N THE MATTER OF AN ARBITRATION PURSUANT TO S.148.2
OF THE INSURANCE (VEHICLE) REGULATION,
B.C. Reg. 447/83 and the Arbitration Act [SBC 2020] c.2 VANIAC No.: 2611-UMP

BETWEEN:

CT

CLAIMANT

AND:

INSURANCE CORPORATION OF BRITISH COLUMBIA

RESPONDENT

ARBITRAL AMENDED HEARING AWARD

Arbitrator: Carla Bekkering C. Arb.

Bekkering York Barristers LLP

203 – 1437 Kingsway

Vancouver, BC V5N 2R6

A. Parties

Insured: [redacted]
c/o E. Anthony Thomas
Simpson Thomas & Associates
701 – 13761 96th Avenue
Surrey, BC V3V oE8

Insurer: **ICBC**
c/o: Lyle G. Harris, K. C.
Harris & Brun Law Corporation
#500 – 555 West Georgia Street
Vancouver, BC V6B 1Z5

B. Introduction

1. This is an Arbitration pursuant to the Underinsured Motorist Protection provisions, **Part 10, Division II of the Regulation to the *Insurance (Vehicle) Act* B.C. Reg. 447/83 and the *Arbitration Act* SBC 2020 C 2.** The parties have agreed that the BC Supreme Court Rules will apply to the Arbitration. The Arbitration commenced on December 9, 2025, and concluded on December 17, 2025. The parties did not choose to have a court reporter present. The parties have asked me to assess the claim without reference to UMP deductibles.

2. The parties have submitted an agreed statement of facts. The claimant is 63 years old with a date of birth of December 30, 1960. She resides with her mother at [redacted] in Vancouver, B.C. It is agreed that the respondent, ICBC, was the insurer. The parties agree that the claimant was an Insured under the plan and, in particular, Part 10, and that she was entitled to coverage pursuant to section 148.1 of the Regulation.

3. The Arbitration arises out of a motor vehicle accident which occurred on April 3, 2015. The claimant was a front seat passenger in a vehicle travelling south on Interstate 5 in Washington. A motor vehicle owned by [redacted] and [redacted] and operated by their son [redacted] struck the claimant's vehicle. It is common ground that [redacted] is solely liable for the accident. The accident appears to have been quite significant in impact. The tort matter was settled in the state of Washington for available insurance limits. The parties have also agreed that the claimant's CRA income tax returns correctly set out her income. The parties have agreed that several x-rays and MRIs have been taken of the claimant's pelvis, left shoulder, left hip, and neck since the accident. The dates of the claimant's treatment with massage therapy, occupational therapy, kinesiology, and physiotherapy are also agreed to.

4. The claimant is making a claim for the following heads of damage:

a.	Non-pecuniary damages	$150,000
b.	Past wage loss	$531,765
c.	Loss of real estate investment income	$200,000
d.	Loss of future earning capacity	$408,318
e.	Loss of past housekeeping capacity	$12,180
f.	Cost of future care	$78,257
g.	Special damages	$32,019.12
h.	**Total award sought**	**$ 1,412,539.12**

5. The respondent's position is that I should award the following:

a.	Non-pecuniary damages	$60,000 – $90,000
b.	Past income loss	$50,000 – $70,000
c.	Loss of real estate investment income	$0
d.	Loss of future earning capacity	$0
e.	Loss of past housekeeping capacity	$0
f.	Cost of future care	$23,518.65

g.	Special damages	$32,019.12
h.	**Total award sought**	**$165,537.77 to $215,537.77**

D. Evidence

6. The lay evidence presented for the claimant consisted of the claimant's evidence and the evidence of [redacted]. The claimant also submitted evidence from two experts, Jasmine Shivji, an occupational therapist and Dr. MacKean, a physiatrist. The respondent called no lay evidence. The respondent submitted the report of Dr. Olch, an orthopedic surgeon.

7. Exhibits were entered as followed:

   Exhibit "1" Employment letter from Ian Wood with signature page of the claimant.

   Exhibit "2" DB paystubs, 2014.

   Exhibit "3" DB paystubs, 2015.

   Exhibit "4" Joint Book of Documents.

   Exhibit "5" A list of properties purchased and sold from Canada and the United States with attached supporting documentation.

   Exhibit "6" The Respondent's Book of Documents.

8. All Exhibits were entered by consent.

9. The parties advised me during the hearing that there was potential for employment insurance records to arrive after the hearing. In January, I received an application for employment benefits that the parties agree it should be marked as Exhibit "7", by consent. The parties agree to the following amendments to the agreed statement of facts:

   13 (a) In Exhibit "7", at page 12, the records indicate Ms. [redacted] started working for DB Equipment on March 1, 2014, and her last day was August 15, 2014, due to her employer going bankrupt;

   (b) Exhibit "7", at page 12, the records indicate Ms. [redacted] annual income was $94,560;

   (c) Exhibit "7", at page 14, the records indicate Ms. [redacted] did not have any additional periods of employment in the 52 weeks prior to the accident;

   (d) Exhibit "7", at page 17, the records indicate the application for benefits was received on March 17, 2015; and

   (e) Exhibit "7", at page 22, the records indicate Ms. [redacted] acceptance of the attestation clause.

10. I requested submissions. The parties declined to provide verbal submissions but, in writing, the respondent submits that Exhibit "7" further erodes the credibility of the claimant. The claimant submits that Exhibit "7" is consistent with her evidence.

C. Claimant's Evidence in Direct Examination

11. The claimant is 63 years of age. She is a petite lady. Prior to the accident, she was in a relationship with [redacted]. She had been in that relationship for many years. It broke down for reasons unrelated to the accident sometime in 2022 and there was a family law action filed in 2023. She is currently unattached to a relationship and she resides with her mother. The [redacted] Street home in which she resides was signed over to her as part of estate planning many years ago. There is currently a mortgage in excess of $1 million on the home. The claimant lives in the basement suite. Her mom lives on the top floor. The claimant had certification to be a CGA. At one point, she worked as a CGA but she had not kept up her credentials. She was employed in the year before the accident doing bookkeeping. The nature and extent of this employment is disputed by the respondent.

