IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rabiei v. Oster,*
2019 BCSC 733

Date: 20190513
Docket: M168118
Registry: Vancouver

Between:

Nazanin Rabiei

Plaintiff

And:

Leo Oster and Chaesun Lim

Defendants

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:	P. Bisbicis R. Bisbicis E. Yacout, A/S
Counsel for the Defendants:	C. Cassidy M. Carter
Place and Date of Trial:	Vancouver, B.C. January 14-18, 28-31, and February 1, 2019
Place and Date of Judgment:	Vancouver, B.C. May 13, 2019

1. Introduction

[1] On March 22, 2016, the plaintiff, Nazanin Rabiei, was involved in a motor vehicle accident. The defendants have admitted liability. Ms. Rabiei asserts that, as a result of soft tissue injuries she sustained in the accident, she has been left with chronic pain in her neck, upper back and left shoulder. She says further that, as a result of the injuries she sustained, her ability to pursue and maintain a career as a hair stylist has been limited, and she no longer plays the violin, which was a favourite pastime. In addition to non-pecuniary damages, Ms. Rabiei seeks compensation for lost earning capacity (both past and future), lost housekeeping capacity, costs of future care, an in-trust award, and special damages.

[2] The defendants do not dispute that, as a result of the accident, Ms. Rabiei sustained soft tissue injuries to her neck, back and shoulder. However, the defendants say that the injuries were not as severe as Ms. Rabiei asserts, and that her current shoulder problems are not the result of any injuries she sustained in the accident. The defendants say further that Ms. Rabiei has failed to take reasonable steps to mitigate her damages, both by failing to follow treatment recommendations and by failing to take reasonable steps to find employment at a level she reasonably could have been expected to achieve in light of her injuries. The defendants say that, as a result, there should be a significant reduction of any damages awarded (apart from special damages) to Ms. Rabiei.

2. Background

[3] Ms. Rabiei was born in May 1989 in Iran. She has a younger sister, Negar, who was born in September 1993.

[4] Ms. Rabiei graduated from high school in Iran, and began university there, studying architecture. She completed three years of her university program. However, her family faced religious persecution in Iran, and, in 2012, Ms. Rabiei, her mother and sister left Iran for Turkey. They remained in Turkey for about two and a half years. While she was living in Turkey, she worked as a hair stylist and nail technician.

[5] Ms. Rabiei, her mother and sister came to Canada as refugees in September 2014. Ms. Rabiei was then 25. The three of them lived in a two-bedroom apartment in Burnaby, with Ms. Rabiei and her sister sharing a bedroom. Ms. Rabiei's sister moved out on her own in April 2018. As of trial, Ms. Rabiei and her mother continue to live in the Burnaby apartment.

[6] When Ms. Rabiei arrived in Canada and her English language skills were tested, they were quite poor. Soon after arriving, she enrolled in an adult school in Burnaby with the goal of improving those skills. As she recalled, she attended school for between nine and 12 months.

[7] Ms. Rabiei worked part-time while she was attending school. Soon after arriving in B.C., Ms. Rabiei quickly found a job as a cashier at "Persia Foods," where the limitations on her ability to communicate in English were not a problem. She worked there for about a year or so.

[8] Ms. Rabiei also pursued work as a hair stylist and nail technician. As she recalled, a friend told her about a salon – "The Side" – whose owner would not be too concerned about Ms. Rabiei's English skills. As Ms. Rabiei recalled, she began working at The Side in about May 2015. The owner and manager, Lien St-Gelais, arranged for Ms. Rabiei to "shadow" her at work in the salon for a period and also gave Ms. Rabiei the opportunity to practice, on an unpaid basis. Once Ms. Rabiei became more comfortable, she began providing services on her own for customers, as a paid employee. Ms. Rabiei did manicures, pedicures and hair at the salon, and was paid a commission, based on the number of customers for whom she provided salon services. In June 2015, the first month in which she was paid, Ms. Rabiei's gross earnings were about $238.00.

[9] Ms. St-Gelais described the quality of Ms. Rabiei's work as "perfect." According to Ms. St-Gelais, Ms. Rabiei's work ethic before the accident as "the best," and she was very productive and friendly.

[10] In addition to school and work, soon after arriving in B.C., Ms. Rabiei began taking violin lessons. Ms. Rabiei explained that she started playing violin when she was nine, and continued studying until she was about 17. Once she got settled in B.C., she began studying again. Her teacher was Mr. Ali Asgari-Doulabi. Mr. Asgari-Doulabi has been a violin teacher for over 20 years, and, in addition to teaching, he had (among other things) played professionally as an orchestral musician. Ms. Rabiei had a one-hour private lesson each week with Mr. Asgari-Doulabi. As Ms. Rabiei recalled, once she started taking lessons again, she would practice regularly, about two hours a day. Mr. Asgari-Doulabi described Ms. Rabiei as a very committed student, enthusiastic and talented. As best he could remember, before the accident, Ms. Rabiei did not miss any lessons.

[11] An acquaintance from when Ms. Rabiei was living in Turkey, Fares Hekmatshoar, had moved to the lower Mainland in September 2012. As of trial, Mr. Hekmatshoar was a full-time student at Simon Fraser University, taking a Bachelor of Science in Kinesiology degree. Although Mr. Hekmatshoar and Ms. Rabiei had known one another in Turkey, it was not until Ms. Rabiei arrived in B.C. that they became friends. Mr. Hekmatshoar was a singer, and, as he explained, he and Ms. Rabiei would regularly get together every couple of weeks, when he sang and Ms. Rabiei accompanied him on the violin. They would also spend time together doing other things, such as having coffee, bowling and swimming, and visiting each other's homes. As Mr. Hekmatshoar recalled, they would go out to clubs and dancing every two or three weeks. In the summer, they would play volleyball and go for picnics. Mr. Hekmatshoar also had Ms. Rabiei cut his hair. He described Ms. Rabiei before the accident as a happy person, very active and outgoing.

[12] According to Ms. Rabiei, before the accident, her health was good and she had no problems. Her evidence in that respect was confirmed by her mother and sister. As Ms. Rabiei recalled, some time before the accident, she developed pain symptoms in the front of her left shoulder. At trial, Ms. Rabiei was unable to recall how long before the accident she developed these symptoms, and was unable to recall what she told her family doctor, Dr. Jalali, in that respect. In early February, she went to see Dr. Jalali about the problem, which she reported at that time she had had for about two months. At trial, Ms. Rabiei described the location of the pain as just above her armpit, at the joint of her left arm and shoulder, and, as she recalled she was unable to move her arm above shoulder height without causing pain. Sleeping on her side was also painful. As she recalled, when she saw Dr. Jalali, he told her to rest and to take some medication, which she did. "Rest" included not practicing violin. He also referred her for x-rays and an ultrasound. The x-rays were done before the accident; the ultrasound was done after. The x-rays were normal. In any event, as Ms. Rabiei recalled, she rested by not playing the violin, although she did not stop working. According to Ms. Rabiei, in about seven to 10 days after seeing Dr. Jalali, she was back to 100%.

3. The Accident and life after the accident

[13] The accident happened in a Walmart parking lot. According to Ms. Rabiei, she was stopped about a car length behind the defendant's vehicle and he backed into her.

[14] As Ms. Rabiei recalled, right after the accident, she had headaches, pain in her neck, upper and lower back and left shoulder, and some numbness and tingling in her left arm, through to her left hand and fingers. She described feeling pain in the whole of her shoulder, as compared with the location of the pain (in the front of her shoulder) that she had pre-accident. According to Ms. Rabiei, the day after the accident, she went to see Dr. Jalali about her symptoms.

[15] As Ms. Rabiei recalled (and Dr. Jalali's clinical records confirm), she saw Dr. Jalali several times over the next few weeks. On March 31, 2016, Ms. Rabiei had the ultrasound for which Dr. Jalali had made the referral before the accident. The report mentioned some "background tendinopathy" in the supraspinatus tendon. On April 12, Ms. Rabiei saw Dr. Jalali and they discussed the results of the ultrasound. Dr. Jalali's clinical records for that appointment state: "Discussed left shoulder pain in great detail, to start PT [physiotherapy] L shoulder tendinopathy." Ms. Rabiei saw Dr. Jalali again on April 14, and his clinical records state she came with "questions regarding her shoulder pain and starting PT." As Ms. Rabiei recalled, she told Dr. Jalali that she wanted to take time off work because of her symptoms, especially the pain in her left shoulder. Dr. Jalali referred her for physiotherapy, and his clinical record for that appointment states (under "Plan") that Ms. Rabiei was to "contact EI [Employment Insurance] and bring me forms to sign."

[16] However, Ms. Rabiei felt that Dr. Jalali did not seem very interested in her accident symptoms, and she explained that she wanted to be seen by a doctor who worked with people who had been involved in accidents. So, beginning on April 22, 2016, Ms. Rabiei began seeing a new family doctor, Dr. Gurdeep Parhar, in relation to matters connected with the accident. Ms. Rabiei explained that Dr. Parhar's office and the place where she was going for physiotherapy were in the same building, and

Dr. Parhar's office was also closer to her home in Burnaby. She continued to see Dr. Jalali as her family doctor in relation to all other medical matters.

[17] At Ms. Rabiei's first appointment with Dr. Parhar on April 22, 2016, Dr. Parhar assessed her as having "musculoligamentous" injuries to the cervical, thoracic and lumbar spine, muscle tension headache and "pain L shoulder condition worsened with" the accident. When asked at trial about the word "worsened," Dr. Parhar said it was not a good choice of word. Dr. Parhar recommended "ice, heat, rest, exercise," physiotherapy and follow-up as needed. Dr. Parhar prescribed naproxen, an anti-inflammatory and analgesic. However, according to Ms. Rabiei, she did not fill this prescription. She explained that she had Tylenol and Advil at home, and she decided to take these instead. Dr. Parhar did not prescribe naproxen after this first visit.

[18] Ms. Rabiei saw Dr. Parhar again on May 3, June 14, and August 15, 2016. At each visit, he noted findings that all ranges of motion of the cervical, thoracic and lumbar were decreased in all directions. At the June 14 visit, Dr. Parhar noted that "Since the last visit, patient's neck pain is better. Worst symptom is shoulder pain. Condition improved." On examination as of both June 14 and August 15, Dr. Parhar found tenderness to palpation in the right, midline and left region of the cervical spine as well as in the thoracic and lumbar spine. His assessment on those dates was: "Musculoligamentous injuries of C-spine, T-spine and L-Spine" and "Joint/Limb Condition in L shoulder/upper arm." His recommendations included ice, heat, rest and exercises, and physiotherapy.

[19] Ms. Rabiei's last visit to Dr. Parhar in 2016 was on October 20, 2016. He noted that her condition was unchanged since the last visit. He continued to assess her as having "musculoligamentous injuries" of the cervical, thoracic and lumbar spine, and also assessed "joint injuries; Lt. shoulder." In addition to ice, heat, rest and exercise, he recommended a "personal trainer/kinesiologist." Based on that visit, Dr. Parhar prepared a "CL-19" medical report in February 2017. That report

indicated a reassessment date of February 21, 2017. However, Dr. Parhar did not see Ms. Rabiei again until April 19, 2018.

[20] In conjunction with most of her visits to Dr. Parhar in 2016, Dr. Parhar provided a letter, addressed "To Whom it May Concern" concerning her absence from work. The contents of the letters dated April 22, July 7 and October 20, 2016 are identical and state:

> This patient has been unable to return to work due to injuries suffered in the motor vehicle collision of Mar 16 [sic], 2016.
>
> From today the patient will need to be off work for at least another 8 weeks.
>
> The patient is being reassessed regularly and thus another prognosis will be offered at a later date.

[21] Dr. Parhar explained that accuracy is very important to his practice. However, he acknowledged in cross-examination that the March 16, 2016 date in the letters prepared for Ms. Rabiei is incorrect.

[22] Ms. Rabiei did not return to work, either at The Side or anywhere else, for the remainder of 2016. After the accident, she attended a couple of violin lessons where she and Mr. Asgari-Doulabi did mostly music theory. She then stopped taking lessons altogether and has never returned. Ms. Rabiei explained that, after the accident, she did not play the violin for a couple of months. Then, she tried a couple of times to play. However, when she did, she had more pain in her shoulder and neck and she was unable to play.

[23] Ms. Rabiei began physiotherapy at the end of April 2016. At trial, she was unsure whether she had 12 sessions or 20 sessions, although the records confirm that she had 12 (not 20) sessions. In any event, her physiotherapy continued into July 2018.

[24] The physiotherapist's discharge note dated July 14, 2016 states in part:

> ● Patient has now recovered from her left arm and shoulder issues, has some mild pain with deep palpation but has full ROM . . .. Would need further strengthening up as her upper back, neck and core are still quite weak.

[25] The treatment plan stated that Ms. Rabiei would now benefit from a kinesiologist-supervised active rehabilitation program, with the goal of regaining strength and function. This was consistent with Dr. Parhar's recommendation at the October 20, 2016 visit.

[26] In January 2017, Ms. Rabiei began a hairdressing course at Vancouver Community College ("VCC"), although that same month Dr. Parhar produced another "To Whom it May Concern" letter stating that Ms. Rabiei would need to be off work until February 21, 2017. The VCC course was full-time and ran until October 2017. Ms. Rabiei successfully completed the course and obtained her hairdressing licence.

