \$5,712.

[209] In terms of longer-term or ongoing costs, Mr. Armstrong recommended the following (no multipliers have been applied):

- a) Physiotherapy, twice a month to age 65, annual cost: \$1,800;
- b) Massage therapy twice a month for three years: \$6,480;
- c) Transportation for physiotherapy and massage to age 65: approximately \$1,660 per year;
- d) Kinesiology, once a month for three years: \$3,240 per year;
- e) Clinical counselor once a week: \$5,760 per year;
- f) Gym membership: \$600 per year;
- g) Cannabis oil: \$420 per year;
- h) Housekeeping two hours once a week to age 80: \$8,160.

[210] The defendants submit no award is appropriate for psychiatric assessment as she was referred to a psychiatrist by Dr. Brcic, which would not require out-of-pocket expenditure. They also contend that the need for clinical counsellor services is not because of the Accident. They submit the services of an occupational therapist is not needed before Ms. Gark has surgery given her current limitations. They also submit there is considerable overlap in Mr. Armstrong's recommendations.

[211] The defendants submit it is appropriate to award the following one-time costs, which total about \$23,457:

- a) Physiotherapy before surgery: \$2,375;
- b) Physiotherapy in the first year after surgery: \$1,800;
- c) Massage therapy before surgery: \$1,512;
- d) Massage therapy in the first year after surgery: \$3,024;
- e) Kinesiology first year after surgery: \$1,134;

- f) Occupational therapist, after surgery: \$1,920;
- g) Housekeeping for one year post-surgery: \$1,428;
- h) Care-aide post-surgery for one year: \$5,998;
- i) Gym membership for years #2 to #4 after surgery: \$2,366;
- j) Aides for independent function to maximize work capacity: about \$1,900.

[212] With regard to ongoing costs, they submit the following are appropriate (no multipliers have been applied):

- a) Physiotherapy to age 65: annual cost of \$150;
- b) Massage therapy to age 65: annual cost of \$189;
- c) Kinesiology for years 2 to 4 after surgery: annual cost \$189;
- d) Housekeeping for age 65: annual cost of \$500;
- e) Transportation costs for physiotherapy and massage to age 65: annual cost of \$138.

[213] I note that Mr. Armstrong's report specifically identifies the source of the recommendation for each item. However, that does not mean that on the whole of the evidence, every item is reasonable and justified.

[214] For the most part, I find the one-time costs recommended by Mr. Armstrong to be reasonable. However, I agree with the defendants that it is not appropriate to include private psychiatric assessment or occupational therapy before surgery, but I find it appropriate to include services for vocational assessment. Further, I do not agree with the defendants that clinical counselling services are not related to the Accident, and find it appropriate that any award include that.

[215] I do agree with the defendants that there would be considerable overlap for awarding annual costs to age 65 for gym membership, physiotherapy, massage

therapy as well as short term costs for kinesiology and occupational therapy. I also find the frequency relied upon by Ms. Gark to be unreasonable, for the long term.

[216] Taking into account all these factors, in light of the evidence and my findings, I find an award of \$175,000 is justified and reasonable.

**CONCLUSIONS AND COSTS**

[217] The parties agreed on an amount to award for special costs, and I am satisfied that is appropriate. In summary, I award the following:

a) Non-pecuniary damages:	\$220,000
b) Past Loss of earning capacity:	\$125,000
c) Future Loss of earning capacity:	\$475,000
d) Cost of future care:	\$175,000
e) Special damages:	\$10,278.15
<b>Total:</b>	<b>\$1,005,278.15</b>

[218] Ms. Gark is entitled to court-ordered interest on the total amount awarded. She is also entitled to her costs of this litigation. If there are facts of which I am unaware relating to costs, the parties may seek a brief hearing before me to address that, but that request must be made no later than 30 days from the date of this judgment.

[219] I end by expressing my sincere regret to Ms. Gark and counsel at the delay in rendering this judgment caused by my having to take medical leave earlier this year.

“Sharma J.”