12. The claimant's evidence was that the accident happened around 2 a.m. She was a passenger in her own vehicle and [redacted] was driving. She was asleep. They were on their way to Las Vegas for a vacation and to see Diana Ross. She woke up to a bang and saw dust and debris and pieces of a car. The vehicle that had struck them was going fast and they could not keep up with it. Another vehicle tried to flag them down, but they were scared to stop. That vehicle followed them. After they travelled some distance, they saw police vehicle lights. The police had pulled over the vehicle that had hit them. The witness behind them had called 911. They spoke to the police and left. It was clear from her evidence that this was a significant impact to the claimant and that it was very upsetting to her.

13. Initially, she felt tension in her neck going down the left side. This spread down her arm when they were on their way to the airport. She felt a little bit of back pain, but most of her pain was from her neck through to her arm. They did attend and complete their trip to Las Vegas to see Diana Ross. The claimant stayed in her room most of the time and begin feeling hip pain on the left side and in the ball of her back. She was able to return from Las Vegas and sought medical attention once she was in Canada. She denied being in Las Vegas for the purpose of gambling.

14. She went to a walk-in clinic, Khatsahlano Clinic. She was referred to massage therapy. She was given medication but it made her feel off and she did not think it agreed with her. In 2015 she had physiotherapy and massage therapy. There was also some kinesiology. This treatment made her feel worse. Registered massage therapy was helpful. Karp Rehabilitation was also consulted. Kinesiology made her feel worse. Physiotherapy included some cupping and acupuncture and exercise which did not help. Her physiotherapist suggested a six-month break, and then the pandemic hit. A previous direction to pay on all treatment was not renewed and she could not afford treatment. Therefore, she stopped most of her treatment. She continued treatment with her GP at the Khatsahlano Clinic and has recently gotten a regular GP, Dr. Pires.

15. Her evidence was that she continued to experience pain in her neck, left shoulder, left arm, lower back and her left hip/leg. Over the years, her pain intensified. She developed a left-sided frozen shoulder in 2017. She was referred to the UBC Sports Medicine Clinic in 2019. This slowly resolved, taking about three years. She was unwilling to have injections due to a fear of needles. Currently, she can move her shoulder in most directions. Her symptoms are changing, and her evidence was that her right side has started to tingle and her right shoulder had begun to cause her pain and to freeze as well. She described her pain as between a seven to an eight most times. She also has back pain and headaches. There has not been much improvement.

16. She has had numerous medical imaging including x-rays of her pelvis (x2), left shoulder, and left hip in 2016. She had an MRI of her left hip on December 11, 2016, an x-ray of her left shoulder on April 3, 2018, an ultrasound of her left shoulder on May 24, 2018, and an MRI of her neck. Treatment included massage therapy treatment twice in April 2015, an occupational therapy treatment on August 27, 2015, kinesiology from December 2015 to April 2016, massage therapy from mid-2015 until early 2019, and physiotherapy from January 2018 until May 2019 as set out in the agreed statement of facts.

17. The claimant testified that she did not have any physical limitations before the accident. She did have thyroid issues and diabetes that did not affect her quality of life.

18. The claimant says that her frozen shoulder on the left side developed due to the collision and that the right-side frozen shoulder developed later due to overuse caused by the collision injuries. She testified to ongoing neck pain, headache, hip pain and back pain. She testified that she cannot work due to experience of pain, particularly when sitting. She testified to daily excruciating pain. She was clearly uncomfortable at times in the hearing room, particularly on the second day that she gave evidence. The claimant says that she had a good lifestyle before the accident. She lived in a nice apartment with her partner. They liked to take trips together. She liked to socialize and have dinner with her friends, often at house parties. They liked to gamble and to go to the Casino. They took many trips to Las Vegas and Palm Springs, as well as cruises.

19. After she and [redacted] parted ways post-accident, the claimant maintained a small group of friends. They socialized, going out for coffee and dinner. Her evidence was that most of the time her friends paid and sometimes she would pay them back. She described the outings as not too expensive – they would have dinner, coffee or perhaps a few glasses of wine.

20. She has a fear of needles. Because of this and because a friend had had it done and said it was painful, she was not prepared to consider injections into her shoulder or her hip. Acupuncture was different for her as the needles were small and only went into her skin.

21. She has become quite housebound. She cannot clean her home. Her mother, who is in her nineties, is doing the house and yard work. The claimant does very little. She cannot afford to have help in the house. She has a home office because she tried working after the accident but she cannot work and does not use the office.

22. She testified that she lived a good lifestyle that has been adversely affected by the accident. She lived with her partner and she enjoyed travelling, dancing, and, fine dining. She cannot do housework. She does little recreationally. She cannot work as she did before the accident. She has been unemployed due to the accident and she cannot fully participate in real estate investing. She has not worked since the accident. In cross-examination, she stated that she thought she had applied for CPP disability and she thought this was denied. More recently, she applied for Persons with Disabilities. She also has CPP (Old Age Pension). She attributes all of her losses to the subject motor vehicle accident. She seeks compensation for non-pecuniary loss, past and future wage loss, loss of housekeeping capacity, and past and future care without reduction for any other factors.

D. Expert Evidence

23. Dr. MacKean, physiatrist, has evaluated the claimant and penned a report on April 25,2024. The report refers to an accident 3-5 years ago. This was an error. It occurred 3-5 years before the subject accident. The claimant had recovered from that accident. The history she took was that the claimant worked as an accountant and office manager since 2013, working up to 12 hours a day. The claimant could not work post-accident as she could not sit for very long. Her examination revealed restricted range of motion in her neck and decreased range of motion in her shoulders. The left was worse than the right. She noted decreased range of motion in her left hip.