[27] Ms. Rabiei explained that she had wanted to be an artist who worked with hair, not just a stylist. While at VCC, she gave thought to taking courses and then applying to work in the movie industry, and she both researched and talked to instructors about her plans. However, based on what she was told, she would need to be able to work 16-hour days, and also to practice her skills on more and more clients. She felt that, because of the symptoms in her neck, back and shoulder, she could not practice sufficiently, and the symptoms affected her ability to do her job as a stylist.

[28] In April 2017, while she was going to school, Ms. Rabiei also returned to work part-time at The Side. She worked there through to the end of September 2017, and earned (on average) about $600 per month. However, according to Ms. St-Gelais, Ms. Rabiei worked more slowly than she had before the accident. In addition, Ms. Rabiei explained that she found performing manicures and pedicures too painful, and stopped doing them altogether.

[29] Ms. Rabiei acknowledged that she had been advised to attend active rehabilitation. However, she did not. Instead, she eventually did exercises with the assistance of Mr. Hekmatshoar. As Mr. Hekmatshoar recalled, Ms. Rabiei contacted him and asked him to help her work out, which he did in the summer of 2017. As he recalled, he worked with Ms. Rabiei two or three times a week, for three or four

months. He described helping Ms. Rabiei with some upper and lower body exercises, mostly to help her gain strength, and described what he was doing as acting more like a spotter. He explained that, for example, if Ms. Rabiei wanted to do a shoulder press, Ms. Rabiei needed someone to raise her elbows straight, because injury could result if exercises were not done properly. Mr. Hekmatshoar confirmed that he has never been certified as a personal trainer.

[30] At the end of October 2017, after she had completed her course at VCC, Ms. Rabiei began working as a hair stylist at the "Fresh" salon in the Oakridge Mall. Ms. Rabiei worked there full-time, Friday to Tuesday, mostly 8 hours a day (apart from Sundays, when her workday was slightly shortened), until the salon closed in August 2018. Ms. Rabiei explained, that at Fresh she was paid the greater of a commission or $12 an hour. As she recalled, her first month at Fresh, she was paid hourly, and, after that, she was paid a commission. As she recalled, she typically had four or five clients a day, and she described the salon as not very busy.

[31] In March 2018, two years after the accident, Ms. Rabiei was examined for discovery in this action. The following exchange was put to her during her cross-examination at trial:

> Q. Okay. How - - how is your left shoulder these days?
> A. Still the same.
> Q. Still constant severe pain?
> A. Yes.
> Q. It never lets up?
> A. Never.

[32] Ms. Rabiei offered an explanation at trial. She said her shoulder pain never goes away, and always bothers her. However, she also realized and acknowledged that her injuries have improved.

[33] Ms. Rabiei attended a functional capacity evaluation by Mr. Paul Pakulak on July 12, 2018. At that time, she reported intermittent pain in her neck and upper back (left more than right), intermittent left shoulder pain, and occasional pain and

muscle tension in her low back at the end of her busier days at work. She rated her highest and lowest levels of neck and upper back pain in the preceding 30 days as 3/10 and 0/10, respectively. Ms. Rabiei rated her highest and lowest levels of shoulder pain in the same period as 5/10 and 0/10, respectively.

[34] Ms. Rabiei was unable to shed much light on how much she earned while she was working at Fresh. Ms. Rabiei estimated her income there at about $1,800 a month plus tips. However, apart from what can be extrapolated from a review Ms. Rabiei's 2017 notice of assessment and her 2017 earnings at The Side, there is no independent or corroborating evidence (for example, a T4 slip or a pay stub) of her earnings at Fresh, although it would be reasonable to expect it.

[35] Ms. Rabiei explained that, when Fresh closed in August 2018, the salon gave her clients' numbers to her. Ms. Rabiei contacted Ms. St-Gelais about using a chair at The Side and having some of her clients see her there. Ms. St-Gelais was agreeable. As Ms. Rabiei recalled, she contacted her former Fresh clients, and a few clients came to see her at The Side. The income she earned from performing services for these clients is unknown. However, for most of Ms. Rabiei's clients, the location of The Side was not convenient. In any event, that arrangement was never intended to be more than temporary. Ms. Rabiei was out of the country on a planned vacation in Turkey from mid-September and until the end of October 2018. She also got married while in Turkey. She explained that her husband remained there when she returned to B.C.

[36] According to Ms. Rabiei, when she returned from vacation, she had an opportunity to rent a chair at another salon, Beauté, located on Main Street in Vancouver. She explained that she was offered a chair for either three days a week or five days a week. Ms. Rabiei explained that she wanted to work, but with the pain in her upper back and left shoulder, it was hard for her to work five days a week. She decided to rent a chair for three days a week, Friday through Sunday, and she has been working at Beauté as an independent contractor since November 2018.

[37] According to Ms. Rabiei, some days she works eight hours and other days 10 hours, depending on the number of clients and the services she is performing. She explained that a haircut can take an hour, whereas doing colour can take between two and four hours. Ms. Rabiei estimated that she would see four to five clients a day, on average. As of trial, she believed that she had enough clients to fill more than three days per week of work. However, apart from monthly sales reports for November and December 2018, which Ms. Rabiei generated using the "Square" software application, Ms. Rabiei produced no other records (for example, an appointment calendar) to show the number of clients she in fact had, the hours she was working or the services she was providing.

[38] According to Ms. Rabiei, on the days she is working, her neck, upper back and left shoulder bother her, and the pain gets worse and worse during the day. She described feeling pain in her neck, upper back and the whole of her shoulder. On the days she is not working, she feels mostly stiffness in those areas, although she feels better than on the days she is working. As Ms. Rabiei recalled, in the six months or so before trial, her neck and upper back pain (which mostly came together, making it hard for her to identify the source) depended on work, and she had left shoulder pain most of the time. However, she acknowledged that her neck, upper back and shoulder pain "comes and goes." According to Ms. Rabiei, at the beginning of the day, she is mostly stiff, while she feels pain at the end of the day. She acknowledged that all areas have improved since the accident.

[39] Ms. Rabiei saw Dr. Parhar again on December 28, 2018 for what was described as a "follow-up" visit. Dr. Parhar noted Ms. Rabiei's subjective report that her condition had improved, although work aggravated her left shoulder pain. On examination, Dr. Parhar noted: "Tenderness to palpation in R, midline and L regions of C-spine and T-spine." His note of the degrees of range of motion in the cervical spine (which he identified as "decreased") was identical to the corresponding note in his other clinical records for all the previous visits. For reasons that were not very well or convincingly explained, on December 28, 2018, Dr. Parhar provided another

"To Whom it May Concern" letter for Ms. Rabiei, even though she was then self-employed. This letter reads:

> This patient cannot work more then [sic] 8 hours per day 3 days per week due to the injuries sustained in the motor vehicle accident in March 16 [sic], 2016.
>
> Work at shoulder level aggravates the pain in the upper back and left shoulder.

[40] In addition to Ms. Rabiei, Mr. Hekmatshoar, Ms. St-Gelais and Mr. Asgari-Doulabi, I also heard evidence from: Ms. Rabiei's mother, Raziah Sharbit; her sister, Nagar Rabiei; a friend and former co-worker at Side, Sara Bayramabadi; and another friend, Mina Koubaei.

[41] Ms. Sharbit has lived together with Ms. Rabiei in the Burnaby apartment since she and her daughters arrived from Turkey in September 2014, except for several months in 2016 (starting shortly before the accident) when Ms. Rabiei was living with her then boyfriend in an apartment on the same floor in the same building. Ms. Sharbit described her relationship with Ms. Rabiei as a very close one. Ms. Sharbit described Ms. Rabiei's health before the accident as very good. She and her daughters shared chores and looking after the household. She could not recall anything about the shoulder pain for which Ms. Rabiei saw Dr. Jalali in February 2016, and, as far as she could recall, Ms. Rabiei never complained about pain before the accident. According to Ms. Sharbit, after the accident, Ms. Rabiei complained about pain in her back, shoulders and neck, and Ms. Sharbit testified that she could see that Ms. Rabiei had problems with her neck, shoulder and back. Ms. Sharbit recalled, after the accident, Ms. Rabiei needed help to get chores and housework done. Before the accident, Ms. Rabiei enjoyed swimming and they went swimming together. However, according to Ms. Sharbit, this was an activity that Ms. Rabiei was no longer able to do after the accident. Ms. Sharbit commented that, in the last six months or so, she observed that Ms. Rabiei looked very tired when she came home from work, and just wanted to rest in her room. She described her daughter after the accident as "very changed" emotionally because she could not take care of her own things.

[42] Ms. Sharbit also said that Ms. Rabiei was a dedicated violin player, and loved playing the violin.

[43] As of trial, Nagar Rabiei ("Nagar") was a second year journalism student at Douglas College and was also working part-time. As Nagar recalled, before the accident Ms. Rabiei had no health problems. She did not recall Ms. Rabiei complaining about pain in her shoulder, or mentioning that she had to stop playing violin for seven to 10 days. However, according to Nagar, after the accident, Ms. Rabiei talked frequently about pain in her upper back and mid-shoulders. As Nagar recalled, before the accident, Ms. Rabiei would often go out dancing at clubs downtown. They would sometimes go swimming together. Nagar explained that she was training to be a lifeguard, and Ms. Rabiei was motivating her. As Nagar recalled, after the accident Ms. Rabiei declined to participate in activities.

[44] Nagar confirmed that, before the accident, she, Ms. Rabiei and their mother shared housekeeping and chores. Nagar mentioned the housekeeping included washing dishes by hand, since the apartment did not have a dishwasher. As Nagar recalled, after the accident, Ms. Rabiei said that she was in "a lot of pain," so she and Ms. Sharbit took on doing most of the heavier chores, including vacuuming. Nagar explained that each of them was responsible for her own laundry, which had to be taken to a laundry room in the basement of the apartment building. According to Nagar, after the accident, Ms. Rabiei was in pain, and she and her mother provided a great deal of help getting housekeeping and chores done. As time went by, Ms. Rabiei needed less help. Nagar also confirmed that, before the accident, Ms. Rabiei loved playing the violin. However, after the accident, and apart from a couple of times when Ms. Rabiei played very briefly, she did not hear Ms. Rabiei playing. With respect to other activities, according to Nagar, when she went out dancing after the accident, Ms. Rabiei sometimes came along but Nagar did not recall seeing Ms. Rabiei dancing.

[45] Ms. Bayramabadi and Ms. Rabiei knew one another slightly in Turkey, before each of them came to Canada. Ms. Bayramabadi arrived in Canada in February

2014. She and Ms. Rabiei met again when they were both attending adult education after Ms. Rabiei arrived in B.C. Ms. Bayramabadi explained that she was looking for work, and Ms. Rabiei put her in touch with The Side. As best Ms. Bayramabadi could recall, she began working part-time as a nail technician at The Side in 2015, although she was unable to recall the month. According to Ms. Bayramabadi, there were some days of the week that both she and Ms. Rabiei were working there, and as Ms. Bayramabadi recalled, she and Ms. Rabiei would often work weekends together. According to Ms. Bayramabadi, before the accident, Ms. Rabiei was mostly doing nails, but also did some hair. As she recalled, Ms. Rabiei was always on time for her clients, and the quality of Ms. Rabiei's work was excellent. She did not recall Ms. Rabiei ever complaining about anything, although she was tired after work.

[46] As Ms. Bayramabadi recalled, Ms. Rabiei came to The Side a day or two after the accident. According to Ms. Bayramabadi, Ms. Rabiei began a pedicure, but was unable to complete it and Ms. Bayramabadi had to help her finish. Ms. Bayramabadi recalled that Ms. Rabiei took a "long time" off work, and when she returned, she just did hair. Ms. Bayramabadi explained that, after Ms. Rabiei came back to work, she herself was not working very much and her opportunities to see Ms. Rabiei were limited. As Ms. Bayramabadi recalled, she and Ms. Rabiei worked together at The Side in 2017, but only one day a week. She recalled seeing Ms. Rabiei looking like she was in pain. Ms. Bayramabadi recalled one occasion when Ms. Rabiei was having difficulties blow-drying a client's hair, and then did not take the next client.

[47] According to Ms. Bayramabadi, she and Ms. Rabiei would sometimes get together outside of work, and they did this after the accident, although not very often.

[48] Ms. Koubaei moved to B.C. in April 2016, and she met Ms. Rabiei in May 2016 through a mutual friend. As Ms. Koubaei recalled, when they met, Ms. Rabiei told her she had been in an accident. Ms. Koubaei estimated that she and Ms. Rabiei would see one another about three times a week, and in the last year and a half, more frequently. According to Ms. Koubaei, the two of them mostly "hang out"

at Ms. Rabiei's place, talking and watching movies. Ms. Rabiei is also Ms. Koubaei's hairstylist, and she sees Ms. Rabiei every two to three months to get her hair cut. According to Ms. Koubaei, when Ms. Rabiei cuts her hair, she has noticed that Ms. Rabiei is usually tired. Ms. Rabiei has complained to her about being tired and in pain, and that her arm and shoulder hurts. Occasionally, and especially after work, Ms. Koubaei has massaged Ms. Rabiei's shoulders and back.

[49] As Ms. Koubaei recalled, she heard Ms. Rabiei play her violin once, at the beginning of their friendship. As Ms. Koubaei recalled, Ms. Rabiei played only very briefly and then said that her arm hurt.

[50] According to Mr. Hekmatshoar, in comparison to the happy, very healthy person he knew before the accident, after the accident Ms. Rabiei would complain about pain in her neck, upper back and shoulder, and he could see that she was in pain. They have not performed any music together since the accident, nor have they gone bowling. They have gone out to a club only once or twice since the accident. According to Mr. Hekmatshoar, on occasion, he has provided some massage to Ms. Rabiei at her request. When he has done this, he could feel tenseness and tightness in her upper back and left side, and he explained that he has to be more careful on Ms. Rabiei's left side.

4. The experts

(a) The medical experts

[51] Opinion evidence from three medical doctors was tendered at trial. Ms. Rabiei tendered opinion evidence from Dr. Parhar and Dr. Nairn Stewart. The defendants tendered opinion evidence from Dr. Danny Goel.

(i) Dr. Parhar

[52] Dr. Parhar was tendered and qualified as a medical doctor qualified and capable of providing opinion evidence concerning the plaintiff in the fields of family medicine, occupational medicine and disability medicine. As I noted above,

beginning April 22, 2016, Dr. Parhar became Ms. Rabiei's treating physician in relation to the injuries she sustained in the accident. His expert report is dated August 23, 2018. As of that date, he had not seen Ms. Rabiei since April 2018.

[53] Dr. Parhar stated in his report that prior to the accident Ms. Rabiei had not had similar injuries, "however she explained that she had been complaining of pain in her left shoulder, but this had fully recovered" prior to the accident. He did not comment further on the possible cause of Ms. Rabiei's pre-accident complaints. Dr. Parhar also stated that prior to the accident, Ms. Rabiei "had not had any recent or ongoing problems with the types of conditions that she had as a result of the" accident. At no time, either in relation to his position as Ms. Rabiei's treating doctor or in relation to his opinion evidence, did Dr. Parhar have a copy of Dr. Jalali's medical records for Ms. Rabiei.

[54] In Dr. Parhar's opinion [underlining and **bold** in the original]:

> The diagnoses that would best describe the conditions that would have resulted from the motor vehicle collision of **March 22, 2016** include:
>
> **1. Musculoligamentous injuries of the cervical spine**
> This is a condition in which neck muscles and ligaments are stretched beyond their usual capacity and micro-tearing has occurred to these tissue fibres.
>
> **2. Musculoligamentous injuries of the thoracic spine**
>
> . . .
>
> **3. Musculoligamentous injuries of the lumbar spine**
>
> . . .
>
> **4. Muscle tension headaches**
>
> **5. Left shoulder muscle strain**
>
> **6. Right upper arm musculoligamentous injuries**
>
> **7. Left upper arm musculoligamentous injuries**
>
> **8. Sleep disturbance**
>
> . . .
>
> **9. Depressed mood**
>
> . . .
>
> **10. Anxiety**

[55] I note the absence of evidence from Ms. Rabiei at trial concerning the last three items diagnosed by Dr. Parhar.

[56] There is nothing in Dr. Parhar's report to support the diagnosis of right upper arm musculoligamentous injuries resulting from the accident, apart from Dr. Parhar's reference (para. 192 of his report) to what he described as an "Ultrasound of the right shoulder" performed on March 31, 2016 together with the interpretation by the radiologist. As Dr. Parhar acknowledged in his evidence at trial, his description of the ultrasound as being of the right shoulder was incorrect. It was in fact an ultrasound of the left shoulder. However, Dr. Parhar did not correct his diagnoses accordingly.

[57] I conclude that the reference to the right shoulder in para. 192 of Dr. Parhar's report was not simply a typographical error (as he stated in his evidence at trial). Rather, I conclude that, when he prepared his report, Dr. Parhar misread the ultrasound and interpretation, and then used that misreading to reach a diagnosis (in fact, a misdiagnosis) of an injury to Ms. Rabiei's right arm.

[58] Dr. Parhar noted that, as of Ms. Rabiei's visit on April 19, 2018, she continued to have problems with neck pain, mid-back pain and left shoulder pain. However, Ms. Rabiei's evidence at trial was that her lingering problems at that time were neck pain, upper back pain and shoulder pain.

[59] With respect to current diagnoses and prognosis, Dr. Parhar said:

> Unfortunately, given that over two years had elapsed since the [accident] when I had last assessed her on April 19, 2018, and the fact that multiple modalities of treatment have been attempted unsuccessfully, this leads me to conclude that [Ms. Rabiei] belongs to the smaller group of patients who have long-term sequelae from their musculoligamentous injuries. Thus, at this juncture, I would be of the opinion that [Ms. Rabiei's] following musculoligamentous injuries have reached plateau (maximum medical improvement), they will continue for the foreseeable future and they are, more likely than not, permanent:
>
> - Musculoligamentous injuries of the cervical spine
> - Musculoligamentous injuries of the thoracic spine
> - Left shoulder muscle strain

- Left shoulder post-traumatic tendinopathy (tendonitis)

[60] This is the only place in the report where Dr. Parhar gives a diagnosis of left shoulder post-traumatic tendinopathy (tendonitis) or mentions that term. He does not explain how he arrived as it as a diagnosis, or (apart from the descriptive "post-traumatic") how the condition resulted from the injuries sustained in the accident.

[61] With respect to future risk, in Dr. Parhar's opinion, Ms. Rabiei has been left more vulnerable to injury in the areas that remained symptomatic, and, in his opinion, the outcome of any future trauma would be worse for her in terms of duration and severity of disability because of the injuries she sustained in the accident. In addition, in Dr. Parhar's opinion, Ms. Rabiei is at increased risk for having intermittent exacerbations of neck pain, mid-back pain and shoulder pain.

[62] Dr. Parhar was apparently asked to express opinions about the impact of the injuries Ms. Rabiei sustained in the accident on her personal life, family life and social life, and did so. However, in my view, these are not areas on which I require the assistance of a medical doctor, or the expertise of someone such as Dr. Parhar, to draw my own conclusions based on the evidence presented at trial. Trial judges and juries do this routinely in personal injury actions when they are assessing non-pecuniary damages, for example. Dr. Parhar's opinions in these areas do not meet the necessity criterion for admission as expert opinion evidence, and I give these opinions no weight.

[63] I note, however, that, in his discussion of the impact of the injuries on Ms. Rabiei's family life, Dr. Parhar indicated that Ms. Rabiei told him that her injuries had caused problems with her family life, as she found it difficult to complete household chores, including "doing yard work." There is a similar note in Dr. Parhar's clinical records for April 22, 2016. Based on the evidence at trial, since the accident (and indeed before), Ms. Rabiei has lived in an apartment in Burnaby. There was no indication from either Ms. Rabiei or any other witness that there was any kind of "yard work" associated with that accommodation, and I doubt that Ms. Rabiei told Dr. Parhar she was having difficulty doing yard work.

[64] With respect to future treatment, it was Dr. Parhar's opinion that Ms. Rabiei should engage in a personal fitness program, with the goals of maintaining strength, range of motion and flexibility in her cervical spine, her thoracic spine and her left shoulder. He recommended exercises in a gym two to three times a week, yoga classes two to three times a week, and water aerobics or aquafit classes two times a week. In the case of more severe exacerbations of pain, he recommended acetaminophen or naproxen (or both), and possibly physiotherapy. Dr. Parhar also recommended a consultation with an occupational therapist.

[65] On cross-examination, Dr. Parhar was asked about the remarkable consistency in his assessment of Ms. Rabiei's cervical range of motion every time he saw her. Throughout, it was limited. When it was pointed out to him that his results are identical from Ms. Rabiei's first visit in April 2016 to her last at the end of December 2018, he expressed surprise. However, he disagreed that his results were incorrect, particularly in comparison to the improved results reported by Dr. Stewart and by Mr. Pakulak (who used measuring tools). Dr. Parhar explained that range of motion fluctuates during the course of the day, and he did not know the circumstances under which Dr. Stewart and Mr. Pakulak did their assessments. He said that fluctuation in range of motion results is common and that his results, which were exactly the same every time, were unusual.

(ii) Dr. Stewart

[66] Dr. Stewart was tendered and qualified as a medical doctor with a specialty in physical medicine and rehabilitation, qualified to give opinion evidence in those areas respecting Ms. Rabiei.

[67] At the request of Ms. Rabiei's counsel, Dr. Stewart carried out an independent medical examination of Ms. Rabiei on April 26, 2018. Her report is dated September 27, 2018. By that time, she had reviewed Dr. Parhar's report.

[68] Dr. Stewart commented that, when she examined Ms. Rabiei, she noted increased muscle tension in the medial trapezius (shoulder) muscles on both sides

at the base of Ms. Rabiei's neck, and tenderness over the paraspinal muscles in the left side of Ms. Rabiei's neck, the left trapezius muscle and the paraspinal muscle in Ms. Rabiei's upper back (more marked on the left). In contrast to Dr. Parhar's examination findings 10 days before, Dr. Stewart found full range of motion in Ms. Rabiei's neck and full rotation to both sides in her mid-back. Dr. Stewart found some limitation of range of motion in Ms. Rabiei's low back. There was full range of motion in both shoulders. Dr. Stewart's findings concerning range of motion were consistent with those of Mr. Pakulak at Ms. Rabiei's functional capacity evaluation (referred to below). Dr. Stewart said that she was unable to reconcile her findings with those of Dr. Parhar.

[69] In Dr. Stewart's opinion, given Ms. Rabiei's history (including Dr. Jalali's examination findings on March 23, 2016) and the reported mechanism of the collision, Ms. Rabiei sustained soft tissue injuries to her neck, upper, mid and low back in the accident. In Dr. Stewart's opinion, Ms. Rabiei had appropriate rehabilitation for her injuries. Dr. Stewart stated that:

> [Ms. Rabiei] has noticed an improvement in her symptoms over time with resolution of her headaches and low back pain and an improvement in her sleep. However, she continues to report left neck and shoulder pain and upper back pain resulting from her injuries in the collision. Ms. Rabiei's neck and shoulder pain and upper back pain have been aggravated by the physical demands of her job as a hairdresser.

[70] In terms of prognosis, in Dr. Stewart's opinion, given the length of time since the accident and the duration of her symptoms, "it is likely that Ms. Rabiei will continue to experience left neck and shoulder pain and upper back pain much as at present in the future." Dr. Stewart observed further that "[i]t is likely that she would have considerably less pain if she was not doing a job which aggravates her symptoms." In Dr. Stewart's opinion:

> Ms. Rabiei missed an appropriate period of work time after the collision given her injuries. She will be unable to do physically demanding work in the future because of her injuries in the motor vehicle collision. In sedentary work she will require the flexibility to change her work tasks and position periodically throughout her workday and she will also require good ergonomics in her work station.

[71] Like the opinions Dr. Parhar was asked to express about the impact of the injuries on Ms. Rabiei's personal and social life, I give no weight to similar opinions expressed by Dr. Stewart, for the same reasons.

[72] With respect to Ms. Rabiei's pre-accident and post-accident shoulder pain, Dr. Stewart said:

> Ms. Rabiei did have some left anterior shoulder pain, probably biceps tendonitis, prior to the motor vehicle collision, although she reported that it had resolved prior to the collision. Her physiotherapy records suggest that at least some of her shoulder pain after the collision was arising from the biceps tendon although most of the pain involved the trapezius muscle. In the case of soft tissue injury to the neck[,] the neck pain commonly radiates into the trapezius muscles. It is my opinion that Ms. Rabiei's previous shoulder pain was largely incidental, contributing to the shoulder pain secondary to her neck injury in the accident only to a minor degree early on after the collision. At the time of my assessment her shoulder pain and my positive examination findings were confined to the trapezius muscle.

[73] Dr. Stewart was asked on cross-examination about Ms. Rabiei's left shoulder issues. Dr. Stewart explained that Ms. Rabiei's pre-accident symptoms were more in keeping with biceps tendinopathy, and she did not believe that Ms. Rabiei had problems in the trapezius muscle prior to the accident. Dr. Stewart explained that, based on Ms. Rabiei's description, it was more biceps pain, aggravated by playing the violin and using a blow dryer, which settled after rest, and Ms. Rabiei then resumed her regular activities. After the accident, the pain was different in location and in character, more constant, and in keeping with both the mechanism of injury and soft tissue injuries. Dr. Stewart explained that biceps tendonitis is usually from repetitive bending the elbow, so that a combination of playing the violin and using a blow dryer could have contributed to biceps tendonitis. Dr. Stewart explained that an individual can have biceps tendonitis and a soft tissue injury at the same time. Moreover, in her experience, biceps tendonitis can arise after a soft tissue injury to the neck because the individual alters his or her body mechanics in order to continue doing regular tasks. In Dr. Stewart's opinion, that is likely what occurred in Ms. Rabiei's case. Dr. Stewart also noted that Ms. Rabiei's post-accident shoulder pain involved the trapezius muscle (something that was confirmed by Dr. Stewart's

examination findings). Dr. Stewart explained that the problem with shoulder pain is that people report shoulder pain, but the shoulder involves a number of structures and a number of different parts could be involved.

[74] Also on cross-examination, Dr. Stewart confirmed that, in her opinion, most of Ms. Rabiei's limitations and problems are the result of the soft tissue injuries to her neck, upper back and trapezius area.

[75] Dr. Stewart was asked on cross-examination if she would defer to a diagnosis of scapulothoracic bursitis made by an orthopaedic surgeon with a shoulder specialty. She said not necessarily, and that she would need to know the basis for the diagnosis. She said further that she would not defer to the opinion of an orthopaedic surgeon on matters other than surgery.