24. Dr. MacKean opined that the claimant sustained a Grade II whiplash disorder of her neck and upper back [greater in the left], Grade II soft tissue injuries to the low back and her left hip, chronic tendinosis in her left hip involving the hamstrings and trochanter area. She may also have bursitis in her left hip. Dr. MacKean also diagnosed posttraumatic headaches. She opined that the claimant sustained chronic adhesive capsulation, greater in her left rib than in her right shoulder. This was an overuse injury. She opined that the claimant had reached maximum medical improvement and that she was totally disabled and would not be able to return to work on a sustained basis. She supported limitations with lifting and with work requiring arms positioned at shoulder level or above. She opined that the right shoulder complaints were due to overcompensation on the left side. She further opined that the self-reporting of the claimant was reliable when compared to the claimant's examination. She recommended massage therapy for 10 to 12 sessions per year, kinesiology, an exercise program that she could work on at the gym, occupational therapy and home assessment to provide recommendations to assist function and home, referral to a pain clinic, MRI of both shoulders, and help for housecleaning, home maintenance, yard work, and gardening.

25. The respondent relies upon the report of Dr. Olch, Orthopaedic surgeon, dated September 24, 2024, arising out of an examination which occurred on May 12, 2022. He took a history that she had lost weight and was now skin and bones. She needed to use padded underwear. His review indicated that the claimant had recovered from her previous accident at the time of the subject accident. His review of clinical records suggests that there was early evidence of loss of range of motion in her neck and left shoulder. These complaints also included back complaints. There were

objective signs of injury including range of motion and the development of frozen shoulder in December 2017. Similar notations were present in the Karp Rehabilitation records indicating a left shoulder impingement in January of 2018. Dr. Olch diagnosed a strain of her neck, bilateral frozen shoulder unrelated to the accident, left hamstring syndrome caused by the accident and low back pain not caused by the accident. His evidence was that the critical finding for frozen shoulder was lack of motion. He disagreed with the proposition that this could develop over time. Frozen shoulder or adhesive capsulitis is of uncertain etiology and is seen in 5% of the population (more common in women aged 40-60). Risk factors include diabetes and thyroid dysfunction, both of which the claimant suffers from. Her physical limitations of hamstring syndrome caused her inability to sit and to stand and these should be treated with injection therapy and physiotherapy follow-up. Dr. Olch places the reason for her disability on the left hamstring. Her pain correlated to the findings in the MRI of the left hip. He further confirmed limitation in activities of daily living related to the hamstring condition. Her frozen shoulder may improve over time and may require surgical intervention. He opined that she may improve with treatment from an orthopedic surgeon.

26. The claimant relies on the report of **Jasmine Shivji OT dated September 5, 2024**. She reviewed the reports of Dr. MacKean and Dr. Olch. She notes that the claimant has avoided activity due to heightened pain sensitivity and anxiety and difficulty in recognizing her mental health needs. She was unable to return to work and was increasingly reliant on her mother for home and yard care. She had developed functional limitations impacting her work, recreation and other functioning. Preoccupation and fear of pain were significant. The claimant completed a patient health questionnaire, general anxiety disorder questionnaire and depression questionnaires and relied on the results of those. These showed moderately severe depression and anxiety, self-reporting. On cross-examination, it was pointed out that her pain reports are higher than one would expect. The respondent questioned the reliability of her pain scoring which is subjective. The witness disagreed and stated that her own observations matched the claimant's mood related responses. The claimant did testify to the emotional effect of her injuries. However, the respondent points out that these were multifaceted and included the breakup with her partner and the resulting loss of lifestyle. The witness was a credible witness who answered questions posed by both counsel directly. Some post-surgical recommendations were abandoned due to the resolution of the claimant's left shoulder complaints. Her evidence supports functional impairment, emotional complaints of depression and anxiety symptoms, and cost of future care items which will be detailed later in these reasons.

27. Both doctors gave evidence remotely. Both were excellent, unbiased witnesses. Similarly, Ms. Shivji, who gave her evidence in person, was an excellent witness.

F. The Evidence of [redacted]

28. She is a friend of the claimants. They met at a friend's house where they were attending a party. She works as a psychiatric nurse. They have been friends for about five years. They go for lunch coffee or dinner. Sometimes they go for a walk. Her evidence was that the claimant had to sit down and take a break after 10 to 15 minutes. She would often pay for the claimant's meals. She

has never been to a casino with the Claimant. They have been on a trip to Whistler where they just drove around.

G. Credibility

29. The respondent's counsel argues that there are credibility issues in general with the claimant and that some of these affect the medical reports. Briefly summarizing his arguments, the respondent argues that the evidence of [redacted] does not support the claimants evidence of having to rob Peter to pay Paul. He stays that [redacted] evidence suggests the plaintiff was warm and friendly and able to go to a house party. There was no discussion about the accident or any emotional effects from the accident. The respondent say is that the claimant's credibility is affected by the employment insurance records, the family law affidavit, statements made in a small claims action, injuries alleged in a January 2020 slip and fall, and a 2024 accident, a prior insolvency, internal inconsistencies relating to her pre-accident employment, her pre-accident financial difficulties and inconsistencies both internal and with her previous discovery evidence. In contrast, claimant's counsel suggests that taking into account the passage of time and all that is happened to the plaintiff, some inconsistencies should be expected and that these do not damage her credibility. The claimant's counsel argues that she was candid and cooperative. He agrees that she may be a poor historian but argues that this can easily be understood due to the passage of time and all that she has been through. He says that much of her evidence is supported by the treatment providers and [redacted], who testified in her case.

30. On the issue of credibility, both counsel cite ***Bradshaw v. Stenner*** 2010 BCSC 1398, pp 186 which reads as follows:

> **[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (Raymond v. Bosanquet (Township) (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanor of a witness generally (Wallace v. Davis, [1926] 31 O.W.N. 202 (Ont.H.C.); Faryna v. Chorny, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; R. v. S.(R.D.), 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (Farnya at para. 356).**
>
> **[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd. (1993), 1993 CanLII 7140 (AB KB), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.**

31. I would add the following:

> **[188] Most helpful in this case has been the documents created at the time of events, particularly the statements of adjustments. These provide the most accurate reflection of what occurred, rather than memories that have aged with the passage of time, hardened through this litigation, or been reconstructed. It should also be remembered that the parties used documentation to accomplish undisclosed purposes here, particularly in the Peachland contract.**

The inability to produce relevant documents to support one's case is also a relevant factor that negatively affects credibility. As well, I have relied upon the evidence of the two lawyers involved, Dhindsa and Hordal, who were independent, professional witnesses who gave their evidence in a fair and objective manner and whose evidence forms a reasonable base for analysis.

32. The respondent cites ***Le v Milburn,*** 1987 BCJ 2690, for the proposition that when a litigant sets out to deceive by deliberate falsehood or gross exaggeration and the court has difficulty disentangling the truth from the web of deceit and exaggeration, if, in the course of disentangling the web, the court casts aside something that was indeed true, the litigant has only himself or herself to blame. Counsel for the respondent also argued that the problem of credibility informs the opinions of experts as set out in ***Kautz v Larue,*** May 3, 1982, Van Reg No B811520, and I, in making a determination, may not be able to place as much weight on them. I agree that that there are some areas where I may not place as much reliance on the evidence of the plaintiff.

33. I agree with the proposition that the burden of proof is on the claimant and that I must consider whether her evidence is internally consistent as well as consistent with other facts. The respondent's counsel argues that the principles to be extracted and that are applicable to this case are lack of corroboration, inconsistency with documentary evidence, changing of testimony during cross-examination, fraud, and inconsistency with common human experience. I agree that this must be considered in the assessment of the evidence and in assessing the credibility of the claimant.

34. Counsel for the claimant cites the case of ***Brunelle v. Yoshida,*** 2014 BCSC 1006, for the proposition that a claimant who had submitted an insurance application refused to admit in court that she had done anything wrong. There were also a number of credibility issues. Nonetheless, the Court held that the claimant's actions were still consistent with someone who had significant injuries. Upon review of ***Brunelle,*** I found paragraph 112 to be a good reminder of the test to be met:

> **[112] A claim for personal injury damages arising out of a motor vehicle accident is, of course, a claim in tort (negligence). As with any negligence claim, in order to succeed, the claimant must prove on a balance of probabilities the following constituent elements of the tort:**
>
> **1. the respondent owed the claimant a duty of care (to avoid acts or omissions which might be reasonably foreseeable to cause injury to the latter);**
>
> **2. the respondent's acts or omissions breached the standard of care applicable to that duty;**
>
> **3. the claimant suffered damage of a sort that is recognized and compensable in law; and**
>
> **4. the respondent's breach was causative, in both fact and law, of the claimant's damage.**
>
> **(See *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 91; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 at para. 3; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98 at para. 24.)**

The Court also found the law at paragraph 116:

> **[116] In *Hoy v. Williams*, 2014 BCSC 234, I had occasion to summarize causation principles as follows:**

[112] Much judicial ink has been spilled on this subject. Fortunately, a very useful and recent summary of the law in this area can be found in Brewster v. Li, 2013 BCSC 774 as follows:

> **[77] In cases of negligence, the claimant must establish: (1) that the respondent was the "cause in fact" of the damage suffered and (2) that the respondent was a "proximate cause" of the damage, "in other words, that the damage was not too remote from the factual cause. ... The remoteness inquiry assumes that but for the respondent's wrongful act, the claimant's loss would not have occurred, but places legal limits on the respondent's liability" (*Hussack v. Chilliwack School District No.* 33, 2011 BCCA 258 at para. 54, 19 B.C.L.R. (5th) 257).**
>
> **[78] The claimant must establish causation for both injury and loss. If a respondent did not cause an injury, (s)he is not liable for the losses flowing from that injury. Even if a respondent did cause an injury, (s)he is not liable for any losses or damages that were not caused by the injury.**
>
> **[79] The basic principle of tort law is that the defendant must put the plaintiff back in the position she would have been in had the defendant's tortious act not occurred (Athey v. Leonati, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 32). The corollary of this principle is that the defendant need not compensate the plaintiff for any loss not caused by his/her negligence or for "debilitating effects of [a] pre-existing condition which the plaintiff would have experienced anyway" (Athey at para. 35).**
>
> **[80] Since the burden is on the plaintiff to prove causation, she must establish that the defendant's tortious act caused both an injury (i.e. her pain disorder and/or her depression) and a resulting loss (e.g. non-pecuniary loss or lost wages). "The former is concerned with establishing the existence of liability; the latter with the extent of that liability" (Blackwater BCSC at para. 363). In the case at hand, if the plaintiff cannot establish that one of her injuries was caused by the MVA, then she cannot recover from the defendant for the losses that flowed from that injury. Additionally, if the plaintiff cannot establish that the injury caused by the defendant, in turn, caused a certain loss, then she cannot recover from the defendant for that loss.**

> **[81] The test for causation in Canada is the "but-for" test (Bradley v. Groves, 2010 BCCA 361 at para. 37, 8 B.C.L.R. (5th) 247; Resurfice Corp. v. Hanke, 2007 SCC 7 at paras. 21-22, [2007] 1 S.C.R. 333; Blackwater v. Plint, 2005 SCC 58 at para. 78, [2005] 3 S.C.R. 3 [Blackwater SCC]; Clements v. Clements, 2012 SCC 32 at para. 8, [2012] 2 S.C.R. 181). To assess whether the 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 (Athey at para. 41). If the answer is "no", the defendant is liable to the plaintiff for the whole of the losses flowing from the injury (Athey at paras. 22**

35. I agree with the proposition of the claimant that, even if I find her to lack credibility in some instances, I can nonetheless make an award where I find there is evidence of injury and loss. The issue is whether, after taking into account credibility of the plaintiff and other corroborative evidence, the head of damages has been proven.

36. I also note the following statement made by the court in **Brunelle:**

> **[117] The distinction between cause of injury and cause of loss is important in this case. For example, the defendant does not deny that the plaintiff sustained some (the claims, minor) injury as a result of the accident, but she denies that those injuries caused or contributed to the demise of the plaintiff's business, Now & Zen. In that regard, the defendant argues the business:**
>
> **1. failed for reasons other than any injury sustained by the plaintiff, or**
>
> **2. even if the injury contributed to the failure, such failure was inevitable in any event and hence no damages should be assessed on that account.**

37. The second case relied upon was ***Marois v Pelech*** 2007 BCSC 1969, affirmed 2009 BCCA. In this case, judgment was upheld. The trial court assessed the claimant's evidence with caution due to inaccurate answers, or answers that were inconsistent with other statements made. Weighing the lay witnesses' evidence, and the medical evidence, the court found consistency and accepted the lay evidence of profound effect from the accident. I agree that this is the approach that I must take. Both doctors agree that the claimant sustained a whiplash injury to her neck. Both doctors agree that there is a chronic left hip injury in her hamstring. Dr. MacKean opined that she sustained post-traumatic headache and there is no contrary opinion. I therefore find that she sustained these injuries. The argued injuries are her low back and her left greater than right adhesive capsulitis. Her evidence was that the left and right shoulder complaints are an overuse injury.