[76] Dr. Stewart made several recommendations with respect to future care, including that Ms. Rabiei work with a kinesiologist to establish and monitor a regular exercise program, and then do daily stretching exercises and follow an active exercise program on her own two to three times a week. Dr. Stewart explained that, typically, rehabilitation for soft tissue injuries is usually physiotherapy, initially passive therapy and then active. This is usually followed by an active exercise or rehabilitation program, tailored to the individual, often done with a kinesiologist. She explained that symptoms can be aggravated by moving to active rehabilitation too early, and that the physiotherapist will usually make the recommendation when the individual is ready for it. However, Dr. Stewart explained that she would not defer to the physiotherapist's opinion, and would make her own assessment about a patient's readiness for active rehabilitation. The results can vary, depending on the injury and symptoms. Dr. Stewart explained that the aim of the rehabilitation is to have the individual become more functional, stronger and more able, although it does not always help. The rehabilitation is not curative. However, a person can become more functional with exercise. Dr. Stewart explained that she recommended that Ms. Rabiei work with a kinesiologist because she thought it would minimize flare-ups, and Ms. Rabiei needed to get back to regular exercise.

[77] Dr. Stewart was asked about the value of Ms. Rabiei working with someone who was neither a kinesiologist nor a therapist nor a personal trainer. Dr. Stewart explained that she would have to assess what Ms. Rabiei was actually doing, because, although it would have been preferable for Ms. Rabiei to work with someone who had training, part of the point is for Ms. Rabiei to engage in exercise. Working with a university kinesiology student for three months would probably be appropriate.

[78] Dr. Stewart also recommended that Ms. Rabiei have regular help with housekeeping, in the order of three hours every two weeks, and she opined that Ms. Rabiei would likely continue to need over-the-counter pain medication.

(iii) Dr. Goel

[79] Dr. Goel is an orthopaedic surgeon with sub-specialty training in all aspects of shoulder orthopaedics. He was tendered and qualified as an expert in orthopaedic medicine with a sub-speciality in orthopaedic medicine in relation to the shoulder, qualified to give opinion evidence with respect to the diagnosis, prognosis, causation, management and treatment of musculoskeletal injuries of the shoulder.

[80] Dr. Goel carried out an independent medical examination of Ms. Rabiei on August 7, 2018. In his report, he noted that, given the area of his speciality, the report would focus on Ms. Rabiei's shoulder, and he acknowledged in his oral evidence that he was providing his perspective as an orthopaedic surgeon. In preparation for the assessment, he reviewed Dr. Parhar's clinical records and Dr. Jalali's clinical records for the period February 2 to March 23, 2016, in addition to other documents provided to him. He was not provided with copies of the reports of any of the plaintiff's experts.

[81] Dr. Goel noted Ms. Rabiei's report of left shoulder pain two months prior to the accident, and that she reported "anterior shoulder pain, as well as neck pain, since that accident."

[82] Dr. Goel made the following diagnosis:

1. Left supermedial scapulothoracic bursitis.
2. Left anterior shoulder pain currently undiagnosed.

[83] One of the questions posed to Dr. Goel for purposes of his report was: what injuries did the plaintiff suffer as a result of the accident? Dr. Goel responded:

> Based on the history, physical examination, as well as the following facts and assumptions:
>
> a. Presentation to family physician prior to and following the MVA.
>
> b. Physician examination suggesting bilateral upper extremity movement and good grip.
>
> It is my impression that Ms. Rabiei's primary injury is related to her cervical spine, paratrapezial muscle and potentially a superior medial scapulothoracic bursitis. However, more likely than not, with the above information, I am unable to conclude the burden of these injuries is directly related to the motor vehicle accident.

[84] Dr. Goel stated that his examination of Ms. Rabiei's left shoulder revealed:

> A. Left shoulder – no visible atrophy or asymmetry or scapular dyskinesia. She has crepitus to the superomedial border which is painful to palpation. The AC [shoulder joint] is nontender, as is the anterior shoulder. Her range of motion is full both actively and passively . . .. Strength testing 5/5 and flexible with external rotation. . . .

[85] In Dr. Goel's opinion, it was premature to comment on a prognosis. Moreover, although in his opinion, Ms. Rabiei had had appropriate treatment recommendations, in his view, further treatment recommendations were indicated, and he recommended further treatment before drawing a conclusion concerning total or partial disability. Dr. Goel specifically recommended a diagnostic and therapeutic superomedial scapulothoracic injection. In his opinion, a series of diagnostic and therapeutic injections would be of value to help address Ms. Rabiei's scapulothoracic region. Further, in Dr. Goel's opinion, it was premature to determine any future sequelae or disability from work, or the length of any disability, based on the need for the injections he recommended.

[86] On cross-examination, a lengthy hypothetical (based in part on Dr. Jalali's clinical records from February 2 and March 23, 2016, and Dr. Parhar's clinical

records from April 22, 2016) was put to Dr. Goel. The gist of the proposition put to Dr. Goel was that the accident contributed to and worsened pre-existing symptoms in the front of Ms. Rabiei's left shoulder. Dr. Goel did not agree. First, he expressed doubt that shoulder pain that had existed for two months would go away in seven to 10 days, based on his expertise and the shoulder patients he sees. In his view, Dr. Jalali's examination findings on March 23 indicated that Ms. Rabiei was able to move her shoulders bilaterally. According to Dr. Goel, he would have expected that findings that were reported by Dr. Parhar in April ("pain L shoulder condition worsened with MVC") would have been present in March, which they were not.

(b) The non-medical experts

[87] Ms. Rabiei also tendered opinion evidence from: Mr. Pakulak (an occupational therapist and functional capacity evaluator); Derek Nordin (a vocational consultant); and Darren Benning (an economist).

[88] Mr. Pakulak was tendered and qualified as an occupational therapist with expertise in functional capacity evaluations and cost of future care assessments, qualified to give opinion evidence concerning functional capacity evaluation and costs of future care as they relate to the issues in this case. Mr. Pakulak was clear that he expressed no opinion on causation, and he was not qualified to do so.

[89] Mr. Pakulak's report, including his discussion of cost of future care matters, is dated October 16, 2018.

[90] In the course of his assessment, Mr. Pakulak tested Ms. Rabiei's range of motion (including in her cervical spine, shoulder and trunk), using measuring tools. His findings were generally either normal or above average. They were consistent with Dr. Stewart's findings.

[91] Mr. Pakulak noted that, in general, Ms. Rabiei's reports of her perceived capacity were consistent with his physical findings, although she overestimated her capacity for bending.

[92] In Mr. Pakulak's opinion, Ms. Rabiei was best suited for activity requiring up to light level strength. He noted that:

> She demonstrated functional limitations specific to prolonged and repetitive overhead work, prolonged neck flexion, repetitive horizontal reaching and unsupported elevation of the arms (i.e. reaching to shoulder level). Given her response to testing (significant increases in pain levels during the testing and a reduction in work pace and capacity over the course of the assessment) it is anticipated that prolonged activity above a light level and/or without provisions for the above limitations will adversely impact her productivity and safety.

[93] Mr. Pakulak continued:

> In my opinion, Ms. Rabiei demonstrated the physical capacity to be employable at up to a light strength level on a full time basis with restrictions and limitations as noted above. Overhead work, prolonged and repetitive positioning of the neck and shoulders for work in front of the body, and unsupported elevation of the arms should be kept to an occasional basis. . . .
>
> It is also my opinion that her overall ability to compete for work in an open job market is significantly reduced due to her ongoing physical limitations. . . .
>
> With respect to her current work as a Hairstylist, . . . the work would be best described as requiring light level strength, prolonged standing, other body positions, upper limb coordination, verbal interaction, colour discrimination and near and far vision. Based on the testing results, it is my opinion that she did demonstrate the capacity to complete the work on a part time basis at a sustainable level. Given her ongoing limitations related to prolonged and repetitive positioning of the neck and shoulders for work in front of the body and elevation of the arms[,] she did not demonstrate the capacity to complete the work on a full time basis at a competitive level.

[94] In Mr. Pakulak's opinion, Ms. Rabiei's demonstrated restricted capacity for the physical demand of reaching out on a constant basis.

[95] Mr. Pakulak also considered Ms. Rabiei's previous work as a nail technician. In his opinion, based on the testing results and the physical demands associated with that work, Ms. Rabiei demonstrated the capacity to complete the work on a part time basis at a sustainable level. In his opinion, based on Ms. Rabiei's limitations related to prolonged and repetitive position of the neck and shoulders for work in front of the body, she did not demonstrate the capacity to complete the work on a full-time basis at a sustainable level, and would be best suited for part-time work.

[96] With respect to Ms. Rabiei's functional capacity in relation to non-work activities, in Mr. Pakulak's opinion, Ms. Rabiei demonstrated the capacity to complete lighter household cleaning chores, but limited capacity for the more physically demanding cleaning chores. He identified vacuuming, washing floors, heavier cleaning in bathrooms and kitchens as examples of chores he would anticipate would be most difficult for Ms. Rabiei. He did not mention doing laundry in this list, and in his oral evidence testified that he expected Ms. Rabiei would be able to do her own laundry, although he could not say whether or not Ms. Rabiei would be pain-free.

[97] I will discuss Mr. Pakulak's future care recommendations in the context of Ms. Rabiei's claim for costs of future care.

[98] Mr. Nordin was tendered and qualified as an expert in vocational rehabilitation, qualified to give opinion evidence in that area concerning Ms. Rabiei. He interviewed Ms. Rabiei on August 13, 2018, and had her complete a vocational test battery at that time. Mr. Nordin's opinions are based on the interview and test results, certain employment and earnings information for Ms. Rabiei, and his review of the reports of Dr. Parhar, Dr. Stewart and Mr. Pakulak.

[99] Mr. Nordin reported that Ms. Rabiei demonstrated weak academic skills as measured by the "Wide Range Achievement Test – 4 (Green Form)" (the "WRAT"). The WRAT is administered in English, and Ms. Rabiei's sentence comprehension and reading composite scores in particular were extremely low (ranked in the first percentile). In Mr. Nordin's view, and taking Ms. Rabiei's WRAT scores at face value, Ms. Rabiei would not be able to cope with academically-oriented training programs. Ms. Rabiei also completed the "Test of Non-Verbal Intelligence (TONI-4)." Mr. Nordin explained that this is an unlimited, language-free test of problem solving ability. Ms. Rabiei's score placed her in the 55th percentile, or in the average range. Mr. Nordin observed that Ms. Rabiei's results on the TONI-4 suggested that her intellectual performance was better when language is factored out of the equation, and he noted that her only average score on the WRAT was for

math computation. This was consistent with the fact that most of Ms. Rabiei's schooling had neither been in Canada nor in English. In Mr. Nordin's opinion, based on the test results, any schooling Ms. Rabiei undertakes should be short-term (less than one year) and practically (as opposed to academically) oriented, as was her course as VCC.

[100] Based on the results of the "Career Assessment Inventory – Vocational Version," Mr. Nordin noted that Ms. Rabiei's interests were similar to those of individuals who work as photographers, cosmetologists, and barbers and hairstylists. Mr. Nordin assumed that, but for the accident, Ms. Rabiei would have continued working as hair stylist and nail technician.

[101] Mr. Nordin noted that, as a general benchmark, the 2011 National Household Survey Estimates of Employment and Employment Incomes indicated that women in B.C. who worked mostly full-time, full-year as hairstylists in 2010 earned, on average $27,510 (in 2018 dollars).

[102] Mr. Nordin expressed the view that, based on the test scores, the program at VCC "may well" represent the maximum of what Ms. Rabiei would be able to cope with in terms of post-secondary studies. He went on to say:

> Absent work as a hairdresser, Ms. Rabiei is qualified only for entry-level occupations . . .. Many of these occupations are likely to provoke her symptoms as much (or more) than hairdressing, with a lower per-hour wage, and/or lack of access to tips and commissions. For that reason, Ms. Rabiei's best option, at present, would appear to be finding hairdressing employment that accommodates her symptoms and gives her the flexibility to adjust her hours to her current abilities.

[103] In his oral evidence, Mr. Nordin acknowledged that his conclusion concerning Ms. Rabiei's ability to pursue post-secondary studies was based primarily on her poor English-language skills. However, those skills were likely going to improve over time, and her current limitations were not necessarily a true reflection of Ms. Rabiei's capacity for more academically-oriented programs.

[104] Mr. Benning was tendered and qualified as an economist, qualified to give opinion evidence concerning future income loss multipliers and calculations of the present value of costs of future care. Mr. Benning prepared two reports, both dated October 19, 2018, on these topics. His reports were admitted into evidence without the need for examination or cross-examination at trial. I will return to Mr. Benning's evidence in the discussion below of loss of future earning capacity and cost of future care.

5. Credibility and reliability

[105] Ms. Rabiei's credibility and reliability are, of course, very important issues in this case, as there is little in the way of objective evidence concerning Ms. Rabiei's injuries and their effects. The opinions of the medical doctors are based, in large part, on Ms. Rabiei's self-reports of pain and limitations. The weight that can be given to those opinions therefore depends on the court's assessment of Ms. Rabiei's credibility and on the consistency of her evidence at trial with the information she provided to the doctors: see ***Edmondson v. Payer***, 2011 BCSC 118, at para. 21, aff'd 2012 BCCA 114.

[106] Where, as here, a plaintiff's case relies on subjective symptoms with little or no objective evidence of continuing injury, the court must be exceedingly careful in examining the evidence and assessing credibility: ***Price v. Kostryba*** (1982), 70 B.C.L.R. 397 (S.C.).

[107] The defendants mount a concerted attack on Ms. Rabiei's credibility and reliability.

[108] The defendants' attack begins with the order in which witnesses were called in Ms. Rabiei's case. Eight witnesses (including Dr. Parhar) were called to testify before Ms. Rabiei. The defendants cite ***Gustafson v. Davis***, 2012 BCSC 1576, at paras. 114-116, for the proposition that, unless there is a good reason to do otherwise, generally speaking, the plaintiff should be the first witness called. The defendants say that here, there was no explanation offered for why Ms. Rabiei

testified after eight other witnesses, and, while she was not in the courtroom when those witnesses testified, she still had ample opportunity to tailor her evidence to fit with the evidence of those witnesses.

[109] I completely endorse, as a matter of best and the most preferable practice with respect to the order in which witnesses are called, what Humphries J. describes in ***Gustafson***. It was not followed here. However, apart from speculation, there is nothing to support the conclusion that Ms. Rabiei in fact tailored her evidence at trial in any degree to conform with evidence given by other witnesses earlier in the trial. The proposition that she had done so was never suggested to her during cross-examination, much less put to her directly. I would not draw any inferences concerning the credibility or reliability of Ms. Rabiei's evidence based on the order in which the witnesses were called.

[110] The defendants say that Ms. Rabiei's evidence concerning her income, and her employment and career goals, is unreliable. They say that witnesses from Ms. Rabiei's time at VCC, or when she was working at Fresh, or who have worked with her at Beauté would have provided a better insight into her functioning post-accident than the witnesses called at trial. The defendants criticize Ms. Rabiei for not calling Dr. Jalali as a witness, given his involvement in her pre-accident shoulder issues. They say that, in the circumstances, it is appropriate for the court to draw adverse inferences respecting Ms. Rabiei's claims.

[111] I do not agree with the defendants' position that an adverse inference should be drawn because individuals (Dr. Jalali, for example) were not called as witnesses by the plaintiff. A party is not obliged to call every witness who has knowledge about the matters in a case. Dr. Jalali was equally available to both the plaintiff and the defendants. The same could be said of persons at VCC or who worked with Ms. Rabiei at Fresh and Beauté. Dr. Jalali's clinical records were available at trial, and admissible pursuant to the terms of the parties' document agreement (Ex. 14). I would not draw any adverse inference based on the witnesses called at trial.

[112] I will address the absence of documentary evidence of Ms. Rabiei's earnings at Fresh in my discussion of "Loss of earning capacity," below. I have already noted above that it would be reasonable to expect such information to be available.

[113] The defendants also say that there are inconsistencies between what Ms. Rabiei reported to the experts concerning her injuries and their effects, and her evidence at trial. Indeed, the defendants say that Ms. Rabiei's evidence is "rife with inconsistencies" and demonstrates an inability on her part to remember important details about her medical history. They point to what they say is a very significant inconsistency between her evidence on discovery concerning her left shoulder pain ("constant severe pain," that never lets up), and her evidence at trial, which was much more measured. The defendants say that what Ms. Rabiei reported at her examination for discovery and to Dr. Goel concerning her pain and disability was far more severe than what she reported to her experts and said at trial. They say her evidence concerning her pre-accident shoulder issues, especially about what she told Dr. Jalali, was suspiciously vague. The defendants say that Ms. Rabiei's evidence concerning improvement in her injuries and functioning has been inconsistent, and her reporting of her treatment is unreliable. The defendants argue that the timing of Ms. Rabiei's visit to Dr. Parhar in December 2018 is suspicious, as is the letter that Dr. Parhar produced following that visit.

[114] Whether Ms. Rabiei accurately reported her symptoms to the medical doctors who examined her affects the weight that can be given to their opinions, which are premised on her reports being accurate. As N. Smith J. observed in ***Edmondson***, at para. 77, "the doctor's job is to take the patient's complaints at face value and offer an opinion based on them. It is for the court to assess credibility."

[115] I would not describe Ms. Rabiei as a particularly good historian, especially with respect to details. For example, her evidence concerning the number of physiotherapy treatments she had was not always consistent. However, this was a detail that, when it was important to be exact, could easily be confirmed through the physiotherapy records. When these were put to Ms. Rabiei, she accepted them as

correct. I would not draw adverse conclusions concerning Ms. Rabiei's credibility or reliability generally, based on her weakness in recalling such details.

[116] During cross-examination, counsel put a number of statements attributed to Ms. Rabiei in the clinical records and expert reports to Ms. Rabiei. Often, she could not recall the details of what she said, although, generally, she did not dispute the report of her statements. For example, with respect to the assessment done by Dr. Stewart, she was unable to recall at trial whether Dr. Stewart recommended seeing a kinesiologist, could not recall what she told Dr. Stewart about school and did not recall telling Dr. Stewart she could only watch movies. However, in my view, Ms. Rabiei's willingness to acknowledge that she was unable to recall details of exactly what was said during these discussions tended to enhance, rather than damage, her credibility.

[117] Ms. Rabiei's evidence on discovery concerning her shoulder pain and its severity was not consistent with her evidence at trial. It was also not consistent with what Ms. Rabiei reported to Dr. Stewart at her assessment about a month later, or what she reported to Mr. Pakulak at the functional capacity evaluation in July 2018. Her discovery evidence and some of what Dr. Stewart stated she reported to her (that the only thing she was able to do was watch movies, for example) show a tendency at times to exaggerate. However, this tendency needs to be placed in context. From my perspective, it was an occasional trait of Ms. Rabiei's evidence, not a chronic or pervasive one, and needs to be assessed taking into account the other occasions (some of which are also illustrated in Dr. Stewart's report and also in Ms. Rabiei's evidence at trial) where Ms. Rabiei accepts and acknowledges improvement in her symptoms and abilities since the accident. She appeared to be less gloomy about her prognosis than Dr. Parhar. She demonstrated an awareness of the need to engage in physical activity, but gave an explanation (essentially, that she was so tired after work, she could not face it) that has the ring of truth to it. In other words, her evidence was in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances: see ***Bradshaw v. Stenner***,

2010 BCSC 1398, at para. 186. At trial, Ms. Rabiei did not assert that she had constant severe pain in her left shoulder that never lets up. I accept Ms. Rabiei's evidence at trial as the more accurate, particularly given its support in the evidence of other witnesses such as Dr. Stewart and Mr. Pakulak.

[118] While Ms. Rabiei was weak with respect to details, I would describe Ms. Rabiei's memory and her ability at trial to recall generally how the accident affected her, both in the short term following the accident and in the years since, as good and consistent with the evidence of the other witnesses called. Ms. Rabiei listened carefully to questions, and was responsive as opposed to argumentative on cross examination.

[119] The defendants do not dispute that Ms. Rabiei sustained soft tissue injuries in the accident. Dr. Stewart (in particular) and Dr. Parhar both explain, from a medical perspective, why those injuries can result, and in Ms. Rabiei's case have resulted, in the neck, upper back and shoulder symptoms that Ms. Rabiei describes. The medical explanation, diagnoses and prognosis are consistent with Mr. Pakulak's findings on the functional capacity evaluation. They support Ms. Rabiei's evidence, which is also supported by the evidence of the other witnesses.

[120] I have concerns about the reliability of Dr. Parhar's evidence, and I have concluded I must be cautious in accepting his diagnoses and opinions, and placing weight on them, where they go beyond those stated by Dr. Stewart. Some examples will illustrate my reasons for caution.

[121] Dr. Parhar testified that accuracy is very important in his practice, which I accept as a general proposition. Despite that, there were a number of mistakes in his expert report and other documents he prepared. As the mistakes mounted, my confidence in Dr. Parhar's reliability diminished. I noted above what I considered to be a misdiagnosis of a right upper arm injury, for which there was no support. His "To Whom it May Concern" letters consistently stated the wrong date of the accident. His identical range of motion findings on multiple visits (which were different and worse than those of Dr. Stewart and Mr. Pakulak) were unusual, and seemed

implausible and not reliable. They gave the impression that Dr. Parhar's examinations and conclusions were somewhat perfunctory and generic. Dr. Parhar reported that Ms. Rabiei had difficulty doing yard work, something that was implausible given that she lived in an apartment, and reinforced the impression that at least some of the contents of his report were generic, rather than specific to and based on Ms. Rabiei's circumstances.

[122] Dr. Parhar's report states (at para. 153) that "On the visit of October 20, 2016, a CL-19 was completed." This turned out to be inaccurate. The CL-19 was not completed until February, although it was based on Ms. Rabiei's visit to Dr. Parhar on October 20, 2016. In Dr. Parhar's expert report, the October 20, 2016 visit is described twice, the second time in relation to the CL-19. I would not expect the descriptions to be different (or a second description necessary), however in places they are. The CL-19 misstated the number of physiotherapy treatments (20) Ms. Rabiei had had. It implied that Dr. Parhar was continuing to prescribe naproxen, which he was not.

[123] As I noted above, my impression was that, occasionally, Dr. Parhar was more negative in his assessment of Ms. Rabiei's circumstances and abilities than she herself was. This is illustrated, for example, by his CL-19 Report, where he described her as "unable to work." In fact, as of February 2017, Ms. Rabiei had returned to school full-time, and she went back to work part-time in April.

[124] Dr. Parhar's provision of the "To Whom it May Concern" letter dated December 28, 2018 shows Dr. Parhar acting as an advocate for his patient in a manner compatible with his role as Ms. Rabiei's family doctor, but inconsistent with his role as an impartial expert. In my view, in circumstances where Ms. Rabiei had been working as an independent contractor for a couple of months, there was no need for this letter to be created except to try to bolster Ms. Rabiei's case.

[125] The result is that I accept Dr. Parhar's opinion evidence where it is consistent with the opinion evidence of Dr. Stewart. Otherwise, I do not place a great deal of weight on Dr. Parhar's opinions.

[126] In terms of the medical opinion evidence, I place the most weight on Dr. Stewart's evidence. In my view, Dr. Stewart was able to explain how Ms. Rabiei's symptoms make sense medically and are consistent with the soft tissue injuries she sustained in the accident. Dr. Stewart was also able to explain, in a credible way and based (at least in part) on her examination findings, the issues Ms. Rabiei describes with her left shoulder. Because of its importance in this case, I will repeat what Dr. Stewart said in her report:

> In the case of soft tissue injury to the neck[,] the neck pain commonly radiates into the trapezius muscle. . . . At the time of my assessment her shoulder pain and my positive examination findings were confined to the trapezius muscle.

[127] There could be little question about Dr. Goel's expertise in orthopaedics related to the shoulder. He was a careful witness, balanced and a good listener. Dr. Goel did not make a definitive diagnosis, within the limits of the area in which he was qualified to express an opinion. These limits are important. He was not qualified more generally to express opinions concerning the effects of soft tissue injuries. Rather, his area of expertise is orthopaedic injuries, and specifically those involving the shoulder. Dr. Goel said that, with the information available to him, he was "unable to conclude that the burden" of Ms. Rabiei's injuries was "directly related" to the accident. However, I note Dr. Goel's comment that Ms. Rabiei's "primary injury is related to her cervical spine [and] paratrapezial muscle." (I omit the balance of that sentence because Dr. Goel prefaces it with "potentially.") I interpret that as consistent with the examination findings of Dr. Stewart (and also Dr. Parhar), who does reach a conclusion, which I accept, concerning diagnoses.

[128] In closing submissions, Mr. Cassidy attacked Mr. Nordin's opinion evidence and argued that it should be given little weight. I disagree. Mr. Nordin's report of the results of his testing of Ms. Rabiei helped explain the existing limits – apart from her injuries – that Ms. Rabiei faced and faces in terms of employability. Even without the accident, Ms. Rabiei did not have a vast array of occupational options open to her. Rather, once she arrived in B.C., she was developing skills in an area that was of interest to her (as confirmed by the testing) and would provide her with

employment, but which was also physical. Mr. Nordin's recommendation against Ms. Rabiei pursuing entry level, minimum wage jobs, and his opinion that she should pursue (with accommodations) employment as a hairdresser as the best option to maximize her residual income-earning ability are reasonable on the facts presented.

6. Causation

[129] One of the main causation issues in this case concerns pain in the front of Ms. Rabiei's shoulder, what the defendants describe as Ms. Rabiei's "anterior shoulder pain."

[130] The defendants say that Ms. Rabiei had a pre-existing and divisible injury – the condition for which Ms. Rabiei saw Dr. Jalali on February 2, 2016 – and that they are not liable for the effects of that injury. The defendants say that Ms. Rabiei complained about this "anterior shoulder pain" when Dr. Goel assessed her in August 2018, indicating that the problem was ongoing. They say that going into hairdressing full-time (first as a student at VCC, and then at Fresh and Beauté) has led to this condition being regularly and routinely aggravated, causing Ms. Rabiei pain and disability, and interfering with her ability to work and play the violin. However, the defendants say they are not responsible for those consequences.

[131] On behalf of Ms. Rabiei, Mr. Bisbicis says that, based on Ms. Rabiei's evidence and the medical opinion evidence (especially that of Dr. Stewart), Ms. Rabiei's shoulder symptoms should be found to be a result of the accident. He argues, citing ***Bradley v. Groves***, 2010 BCCA 361, that this is a case of indivisible injuries.

[132] The basic legal principles concerning causation are not in dispute.