38. In the area of the medical evidence, the claimant argues that I should accept the evidence of Dr. MacKean that there will be no further resolution of her pain and that she had reached maximum medical improvement. Dr. MacKean supports total disability. Her evidence was that the findings were consistent with the claimant's complaints. Based on this report, Dr. MacKean recommended 10-12 massages per year, kinesiology sessions and exercise to be done either at a gym or at home, an OT assessment to assist with function in the home, a pain clinic, MRI of both shoulders, housekeeping and yard assistance. The claimant argues that that the findings of Dr. Olch and the MRI were consistent with the hamstring injury and that her subjective reporting is accurate. He points out that Dr. Olch finds the claimant to be disabled based solely on the hamstring injury. He argues that I should accept Dr. MacKean's opinion on the frozen shoulder that it developed gradually and points out that Dr. Olch admitted that she had shoulder complaints initially and that her age and pre-existing conditions render her more susceptible to this type of injury. However, this argument does not address Dr. Olch's evidence that the hallmark of a frozen shoulder diagnosis is lack of range of motion. It is clear that this developed in late 2017/early 2018 based on the clinical records.

39. Counsel for the respondent also states that parts of the claimant's evidence strain common sense. She does not receive treatment and does not take medication for her headache. She goes into a dark room. She spoke about and demonstrated her exercises but the occupational therapist found her to be drastically deconditioned. I do not agree that these parts of her evidence strain common sense. The exercise was a simple wall push-up. Her exercises were descried as gentle and including stretching. He points out that the evidence of [redacted] does not support a finding that the plaintiff is depressed, sleepless, and socially isolated. He argues that headaches are subjective and cannot be verified by objective means. He points out that the home care services stopped in late January 2020 prior to the shutdown. He suggests that it makes more sense that she stopped the treatment because she was feeling better. He also says that her evidence that her life was joyless was contrasted with the evidence of [redacted].

40. The subsequent motor vehicle accident was not disclosed to Dr. MacKean. This accident had happened six weeks before Dr. MacKean's examination and opinion. The claimant admitted on cross-examination that she sustained an accident in 2024 causing re-injury to her shoulder and neck and she told the ICBC adjuster her sitting time was reduced by that March 2024 accident. This is troublesome that the claimant did not disclose this to Dr. MacKean. She agreed in evidence that she had symptoms and she agreed that she had several massages. She was cross-examined on Exhibit "6", tab 20. She admitted

to telling ICBC that she had a previous injury from a car accident and that the second accident aggravated her injury. I find that it is possible that some of Dr. MacKean's findings may have been more significant due to the recent injury. In particular, some of the objective evidence on examination may be in part a reflection of symptoms from the 2024 accident.

41. There was a slip and fall accident in 2020. This accident was the subject of a provincial court action filed by the claimant against Cadillac Fairview seeking lost wages of $10,000 and pain and suffering of $5,000. The accident occurred on January 20, 2020, and the claimant provided a statement to Cadillac Fairview. She was injured on an escalator and injured her knee and wrist initially. Her statement included that she had a construction project in Chicago as a project management making $5,000 per month. She was unable to go because of knee, leg, and back pain – she could not wear her winter coat. She was seeing Lionel Webb, RMT. She stated that the leg and knee are getting better but her back still has great pain if she stands or sits for too long. She disagreed in her evidence that she was referring to the 2020 injury in her statement. This does not make sense. I find that she was referring to her 2020 back injury in those statements. This also was not disclosed to either doctor. I find that the plaintiff has made a prior inconsistent statement as to the 2020 lower back injury and this adversely affects her credibility on this point.

42. I was asked by the respondent's counsel to disregard parts of Dr. Olch's opinion as he did not have all the facts. In particular, he argues that he was not told the truth about her ability to sit her to stand and that both Dr. Olch's, Dr. McKeen's, and Jasmine Shivji's opinions on disability were informed by this. He also notes that they were not correct in their assessment that the plaintiff was currently significantly impaired from working. This of included the opinion of Dr. Olch. The examination was in 2022. The respondent did not seek to update the expert and to have him consider other evidence and provide an addendum. The plaintiff was clearly uncomfortable the second day of the arbitration. It is not the number of minutes or hours that matters. The fact remains that she cannot sit stand or walk sustainably for lengthy periods of time. I cannot accept The respondent's argument that I should disregard the evidence he lead on this point.

43. In the result, I find that in the subject accident, the claimant sustained the following injuries:

1) A Grade II neck strain exacerbated by the 2024 accident.

2) A Grade II soft tissue injury to her left shoulder;

3) A left hamstring syndrome/hip tendinosis;

4) Headache; and,

5) Low back soft tissue injuries. These were healing or healed and then exacerbated by the 2020 slip and fall and the 2024 accident.

44. I prefer the opinion of Dr. Olch on the issue of her left frozen shoulder. His evidence that the defining characteristic was reduced range of motion and that the frozen shoulder was too remote is more

consistent with the medical records. I do not find that the soft tissue injury gradually turned into a frozen shoulder as there was insufficient evidence on the medical theory of causation. Having made this finding of fact, I am driven logically to also reject the claim for right frozen shoulder. These complaints are unrelated to the accident.

E. Past Wage Loss

45. The claimant testified that she owned two businesses commencing in 2010 and 2011. The first business was Organics Market. The second business was Mainly Organics Pizza on Denman Street. Her role in the business was active. She went to stores and managed the locations including payroll, ordering, following up on staff concerns, and general accounting. She testified that she started these primarily for [redacted] benefit. He was working at Auto Dairy and she was able to order supplies directly from them. In 2012, she "walked away" from these businesses. Her evidence was that the property taxes for the pizzeria went up significantly. The businesses stopped making financial sense due to the increased expenses. Because she had CGA credentials, she decided to go back to that. She received advice from a trustee in bankruptcy to do a consumer proposal for the businesses which is one step down from a bankruptcy. She had a certain amount of time to pay out pursuant to the proposal. She paid $500 every month. In June 2015, she completed the proposal by selling two properties contained in the list marked as Exhibit "5".