[133] The basic principle of tort law is that the defendant must put the plaintiff back in the position the plaintiff would have been in had the defendant's tortious act not occurred. The test for causation is the "but for" test. To assess whether a defendant caused an injury, the trial judge asks if, without the defendant's tortious act, the injury would have resulted. If the answer is "yes," the defendant is not liable for the

injury or the losses flowing from it. If the answer is "no," the defendant is liable to the plaintiff for the whole of the losses flowing from the injury. The losses "flowing" from an injury are those losses that the plaintiff proves, on a balance of probabilities, would not have occurred "but for" the defendant's negligent act. The defendant "takes the victim" as the defendant finds her, and is therefore liable even though a plaintiff's losses are more dramatic than they would be for the average person. On the other hand, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced in any event. If there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. The general rule is that the plaintiff must be returned to the position she would have been in, with all of its attendant risks and shortcomings, but for the defendant's negligence, and not a better position. See: ***Athey v. Leonati***, [1996] 3 S.C.R. 458 at paras. 17, 19-20, 24 and 34-35

[134] Ms. Rabiei's evidence at trial was not that she was suffering "anterior shoulder pain" in her left shoulder. In my view, "anterior" is not a term that Ms. Rabiei would use to describe her shoulder pain. Such vocabulary is not consistent with her background or situation. Indeed, I doubt very much that an ordinary individual whose first language was English (much less someone in Ms. Rabiei's position) would describe pain that she felt in the front of her shoulder as "anterior shoulder pain." Rather, Ms. Rabiei described her shoulder pain following the accident as being in the "whole" of her shoulder, around into the upper back, in a different location from the pain pre-accident. The description of the pain being in the whole of her shoulder was and is consistent with Dr. Stewart's examination findings, which involved the trapezius muscle.

[135] I do not question Dr. Goel's competency (given his very high level of expertise as an orthopaedic surgeon specializing in the shoulder) to obtain a proper history from a patient about a potential shoulder condition. However, I am unable to conclude that when he saw Ms. Rabiei for the independent medical assessment, she

in fact reported “anterior shoulder pain” to him. I do not know what words were in fact spoken and by whom. Moreover, Dr. Goel (unlike Dr. Stewart) was not qualified to give opinion evidence concerning soft tissue injuries or their effects. Rather, he was qualified more narrowly, consistent with his specialty training.

[136] In my opinion, the medical evidence that made the most sense, and was the most consistent with Ms. Rabiei’s evidence at trial was the evidence of Dr. Stewart. She explained why an individual who had sustained the type of soft tissue injuries to her neck and upper back that Ms. Rabiei had sustained could and would develop pain symptoms in the shoulder. Her opinion that Ms. Rabiei’s pre-accident left anterior shoulder pain was probably biceps tendonitis was consistent with Ms. Rabiei’s evidence concerning her pre-accident activities and the medical explanation for the development of biceps tendonitis. It was important for Dr. Stewart’s medical diagnosis that, after seeing Dr. Jalali in early February and resting for seven to 10 days, Ms. Rabiei had resumed her regular activities prior to the accident. Ms. Rabiei’s evidence in that respect is supported by the evidence of Mr. Asgari-Doulabi, who did not recall her missing any of the weekly violin lessons prior to the accident, and the evidence of Ms. Sharbit (who was unaware her daughter even had a problem).

[137] As Dr. Stewart explained in her evidence at trial, a patient may complain about a sore shoulder, but not necessarily be aware of the source of the pain. For Ms. Rabiei, the main source was the soft tissue injuries to her neck. It was Dr. Stewart’s opinion that Ms. Rabiei’s previous shoulder pain was largely incidental, contributing to Ms. Rabiei’s shoulder pain secondary to her neck pain to only a minor degree. This is consistent with the physiotherapy records, as Dr. Stewart also explained. Dr. Parhar implicitly acknowledged that Dr. Stewart’s diagnoses and opinions on these points were correct when he conceded that when he used the word “worsened,” it was not a good choice.

[138] The result is that I reject the defendants’ position that this is a case of a divisible injury.

[139] Having said that, it does not follow necessarily that Ms. Rabiei's pre-accident development of biceps tendinopathy or tendonitis is irrelevant to the assessment of her damages. This is because she is only entitled to be put in the position she would have been in but for the defendants' negligence, and not a better position. If there is a measurable risk that her pre-accident biceps tendonitis would have detrimentally affected Ms. Rabiei in the future, regardless of the defendants' negligence, then this can be taken into account in reducing the overall award. However, in my view, the defendants have failed to show any "measurable risk."

7. Findings and conclusions concerning Ms. Rabiei's injuries

[140] I find that, as a result of the accident, Ms. Rabiei sustained soft tissue injuries to her neck, upper, mid and lower back. These diagnoses are made by both Dr. Stewart, and by Dr. Parhar, who saw and examined Ms. Rabiei about a month after the accident. These are not inconsistent with Dr. Goel's impression concerning Ms. Rabiei's primary injury (although he was unable to opine on what the injury was related to). For a period of some months after the accident, she also suffered from headaches. Physiotherapy treatments, which began at the end of April and continued until the middle of July 2016, were helpful in addressing her symptoms and improving her ability to function. Her headaches and lower back symptoms eventually resolved. However, Ms. Rabiei remained off work for the balance of 2016, because she remained symptomatic in her neck, upper back and left shoulder and (at least in part) because of the advice she received from Dr. Parhar. The pain symptoms in her neck, upper back and left shoulder, while they improved, have persisted and become chronic. Although the symptoms are not debilitating, and they come and go, they impair Ms. Rabiei's ability to function at her pre-accident level, both with respect to her work and her activities outside of work. Further medical improvement is unlikely, although if Ms. Rabiei follows through on recommendations to work with a kinesiologist on an active rehabilitation program, she has the opportunity to become stronger and more functional.

[141] When Ms. Rabiei returned to school in 2017, and then to work, her pain symptoms in her neck, upper back and left shoulder made performance of tasks more difficult. As a result of these symptoms, Ms. Rabiei gave up her work as a nail technician altogether, and focussed on work as a hair stylist. However, she was unable to work at the same pace as before the accident, and her symptoms are aggravated by her work. Because of the continuing symptoms in her neck, upper back and left shoulder, work has also been more fatiguing, and she needs more rest when she finishes work. In addition, because of the effects of the injuries sustained in the accident, Ms. Rabiei has modified her career goals. Instead of being the "artist" who works long days on a movie set as a hair stylist and nail technician, she is now considering the possibility of eventually managing her own salon, where others can do the physical work she is no longer fully capable of doing. She has more difficulty performing all of the household chores she was able to do pre-accident, and chores have had to be redistributed.

[142] In contrast to the happy, healthy and very active person that Mr. Hekmatshoar described pre-accident, Ms. Rabiei is less active socially as a result of the injuries she sustained, and no longer engages in activities such as swimming or going out with friends. As a result of her pain symptoms, she is more fatigued at the end of her workdays, and needs time to recover. Moreover, I find that, as a result of her pain symptoms from the injuries she sustained in the accident, Ms. Rabiei has given up playing the violin. This is a major loss, as, prior to the accident, she was a dedicated and talented violin player. She has also lost the enjoyment of being able to make music together with her friend Mr. Hekmatshoar.

8. Damages

(a) Non-pecuniary damages

[143] It is well-established that the purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering;

impairment of family, marital and social relationships; impairment of physical abilities; loss of lifestyle; and the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff). See ***Stapley v. Hejslet***, 2006 BCCA 34, at paras. 45-46. An award of non-pecuniary damages must be fair and reasonable to both parties.

[144] It is also well established that each case must be decided on its own facts, and prior cases are useful as a guide – but only a guide – in the assessment of non-pecuniary damages.

[145] On behalf of Ms. Rabiei, Mr. Bisbicis submits that an award of $80,000 for non-pecuniary damages is justified in this case. He submits that Ms. Rabiei's evidence, and the evidence of others who know her, show that she is a stoic individual, who will work through her pain. Mr. Bisbicis submits that the evidence shows that Ms. Rabiei is, and always has been, a hard worker. In Mr. Bisbicis's submission, the evidence of Ms. St-Gelais and Mr. Asgari-Doulabi show Ms. Rabiei's pre-accident commitment both to work and to her violin studies. Other witnesses testified about social activities pre- and post-accident, and support Ms. Rabiei's evidence that she is no longer able to participate in and enjoy many of her pre-accident activities.

[146] In support of an award of $80,000 for non-pecuniary damages, Mr. Bisbicis cites the following cases:

- ***Blackman v. Dha***, 2015 BCSC 698: the plaintiff was a 37-year-old mother of three, who sustained soft tissue injuries to her neck and upper back (among other injuries) in a rear-end accident. She had a Bachelor of Arts in Music and a Bachelor of Education, and at the time of the accident, had been an elementary school music teacher for about eight years. She was also active in her church community. At the time of the accident, she did the majority of cooking and housework for her family. Her pain and discomfort from the injuries she sustained affected both her ability to fully function as a music teacher, and also her personal enjoyment of playing instruments. As of

trial, her condition had improved, but it was likely she would continue to experience some pain symptoms in the future. The court awarded $80,000 in non-pecuniary damages.

- ***Beagle v. Cornelson Estate***, 2013 BCSC 933: a 36-year-old woman received an award of $85,000 for soft tissue injuries in the neck and right shoulder, and headaches. Although the injuries were not significant they continued for over five years and were considered to be chronic.

- ***Szymanski v. Morin***, 2010 BCSC 1: a 55-year-old, who (pre-accident) was very physically fit and worked long days as a hardwood floor installer, was involved in a rear-end collision where he sustained soft tissue injuries to the left side of his neck. The injuries resulted in chronic neck pain radiating into his upper left trapezius muscle area. Prior to the accident, he had no health problems, and no issues in his neck or shoulder. After the accident, his symptoms were aggravated by his physically demanding work. The court awarded non-pecuniary damages of $75,000.

[147] On the other hand, on behalf of the defendants, Mr. Cassidy submits that (before any deduction for a failure to mitigate) an award of between $30,000 and $65,000 is appropriate. In Mr. Cassidy's submission, an award at the upper range would be appropriate if I accept the opinions of Dr. Stewart and Dr. Parhar and conclude that Ms. Rabiei's ongoing complaints concerning her neck, back and left shoulder are entirely related to the accident. In support, the defendants rely on the following cases (among others):

- ***Edmondson v. Payer***: the plaintiff, 31 as of trial, sustained soft tissue injuries principally to her neck, as well as wrist pain and headaches, as the result of a motor vehicle accident five years earlier. Physical signs of injury were always minimal. The plaintiff was found to be a generally forthright and credible witness. The court observed that the ongoing injury of which the plaintiff complained was a relatively minor one and she had not attempted to suggest that it amounted to any significant disability. Although the plaintiff

had been able to continue working and remain physically active (with some limitations), five years after the accident, she still had recurrent pain and stiffness that, while not constant, was frequent and significant enough to make her life less comfortable and less enjoyable. The court awarded non-pecuniary damages of $40,000.

- ***Matharu v. Gill***, 2016 BCSC 624: the plaintiff, a 23-year old security screener at YVR, sustained injury to her neck, shoulders and low back in a motor vehicle accident. She had pre-existing conditions (including inflammatory polyarthropathy) that made her more susceptible to chronic pain. However, the court found that her symptoms would continue to resolve and that there was a good chance they would fully resolve within the next one to two years. The court awarded non-pecuniary damages of $45,000.

- ***Young v. Shao***, 2018 BCSC 2017: the plaintiff, in her mid-50s, sustained soft tissue injuries to her neck, upper and lower back, and developed tension headaches. As of trial (about five and a half years after the accident), the plaintiff continued to have symptoms in her neck and shoulder area, where she had developed chronic pain. Her neck pain was also a major trigger for headaches. Further improvement was unlikely. The effects of her injuries interfered with the plaintiff's passion – dancing – and presented challenges to her in her work as an "in-store marketer" at the Bay. The court awarded non-pecuniary damages of $55,000.

- ***Bove v. Wilson***, 2016 BCSC 1620: the court awarded $60,000 to 31-year-old woman who suffered from headaches, neck and back pain, emotional upset and anxiety as a result of injuries sustained in a motor vehicle accident. She had developed chronic pain and her prognosis was poor, but she was able to continue working full‑time as an administrative assistant.

[148] Ms. Rabiei is a young woman, just 30. She has many years ahead of her to live with chronic pain symptoms. When injured, she was just establishing a new

career in B.C. Her pre-accident work history once she arrived in B.C. showed that she was willing to work hard and was ambitious. As a result of the injuries she sustained in the accident, she has been and will be working with pain, and is less able to pursue career goals she had for herself. The satisfaction she can enjoy from her work is diminished. She is less independent at home.

[149] Following the accident, she has been less socially active. However, beginning with her job at Fresh, her work schedule (where she worked Fridays and weekends) must be considered a factor – she has less time available to go out dancing and to clubs with friends.

[150] Ms. Rabiei has given up playing the violin, which is a major loss for her. It has also affected her social life as she and Mr. Hekmatshoar no longer get together regularly to perform.

[151] In view of my findings above, and taking into account the factors mentioned in ***Stapley*** (including in particular Ms. Rabiei's age and stage of life) and the cases cited to me in argument, I conclude that a fair and reasonable award of non-pecuniary damages is $70,000.

(b) Loss of earning capacity

[152] With respect to past lost of earning capacity, Mr. Bisbicis argues that Ms. Rabiei should be compensated for income loss for a period of 10 months (from March 2016 to January 2017, when she entered VCC), together with some additional compensation for the period from the end of October 2017 (when Ms. Rabiei began working at Fresh) to trial. In Mr. Bisbicis's submission, a reasonable gross award for the entire period up to trial is $23,500. This is based (roughly) on the assumption that, but for the accident, Ms. Rabiei would have earned about $1,500 per month on average in 2016, and an extra $5,000 in each of 2017 and 2018 (in addition to what she in fact earned), as well as on Mr. Nordin's evidence concerning average earnings in B.C. of a female hairstylist.

[153] With respect to loss of future earning capacity, Mr. Bisbicis presented an argument based on Ms. Rabiei's reported sales for November and December 2018 at Beauté, and taking into account her expenses. Mr. Bisbicis argued that, based on these amounts, Ms. Rabiei's profit could be calculated at about $9,700 for 4 months or about $29,200 annually. However, she is working only three days a week. If this is grossed up for a five-day week, the annual profit would be about $48,600. After Ms. Rabiei's estimated earnings (based on her residual earning capacity) are deducted, Mr. Bisbicis calculated an annual loss of about $19,470. Using the earnings approach (which, in his submission, is appropriate here), the present value of this loss to age 65 is about $337,000.

[154] Mr. Bisbicis also presented a calculation using the average salary of a hairstylist from Mr. Nordin's report, and applying the earnings approach. The annual loss (the difference between earnings for a 5-day week and a 3-day week) is about $11,000 and the present value to age 65 is about $190,400.

[155] Accordingly, in the submission of Mr. Bisbicis, an award for loss of future earning capacity of between $190,400 and $337,000 would be justified in this case.

[156] On the other hand, Mr. Cassidy argues that the maximum possible award for past loss of earning capacity is about $4,600, and that Ms. Rabiei has not established any entitlement to an award for loss of future earning capacity. Alternatively, Mr. Cassidy submits that, at best, a total award of $20,000 for loss of earning capacity (both past and future) might be appropriate. Mr. Cassidy argues, citing ***Gao v. Dietrich***, 2018 BCCA 372, at paras. 62 and 65-66, that Ms. Rabiei has failed to provide the evidentiary foundation that would justify any higher award. The business records that she has provided (two months of working as an independent contractor at Beauté) are too thin to justify the substantial amounts Ms. Rabiei is seeking.

[157] In addition, Mr. Cassidy argues that Ms. Rabiei has residual earning capacity that she has not used, and any award should be reduced accordingly, on account of a failure to mitigate.

[158] I turn then to the legal principles.

[159] There are two stages in assessing a claim for damages for loss of earning capacity. First, a plaintiff must prove that the injuries suffered in the accident and the resulting symptoms impaired her ability to earn income and that there is a real and substantial possibility that her diminished earning capacity has resulted or will result in a pecuniary loss. A plaintiff may be able to prove that there is a substantial possibility of a future loss despite having returned to his or her usual employment. If the plaintiff satisfies that burden, and therefore establishes an entitlement to compensation, then the second stage requires an assessment of the loss. A plaintiff may prove the quantification of that loss either on an earnings approach or a capital asset approach. Both are correct. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured (as is the case here). See generally ***Perren v. Lalari***, 2010 BCCA 140, at paras. 21 and 32. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies.

[160] The plaintiff's loss is assessed on the basis of the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission: ***Athey***, at paras. 34-35. The assessment is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable. See, for example, ***Parypa v. Wickware***, 1999 BCCA 88, at para. 70, and ***Jurczak v. Mauro***, 2013 BCCA 507, at para. 36.

[161] With respect to the capital asset approach, Savage J.A. wrote in ***Villing v. Husseni***, 2016 BCCA 422, beginning at para. 18:

> [18] Using the capital asset approach does not mean the assessment is unstructured. I agree with Garson J.A.'s observations in *Morgan v. Galbraith*, 2013 BCCA 305:

> [56] If the assessment is still to be based on the capital asset approach the judge must consider the four questions in *Brown* in the context of the facts of this case and make findings of fact as to the nature and extent of the plaintiff's loss of capacity and how that loss may impact the plaintiff's ability to earn income. Adopting the capital asset approach does not mean that the assessment is entirely at large without the necessity to explain the factual basis of the award: *Morris v. Rose Estate* (1996), 23 B.C.L.R. (3d) 256 at para. 24, 75 B.C.A.C. 263; *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43, 63 B.C.A.C. 145.
>
> [Emphasis added.]
>
> [19] In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.), form the basis of the assessment. The questions are whether:
>
> (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
>
> (2) The plaintiff is less marketable or attractive as an employee to potential employers;
>
> (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
>
> (4) The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
>
> [20] The considerations in *Brown* are not intended to be exhaustive: *Sinnott v. Boggs*, 2007 BCCA 267 at para. 9, per Mackenzie J.A.

[162] Although the capital asset approach can be appropriate in circumstances where the loss is not easily quantified, it is not a panacea for situations where what could have been proven, or at least given some evidentiary foundation, was not proven or given an evidentiary foundation: ***Gao***, at para. 62.

[163] I will first address Ms. Rabiei's claim for compensation for past loss of earning capacity.

[164] Based on my findings concerning her injuries and the effects of her injuries, Ms. Rabiei has established an entitlement to compensation for the period beginning March 22, 2016 to the end of 2016. I find that but for the accident, and the injuries she sustained in the accident, Ms. Rabiei would have worked full-time at The Side as both a hair stylist and nail technician during that time.

[165] I turn then to the assessment of Ms. Rabiei's loss for that period. Despite the gaps in the evidence, I conclude that the earnings approach is appropriate.

[166] Ms. St-Gelais, as the owner of The Side, could have been asked at trial about the average earnings in 2016 of a full-time stylist and nail technician in her salon (a matter of past fact). She was not. However, there is other evidence of Ms. Rabiei's pre-accident earnings.

[167] Ms. Rabiei's actual earnings at The Side in 2016 are found in Ex. 9. Her gross earnings for the first three months of 2016 were $2,351.44 ($712.92 in January; $928.72 in February; $709.80 in March, the month of the accident). If I eliminate March (when Ms. Rabiei did not work a full month), Ms. Rabiei's monthly average earnings in 2016 are $820.82. She worked at The Side for seven months in 2015. Her best month in terms of income was December, when she earned $1,141.50. If this month is taken into account (so that the average is calculated over the period from December to February), Ms. Rabiei's average monthly earnings pre-accident are (rounded) $928.00 (gross).

[168] I have no information about tips Ms. Rabiei may have earned in those two months, and her 2016 notice of assessment from the Canada Revenue Agency does not assist. These are facts that Ms. Rabiei could have proved, but did not. I am not prepared to make assumptions in the absence of evidence.

[169] In my view, the evidence does not support Mr. Bisbicis's without-accident figure of $1,500 a month. Rather, I conclude that, without the accident, Ms. Rabiei would have earned an average of $928 per month for the balance of 2016 (nine months) or $8,352, gross. From this amount, the amount that Ms. Rabiei received for employment insurance ($2,572) must be deducted, leaving a total of $5,780 (gross).

[170] Ms. Rabiei began her course at VCC in January 2017. I find that, even without the accident, Ms. Rabiei would have enrolled in this course, as it provided her not only with training but also with the ability to obtain her hairstylist's licence on

completion. Although the course was full-time, beginning in April and through to September 2017 (six months), Ms. Rabiei worked part-time at The Side, where her average monthly earnings (based on the T4 issued by The Side) were (rounded) $600. In 2017, in addition to her course at VCC, Ms. Rabiei spent several months working with Mr. Hekmatshoar to improve her post-accident physical capabilities and function. This was time that would have been available for work, without the accident. Accordingly, I find that, but for the accident, there was a real and substantial possibility that Ms. Rabiei would have picked up more part-time hours at The Side, beginning in January. In my view, based on her actual earnings there, a reasonable assessment of what she would have earned but for the accident in the period from January to September (ten months) is $800 per month, gross, or $8,000. After Ms. Rabiei's actual earnings ($3,598) are deducted, this leaves loss for this period of $4,402, which I will round to $4,400, gross.

[171] Ms. Rabiei began working full-time at Fresh at the end of October 2017 and worked there until August 2018.

[172] As I noted above, no documentary evidence was tendered at trial concerning Ms. Rabiei's earnings at Fresh. Such evidence would have provided useful and relevant information about Ms. Rabiei's residual earning capacity. Instead, there is virtually nothing beyond Ms. Rabiei's oral evidence that the salon was not very busy, her estimate of the number of clients she saw in a day, and her estimate that she earned about $1,800 a month plus tips. This is a poor substitute for reliable, documentary evidence. Moreover, Ms. St-Gelais could have provided information about what a hairstylist, working full-time, earned on average at The Side in 2017 and 2018. However, she was not asked.

[173] Based on Ms. Rabiei's 2017 notice of assessment and the T4 issued for her earnings at The Side, I conclude that, for November and December 2017, Ms. Rabiei earned an average of $1,591 per month, gross, at Fresh. In the circumstances, where Ms. Rabiei was starting a new job at a new salon, I conclude

that this is what she would have earned even without the accident, and she has not established an entitlement to compensation for those two months.

[174] With respect to the period from January until mid-August 2018 (when Fresh closed), a period of seven and a half months, I have concluded that, in the absence of evidence, in particular evidence of what she in fact earned, I am unable to make a reasonable assessment of what Ms. Rabiei would have earned but for the accident. I make no award for this period.

[175] The last period (about three months) begins in November 2018, when Ms. Rabiei became an independent contractor working three days a week at Beauté. In my view, for this period, Ms. Rabiei has established an entitlement to compensation for past loss of earning capacity, as there is a real and substantial possibility that, but for the accident and the injuries she sustained in the accident, she would have been working five days a week as an independent contractor. I do not consider her decision to work for herself as one that came about as a result of the accident or the injuries she sustained in the accident. Rather, I conclude this was a step Ms. Rabiei would have taken even without the accident.

[176] However, the assessment of loss is problematic. Ms. Rabiei is running her own business for the first time. She must generate her own clients. She has expenses, some of which are fixed whether she works three days a week or five days a week. The Square sales reports summarize information, but do not provide much in the way of detail. Ms. Rabiei was unable to explain what some of the line items were. The lack of records from the time she was working at Fresh (for example, appointment records) continues to create problems here. Doing the best I can with the evidence, such as it is, I consider a reasonable assessment of Ms. Rabiei's loss for this period is $1,000, gross.

[177] Accordingly, I assess Ms. Rabiei's damages for past loss of earning capacity at $11,180 (less applicable taxes).

[178] I turn then to the claim for loss of future earning capacity.

[179] In my view, Ms. Rabiei has demonstrated a real and substantial possibility that her residual pain symptoms in her neck, upper back and shoulder will in the future lead to an income loss.

[180] When Ms. Rabiei was injured, she was a young woman who had arrived in Canada as a refugee about 18 months before, and she was pursuing a career (hair stylist and nail technician) she had begun while her family was in Turkey. Given her particular talents and interests, and the circumstances in which she came to Canada, the prospects that Ms. Rabiei would work in a career that was more practical and skills-oriented were high. Although Ms. Rabiei's command of English is very likely to improve, the evidence does not support the conclusion that, at some point in the near future, she would be a candidate for enrollment as a college or university student, and could improve her earning capacity in that way. Since the accident, she has taken steps toward establishing herself in her career as a hairstylist, and she is now working as an independent contractor.

[181] However, Ms. Rabiei's pain symptoms limit her ability to work full-time in her chosen profession, and based on the evidence, limit her ability to earn income in and take advantage of job opportunities that, but for the accident, would be open to her. Ms. Rabiei is able to work, and therefore has residual earning capacity, but she works with pain. The effect of the opinion evidence of Dr. Stewart, Dr. Parhar and Mr. Pakulak is that Ms. Rabiei does not currently meet the physical demands of her work.

[182] This is sufficient to establish an entitlement to compensation for loss of future earning capacity.

[183] I turn then to the assessment of the loss. Again, making the assessment has been complicated by the lack of records from the period when Ms. Rabiei was working full-time at Fresh, and the absence of detail in the records produced since Ms. Rabiei began working at Beauté. The evidence to support Ms. Rabiei's assertion that she has clients that would occupy her full-time five days a week if she were able to work full-time is weak, although she could develop such a client list

over time. Moreover, I do not agree with Mr. Bisbicis that the earnings approach is appropriate here. The loss is not easily measureable, and the capital asset approach is preferable.

[184] In addition, despite the precision of the calculations, I reject the scenario advanced by Mr. Bisbicis as far too speculative. In my view, there is no support in the evidence for the conclusion that, but for the accident, Ms. Rabiei would be earning an income of almost $50,000 as an independent contractor, certainly not in her first year of business. This is another area in which Ms. St-Gelais most likely would have been able to assist, but she was not asked.

[185] Of the ***Brown*** factors, all are applicable here, although, in my view, the first and third feature most prominently.

[186] With respect to contingencies, Ms. Rabiei indicated an intention of running her own salon, where others could do the work that it is painful for her to do and allow her to generate income without aggravation of her symptoms. If she is able to do this, the impact of the injuries on her future earning capacity would be reduced. Whether, but for the accident, she would have worked full-time to age 65 was not explored in the evidence. I do not know what is the typical length of a career for a hairstylist in B.C., and whether most work to age 65 or stop earlier or later. I do not know whether, for example, there are particular conditions (biceps tendonitis or other physical problems, for example, or sensitivity to chemicals) that hairstylists are prone to develop over a career that could affect the ability to earn income in Ms. Rabiei's without-accident scenario. Ms. Rabiei was not asked about whether, for example, she had any plans to take time off work for family. On the other hand, she did in fact take time off work, after Fresh closed, including taking an extended vacation to Turkey. This suggests that, even in the without-accident scenario, Ms. Rabiei would not have been working full-time, five days a week, 52 (or even 48) weeks of the year to age 65. Ms. Rabiei spoke about investigating, while she was at VCC, working in the movie industry, something that would have been compatible with her ambition to be an artist who worked with hair. I consider that to be something that, but for the

accident, she would have explored further. However, what that might have generated in terms of income is unknown.