46. She decided to go back to work. She argues that the presence of the consumer proposal gave her motivation to return to work. The claimant's evidence was that prior to the collision she worked as an office manager for D.B. Equipment Sales Ltd. She testified that she chose to be an employee because her experience running businesses was not successful. After that, her job was a contract position with D.B. Equipment Sales Ltd. She worked for the owner, [redacted], making $45 per hour and working full time, seven hours a day. Sometimes she would work 12 hours a day. D.B. Equipment Sales Ltd. was an HVAC company. There was an office for her to work in. She did the books for the company. She started there in 2014. They went bankrupt in 2014. Exhibit "2" contains her earnings from D.B. Equipment Sales in 2014. These appear to have been directly paid to the claimant. The business had an office in Vancouver on West Georgia Street. There appears to be no issue between the parties as to this period of employment.

47. The claimant's evidence was that the owner [redacted] had plans and approached another HVAC company. He was apparently approved to be an authorized dealer. The plan was he was going to open a new company under a new name Woods Facilities Ltd. Exhibit "1" is a letter dated August 21, 2014, in which Mr. Woods offers the claimant a job with Woods Facilities. This letter has a different address than West 6th Street in Vancouver. The offer is written in pounds sterling. It is unsigned. It offers the claimant a job on a temporary contract as an administrative assistant full time. The claimant has signed the second page on August 21, 2014. There is no original. According to the claimant, she continued to work for him setting up the company and she was responsible to set it up. Some of the tasks completed were set up of the company and reservation of names and accounts. Exhibit "3" contains earnings statements from D.B. Equipment Sales from 2015. The first has a cheque number. The rest do not. After the company went

into bankruptcy, the claimant says that she prepared these statements as "banked hours" to show how much she was owed. They relate to the new company even though they have the old company name on them. He had a partner who was supposed to be working in the new company. At some point, the partner [redacted] met with her and gave her $2,700 US as a good faith payment. This was included in her 2014 income. The claimant has made various attempts to contact [redacted] such as looking up to his company which is now defunct. His old number is out of service. Her Plan B was to apply for another comptroller position if the work with [redacted] did not pan out. Her evidence was that she was working but was not paid after D.B. went bankrupt. She relies on Exhibit "3" as evidence of the value of her work. She is the author of Exhibit "3". She was entering her time and creating paystubs but testified that she was not being paid and there was some agreement that she would be paid later. I place little weight on Exhibit "3". It was prepared by the claimant and appears to be relied on to buttress her credibility which is not an admissible purpose.

48. The claimant states that I should accept that she was employed by D.B. Equipment Sales until it went bankrupt in late 2014. She also states that I should accept that the owner [redacted] planned to start another business called Green Master/Woods Faculties and that the claimant was hired by [redacted] to set up the new company. The respondent, on the other hand, states that the 2015 documents were fraudulently prepared by the claimant to support a longer period of employment. I have concerns about the documents. Firstly, the offer contains no signature and is expressed in pounds sterling. Secondly, the acceptance page original was not presented. Thirdly, Exhibit "7" (EI records) indicate that her last day was August 15, 2014 due to her employer going bankrupt but the paystubs in Exhibit "3" start in December 2015. The offer is dated August 14, 2014. The documents are internally inconsistent. I also have concerns about her testimony that [redacted] or his previous company was bankrupt and he did not want his creditors to know he owed money. The claimant appeared willing to collude with [redacted] in an attempt to assist him in avoiding potential payments to creditors. This does not reflect well on her credibility in general. Further, on her own evidence, she was in touch with [redacted] maybe one to two times post-MVA. She only met with "[redacted]" once and did not have his contact information. I agree with the submissions of the respondent that her evidence on this point negatively affects her credibility. I cannot accept it as truthful. It strains common sense. She may or may not have been doing unpaid work for [redacted] but I do not accept the letter or the unpaid pay stubs as proof contents. I find that the claimant was last gainfully employed in August 2014.

49. In consideration of the claimant's earning capacity from employment income, I must consider what was declared on her income tax returns.

50. Her Canadian Income Tax Returns reveal the following income:

	2010	*2011*	*2012*	*2013*	*2014*	*2015*
T4 earnings	$6,350	$7,200	$7,900	$7,007	$44,136	___
Investments	-	$60	$188	-	$308	$228
Gross rental	$49,600	$51,150	$53,450	$52,200	-	$39,500

	2016	2017	2018	2019	2020	2021	2022
T4 earnings	-	-	$1	$1	-	-	-
Investments	$305	$243	-	-	-	-	-
Gross rental	$24,000	-	-	-	-	-	-
Net rental income	$(37,602)	-	-	-	-	-	-
Taxable capital gain	$21,048	-	-	-	$12,708	-	-
Capital gains/losses	-	-	-	-	-	-	-
Gross Business	-	-	-	-	-	-	-
Net Business	-	-	-	-	-	-	-
Other	-	-	-	-	$20,000	$18,600	$900
Dividends	-	-	-	-	-	-	-
EI Benefits	$2,620	-	-	-	-	-	-
Social Assistance	-	-	-	-	-	-	$1,454.00
CPP Benefits	-	-	-	-	-	$4,480	$5,019
Net rental income	$(37,470)	$(26,691)	$(15,812)	$(17,251)	-		$(29,551)
Taxable capital gain	$17,838	$2,000	-	-	$78		$28,896
Capital gains/losses	$35,676	$4,000	-	$57,792	-		-
Gross Business	$26,590	$31,600	$27,920	$19,950	-		-
Net Business	$16,858	$26,959	$9,455	$(705)	-		-
Other	-	-	-	-	$4,235		
Dividends	-	-	-	-	$32		$14,986
EI Benefits	-	-	-	-	-		-

51. The claimant asks me to assess past income loss based on full time work. This submission is based on full time employment with D.B. Sales or $95,000 per annum. Her plan and belief testified to was that she would have continued with the new company Green Master and would have been paid $5,000 per month ($60,000 annually) until the office was set up and then she would have earned $3,200 bi-weekly ($83,200). If this did not work out, she would have sought similar employment at a similar wage. This gives rise to a calculation of $909,000 to the date of the arbitration. This was reduced for a contingency of 25% due the uncertainty. With an income tax reduction of 22% this amounts to a loss of $531,765 claimed by the claimant.

52. The respondent relies on the claimant's pre-accident income summarized in its arguments.

Year	T4	Net Business	Total
2010	$6,350	$16,848	$23,198
2011	$7,200	$26,959	$34,159
2012	$7,900	$9,455	$17,355
2013	$7,007	($705)	$6,032
2014	$44,136 + 3483	($60,736)	($13,117)

53. The respondent argues that there is insufficient significant income shown on her ability to work as an office accountant or manager. She did not try to go back to her former employment. There is no pattern that allows for an assessment of loss of income stream. Her loss of income claim must be assessed in light of her cruises, trips away, long weekends away which are incompatible with the desire to hold on to a regular job. The respondent suggests that I assess past income loss between $50,000 - $70,000.

54. I agree that from 2010 – 2014 she declared modest amounts of income of under $10,000 with the exception of 2014. She earned $44,136 in that year plus the extra money she received from "[redacted]" for a total of about $47,000. She stopped working in the summer of 2014 as set out in the EI records. I have concerns about the credibility of the claimant with regards to the time period between the summer of 2014 and the accident. She gave evidence that she needed to find employment prior to the accident but this is inconsistent with the termination of her employment in 2014 with no further income producing employment. Her evidence that she was working essentially for free is also inconsistent.

55. As earlier referred to, the claimant applied for EI regular benefits after the accident. There was a two week waiting period. Then she had regular benefits for a short period of time and then this was switched to sickness benefits. She was cross-examined on the records. She was out of country from March 4, 2015 to June 4, 2015. It was suggested to her that she was "banking hours" while collecting EI. She was cross-examined on other misstatements in the records including a declaration that she was in the United States for family reasons, that she was ready and available for employment at a time when, in her direct examination she testified that she could not work, and that she was out of country in May 2015 several times. She did not apply for sickness benefits until June. She was out of country for two weekends in June 2015 working on her real estate. Although she accommodated her injuries by standing and moving around in the plane, it does appear that she was quite active and continued her real estate endeavors and continued to travel. Her evidence was that she was able to stand in the plane and that she was "always moving around" doing real estate.

56. When confronted with the May 10, 2015, correspondence from Services Canada, she admitted that she was looking for work and had applied to six positions in various administrative positions. Services Canada found that she was willing or capable of working full time in her regular field based on the information provided by the claimant. It is also notable that she provided her last day of work as August

8, 2014. She was off benefits from July 26, 2015 and then back on regular benefits from October 15, 2015 to January 16, 2016. The respondent argues that the pay stubs are not consistent with her EI statements. The claimant indicated she was available for work after the accident. However, her evidence was that she was feeling badly and her claim was converted from regular to sick benefits. I accept this evidence as truthful as it is consistent with the records. I take into account that she searched for and could not find a job during this time period. Her evidence was that she realized that she could not work later. The records are more consistent with her employment ending in summer 2014 as I have earlier stated. I agree with the respondent's submissions on this point that the employment insurance documents contradicted her evidence as to her last date of employment, that there is some inconsistency between her statements in this regard and her statement at the examination for discovery, that hurts search for several jobs after the accident is inconsistent with her statement that she could not work. Currently, she is on Persons with Disabilities Payments and CPP (Old Age).

57. I find that the claimant's pre-existing earning capacity was nominal for self-employment/business activities. Her last year of employment shows part year full-time employment. The gap between being paid off and the accident has not been adequately explained by the claimant's evidence. Doing the best I can with the evidence, I find that, but for the accident, the claimant would have likely sought employment. I also find that she would have had difficulty maintaining full-time employment and finding a job. I find that her loss is best quantified as a past loss of opportunity because there is insufficient evidence to establish a stream of loss or ongoing increases/raises. On balance, I find that the claimant's approach overvalues the loss. Her best year was about $47,000 per annum, or about $900 per week. Using the claimant's format of $900 x 505 weeks this totals about $450,000. From this amount, income tax would be deductible. The calculations would suggest a loss of $386,000. I am mindful of the respondent's submissions that the evidence does not support a strict arithmetical calculation. There are positive contingencies (raises/better income producing performance) and negative contingencies (her 2020 injury) to apply. I set these at a further reduction of 10%. Rounding this up, I award **$348,000** for past wage loss.

F. Real Estate Income

58. The claimant seeks $200,000 in compensation for loss of ability to invest in real estate. The claimant had been an investor in real estate since 1990. Exhibit "5" consists of a list of properties purchased and sold and attached evidence in support. Her evidence was that she was involved in her properties including the development, making sure that the workers were working, reviewing pictures, requesting drawings and attending on site. Prior to the accident, she could stay all day. After the accident she could not stay all day. Because some properties were in America, she filed both Canadian and American returns. She has not filed any American returns since 2019. She stopped investing in real estate in 2022. She did make profit selling her properties but says that she could have made much more profit. She no longer has a bank account in America. She no longer does business in America. She has sold the properties gradually since the accident. She could not put a number on how her loss could be quantified in her evidence.

59. Two charts of US and Canadian Real Estate Holdings were presented in evidence. Some unknown information was added in the claimant's direct evidence.