[187] The present value (using Mr. Benning's economic multiplier) of an annual loss of $8,000 to age 65 is $138,440. This, I think, is on the low side. The present value of an annual loss of $10,000 to age 60 is $164,390, which I think is on the high side.

[188] Given that Ms. Rabiei is being compensated for the loss of her future earning capacity – the capital asset – I conclude that a reasonable assessment of that loss is $150,000.

(c) Cost of future care

[189] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See ***Gao***, at paras. 69-70.

[190] A little common sense should inform claims for costs of future care, however much costs may be recommended by experts in the field: ***Penner v. Insurance Corporation of British Columbia***, 2011 BCCA 135, at para. 13. No award is appropriate for costs that a plaintiff would have incurred in any event: ***Shapiro v. Dailey***, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see ***Lo v. Matsumoto***, 2015 BCCA 84, at para. 20,

[191] The cost of future care recommendations are summarized in Mr. Pakulak's report. They included services of a kinesiologist, a gym pass and assistance with homemaking tasks (all based on Dr. Stewart's recommendations), and occupational therapy (based on Dr. Parhar's recommendation).

[192] Ms. Rabiei originally presented a claim for cost of future care in the sum of $107,372, based on the present value calculation found in Table 2 of Mr. Benning's report (Ex. 8), which I summarize as follows:

Item	**Cost**	**Frequency**	**Present value**
Kinesiologist	$1,463.00	Year 1	$1,448.00
Pass to Rec Centre to age 65	$431.00	Annual to 65	$10,773.00
Pass to Rec Centre from age 65	$324.00	Annual from 65	$2,643.00
Occupational therapy	$660.00	Year 1	$653.00
Vocational rehabilitation	$3,500.00	Year 1	$3,465.00
Homemaking	$2,437.00	annual to age 80	$74,459.00
Advil	$8.00	annual	$260.00
Tylenol	$7.00	annual	$223.00
IcyHot patches	$280.00	annual	$9,287.00
Voltaren Emulgel	$125.00	annual	$4,161.00
Grand Total			$107,372.00

[193] I note that the multiplier used for the "annual" amounts goes well beyond age 90.

[194] In closing submissions, Mr. Bisbicis reduced the amount claimed to $75,000. He did not allocate that sum to or among any particular items.

[195] In Mr. Cassidy's submission, either no award or only a very modest award (about $2,000) should be made for cost of future care. Mr. Cassidy says that, for example, work with a kinesiologist has been recommended for Ms. Rabiei on several occasions, but she has never followed up. He says, based on Ms. Rabiei's evidence that pre-accident, she swam regularly at pools around the city, no award is appropriate for a gym pass, as this was an expense Ms. Rabiei would likely have

incurred absent the accident. Mr. Cassidy says that claims for occupational therapy and vocational rehabilitation are not reasonable. In his submission, the same applies to the claim for cost of housekeeping services. In addition, Mr. Cassidy says that, although Ms. Rabiei testified that she uses Tylenol and Advil occasionally, she did not testify at trial about use of IcyHot patches or Voltaren Emulgel. Mr. Cassidy argues that, at best, a small award for Advil and Tylenol might be justified.

[196] Active rehabilitation with a kinesiologist has been consistently recommended for Ms. Rabiei, beginning with her discharge from physiotherapy, continuing with Dr. Parhar through to Dr. Stewart. Contrary to what Mr. Cassidy implies by his submissions, Ms. Rabiei did not ignore the recommendation altogether. However, instead of locating and paying for a kinesiologist, she asked Mr. Hekmatshoar to work with her. In Ms. Rabiei's circumstances, and in the light of Dr. Stewart's evidence at trial, I do not consider that unreasonable. In my view, the amount claimed can be justified and is reasonable, based on the evidence.

[197] The present value of the costs of a gym pass are over $13,000. Ms. Rabiei never purchased a gym pass, either before or after the accident. However, she used the services available (the pool, for example) in recreation centres, both before and after the accident. Ms. Rabiei has not persuaded me there is a real and substantial possibility that she would incur this cost, either to age 65 or (even more doubtfully) beyond. I award nothing for these items.

[198] I agree with Mr. Cassidy that the amount claimed for vocational rehabilitation cannot be justified as a cost of future care. There is nothing to suggest that Ms. Rabiei has any intention of pursuing a career different from her current career, or that she would incur this cost if awarded.

[199] An assessment by an occupational therapist of Ms. Rabiei's work set-up is justified as an item of future care. However, the cost was estimated on the basis of services to assess "home, school and work." I allow $400 for this item (about three hours of a therapist's time, plus expenses).

[200] The largest item is for homemaking. However, in my view, the recommendation of three hours of assistance every other week does not reflect the reality of Ms. Rabiei's living situation, where she shares an apartment with her mother. There is no indication this is likely to change, either in the near or longer term, although that possibility cannot be ruled out. For example, I did not hear whether there are any plans for Ms. Rabiei's husband to move to B.C. from Turkey. However, given my findings concerning Ms. Rabiei's injuries resulting from the accident, and in view of Dr. Stewart's and Mr. Pakulak's evidence concerning Ms. Rabiei's physical limitations as a result of those injuries, I conclude that some allowance for future care in relation to homemaking is reasonable and justified. I award $35,000 for this item.

[201] Finally, with respect to medications, although the amounts claimed are small, and Dr. Stewart mentioned that it was likely Ms. Rabiei would continue to require over-the-counter pain medications in the future, Advil and Tylenol can be found in most households as a matter of routine first aid and pain control. I consider these items fall within the category of costs that would have been incurred even without the accident, and I award nothing for these items. Moreover, I agree with Mr. Cassidy that the evidence does not support any award in the amounts claimed for either the IcyHot patches and Voltaren Emulgel.

[202] In summary, I award the following amounts:

Item	**Award**
Kinesiologist	$1,448.00
Occupational therapist assessment	$400.00
Homemaking	$35,000.00
Total	**$36,848.00**

(d) Loss of housekeeping capacity

[203] Ms. Rabiei seeks an award of $35,000 for loss of housekeeping capacity. She says that, as a result of her injuries, she is and has been limited in her ability to

perform household chores, especially heavier chores, and has had to rely on family members (most recently her mother). In addition, Ms. Rabiei says that she needs periods of rest, especially on the days that she is working, to avoid aggravating her symptoms, thus also limiting her ability to perform household chores.

[204] The defendants say that there should be no award for loss of housekeeping capacity, and that any impact of Ms. Rabiei's injuries on her housekeeping capacity should be taken into account in the award for non-pecuniary damages.

[205] Compensation for loss of homemaking capacity is distinct from compensation for cost of future care. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See ***Westbroek v. Brizuela***, 2014 BCCA 48, at paras. 72-78.

[206] In my view, a modest award, consistent with a cautionary approach and commensurate with the loss, can be justified in this case. I award $5,000.

(e) In-trust claim

[207] Ms. Rabiei seeks an "in-trust" award in respect of assistance provided to her by her mother and sister. In closing submissions, her claim in this respect has been presented at $2,880 (roughly 1.5 hours of assistance per week at $20 per hour to about April 2018).

[208] A plaintiff can recover an amount to reflect the assistance provided by family members. However, such claims must be carefully scrutinized, both with respect to the nature of the services (were they simply part of the usual "give and take" between family members, or did they go "above and beyond" that level), and with respect to causation (were the services necessitated by the plaintiff's injuries or would they have been provided in any event?): see ***Bystedt (Guardian ad litem of)***

v. Hay, 2001 BCSC 1735 at para. 180, aff'd 2004 BCCA 124; and ***Dykeman v. Porohowski***, 2010 BCCA 36, at para. 29.

[209] In my view, the assistance provided by Ms. Rabiei's mother and sister (primarily performing household chores in and around the parties' apartment) did not go above and beyond what would have been part of the normal give and take among family members sharing the same apartment so as to justify an in-trust award. I am not persuaded that, to the extent that Ms. Sharbit has done Ms. Rabiei's laundry (for example), it has been because Ms. Rabiei could not do such chores as a result of injuries sustained in the accident. Such a conclusion is not consistent with Mr. Pakulak's evidence concerning Ms. Rabiei's functional capacity.

[210] Accordingly, I make no in-trust award.

(f) Should damages be reduced for a failure to mitigate?

[211] Mr. Cassidy submits that Ms. Rabiei's non-pecuniary damages and any damages awarded for loss of earning capacity, loss of housekeeping capacity and cost of future care should be reduced by 20% for a failure to mitigate. Mr. Cassidy argues that Ms. Rabiei has unreasonably refused to pursue active rehabilitation with a kinesiologist and refused to take naproxen, prescribed for her by Dr. Parhar.

[212] Mr. Cassidy submits that had Ms. Rabiei worked with a kinesiologist, which (Mr. Cassidy submits) is a standard part of treatment for soft tissue injuries, her injuries would likely have improved. Mr. Cassidy points to Dr. Stewart's evidence that there is a wide variability in recovery and that, while most people recover some never do. He submits that Dr. Stewart was unduly negative in her testimony, and the appropriate focus is on her evidence that most recover with rehabilitation.

[213] Mr. Cassidy submits further that Ms. Rabiei failed to take reasonable steps to mitigate her loss of earning capacity, and, in particular, has failed to make full use of her post-accident residual earning capacity. He submits that Ms. Rabiei had an obligation to take on work at a job that did not constantly aggravate her symptoms in her neck, left shoulder and upper back, and that by pursuing work as a hairstylist,

she failed to take reasonable steps to mitigate her losses. Mr. Cassidy submits that many unskilled jobs do not require the type of physical actions that Ms. Rabiei must perform working as a hairstylist and that aggravate Ms. Rabiei's symptoms, and those jobs pay close to the same amount. Mr. Cassidy submits that Ms. Rabiei could have chosen any number of minimum wage jobs and made as much or more than her income as a hairstylist. In Mr. Cassidy's submission, post-accident income at this level (about $25,300 gross) should be imputed to Ms. Rabiei at a minimum, and any award for loss of capacity should reflect this as her minimum residual earning capacity.

[214] Mr. Bisbicis submits that the defendants have failed to make out any failure to mitigate.

[215] The defendants bear the onus of establishing that the plaintiff failed to take reasonable steps that would likely have reduced her damages. The mitigation test is a subjective/ objective test. That is, whether the reasonable person, having all the information at hand that the plaintiff possessed, ought reasonably to have undergone the recommended treatment The second aspect of the test is the extent, if any, to which the plaintiff's damages would have been reduced by that treatment. See ***Gregory v. Insurance Corporation of British Columbia***, 2011 BCCA 144, at paras. 53 and 56 (citing ***Chiu v. Chiu***, 2002 BCCA 618, at para. 57).

[216] With respect to whether Ms. Rabiei acted unreasonably with respect to her physical rehabilitation, in my view, the defendants have failed to satisfy their burden. Ms. Rabiei did not ignore the recommendation to pursue further rehabilitation, as her evidence and Mr. Hekmatshoar's evidence shows. Moreover, as both Dr. Stewart and Dr. Parhar explained, even engaging in active rehabilitation does not guarantee any particular result for a particular individual. It also is not curative. Whether, and if so, to what extent, engaging in active rehabilitation in October 2016, rather than in 2017, would have reduced Ms. Rabiei's damages is unknown.

[217] Dr. Parhar prescribed naproxen for Ms. Rabiei when she first saw him in April 2016. Instead, Ms. Rabiei took Tylenol and Advil. Her decision to do this is not

unreasonable, and there is no evidence that taking naproxen rather than Advil would have made any difference.

[218] In my view, the proposition that Ms. Rabiei failed to mitigate her damages with respect to loss of earning capacity by not abandoning hair dressing and taking a minimum wage job must also be rejected. That Ms. Rabiei would have been better off doing this is contrary to the evidence of both Mr. Nordin, and Mr. Pakulak.

[219] Accordingly, I find that the defendants have failed to show that Ms. Rabiei's damages should be reduced on account of a failure to mitigate.

(g) Special damages

[220] The parties agree that the plaintiff incurred special damages as a result of the accident in the sum of $2,095.

9. Summary and disposition

[221] In summary, I award damages to Ms. Rabiei as follows:

(a) non-pecuniary damages in the sum of $70,000

(b) for loss of earning capacity to trial $11,180 (less applicable taxes);

(c) for loss of future earning capacity $150,000;

(d) for cost of future care $36,848;

(e) for loss of housekeeping capacity $5,000; and

(e) special damages in the sum of $2,095.

[222] I will leave counsel to deal with applicable taxes on the gross award for income loss from March 22, 2016 to trial. If they are unable to reach agreement, they have liberty to apply.

[223] There will be pre-judgment interest in accordance with the ***Court Order Interest Act***, R.S.B.C. 1996, c. 79.

[224] Subject to any submissions the parties may wish to make concerning costs, Ms. Rabiei is entitled to her costs on Scale B. If the parties wish to make further submissions concerning costs, I direct that appropriate steps be taken within 30 days of the date of these Reasons to obtain a convenient hearing date from Scheduling.

"ADAIR J."