Summary of properties sold in Canada

Tab	PLOD #	Address	Purchase Date	Purchase Price	Date Sold	Sale Price
1	C1.28 C1.29	[redacted] Vancouver, [redacted]	1984	$99,000	Still owns	n/a
2	C1.11 C1.14 C1.15	[redacted] Coquitlam, BC	1991	$99,900	2021	$459,000
	No docs	[redacted] Chilliwack, BC	1994	$116,000	2009	$170,000
3	C1.19 C1.12 C1.21	[redacted] Port Coquitlam, BC	1994	$108,900	2016	$222,000
4	C1.16 C1.17 C1.18	[redacted] Port Coquitlam, BC	1994	$124,900	2017	$375,000
5	C1.35	[redacted] Coquitlam, BC	1998	$133,900	2009	$280,000
6	C1.25 C1.26 C1.27	[redacted] Surrey, BC [redacted]	2004	$174,900	2014	$242,000
7	C1.25 C1.26 C1.27	[redacted] Vancouver, BC [redacted]	2005	$240,500	2015	$430,000
8	C1.9 C1.10 C1.12 C1.13	[redacted] Vancouver, BC	2007	$664,000	2013	$895,000
	No docs	[redacted] Port Coquitlam, BC	2016	$274,900	2020	$368,800

60. Property 1 is her principal residence. The claimant states that prior to 2012, she only sold one property in Chilliwack because it was too far away. This is the third (unnumbered) property in the above-noted chart. Property 8 and 6 were sold to fund her consumer proposal. She sold property 5 because she owned it with a friend and he wanted to get into the real estate market. She invested at his advice and testified that she lost that money in the stock market. She blames him for the losses. She sold property 6 and 7 to pay out the consumer proposal from her previous businesses. The last unnumbered property was sold as it was a pre-sale and she could not afford to complete. Her evidence is that she had to sell the rest of her Canadian properties other than her principal residence in order to survive financially.

61. She began investing in American real estate. The American Real Estate holdings are summarized here:

Tab	PLOD #	Address	Purchase Date	Down Payment	Purchase Price	Date Sold	Sale Price
1	C1.69 C1.70	[redacted] Henderson [redacted]	Oct 2012	None	$85,000	Sept 2014	$151,000
2	C1.48 C1.49	[redacted] [redacted] Las Vegas [redacted]	Nov 2013	$10,000	$10,000	Feb 2020	$112,000
3	C1.50 C1.51	[redacted] [redacted] Las Vegas NV [redacted]	Dec 2013	$10,000	$60,000	Jun 2018	$110,000
4	C1.71 C1.72	[redacted] Chicago IL [redacted]	Jul 2016	$33,000	$33,000	May 2018	$190,000
5	C1.73 C1.75	[redacted] Chicago IL [redacted]	Jul 2016	$12,000	$12,000	Unknown	Foreclosure
6	C1.54 C1.55	[redacted] Las Vegas [redacted]	May 2018	$5,000	$75,000	Oct 2020	$109,000
7	C1.52 C1.53	[redacted] Las Vegas NV [redacted]	May 2018	$5,000	$74,550	Oct 2020	$109,000
8	C1.58 C1.59	[redacted] Las Vegas NV	Jul 2018	$10,000	$85,000	Jun 2022	Foreclosure
9	C1.74 C1.77	[redacted] Chicago IL [redacted]	Nov 2019	$36,000 (estimate)	$62,000	June 2019	$265,000
10	C1.60	[redacted] Chicago IL [redacted]	Aug 2020	$21,000	$81,900	Sep 2022	Foreclosure
11	C1.56 C1.57	[redacted] Elmhurst IL [redacted]	Jul 2021	$36,000	$160,000	Sep 2022	Unknown
12	No docs	[redacted] Chicago IL (bare lot)	Unknown	$5,000	Unknown	A few years ago	$12,000

62. Property 1 (Smiling Cloud) sold in September 2014. She used an LLC "West Coast International" to purchase more properties. In November 2013, she borrowed $20,000 and borrowed equity of $46,000 from 6876 Smiling Cloud. She used this to purchase properties 2 and 3 from [redacted]. Her evidence was that she eventually sold properties 2 and 3 needing to fund her lifestyle. She also states that she sold property 4 out of financial necessity. She testified that property 5 went into foreclosure due to the pandemic. In February 2018, she borrowed equity ($21,000) from [redacted] Decatur Blvd. She bought property 6,7, and 8. According to her, the properties had to be sold due to her injuries and property 8 went into foreclosure. She began purchasing in Chicago and Elmhurst, Illinois (property 9, 10, 11, and 12). Her strategy in real estate was to buy without money down or to use other people's money. These were either fix and flip or redevelopment. The American system is different. American guarantors would charge $5,000 for guaranteeing the line of credit on the properties. On property 9, the guarantors [redacted] and

[redacted] only stood to make $5,000 although they were described as partners. The claimant agreed with the discovery evidence that she called him a partner, that West Coast International LLC was incorporated in Nevada and that [redacted] and [redacted] were listed as partners. Her evidence was that she wanted them to be part of the agreement so they went on her operating agreement. The property located at property tab 11 was also guaranteed by them. It was going into arrears so [redacted] bought the property for the arrears. Her evidence was that this was pandemic-related. There was some issue between counsel. Claimant's counsel argued that the claimant had given that evidence indirect and had qualified that in cross-examination. I rely on her evidence in chief and my notes indicate that she agreed it was at least partly pandemic-related. Property 12 was accident-related according to her evidence.

63. The claimant was cross-examined on two payments from Smiling Cloud. $46,000 was paid to Westminster Loan Servicing and $51,000 was paid to Del Toro Loan Servicing. West Coast International LLC had an address for service at the claimant's residence.

64. The claimant was cross-examined on Exhibit "6". She filed for bankruptcy in September 4, 2013. At that time, she declared monthly income of $2,191 for accounting income. It was pointed out to her that she did not account for Smiling Cloud. It closed for sale on September 12 2014, before her creditors proposal was finalized in 2015.

65. She testified that she was incorporated in 2013 as Westcoast International LLC. The corporate sales are on her income tax returns. She testified that she does not know if her returns are right or wrong and relies on her accountant. It was suggested to her that she put properties into her LLC to avoid declaring them to creditors. Her proposal was cleared in 2015 and until that time she had to declare her sales and money to creditors including those in the next 12 months. She denied the suggestion that she had a moral obligation and legal obligation to report them to her creditors. I have concerns about this evidence. The claimant was trained as an accountant and would have understood generally accepted accounting principles. I agree with the submission that there was an attempt to evade her creditors during this period. This does not reflect well on her credibility.

66. Her American Income Tax returns reveal the following income:

	2014	*2015*	*2016*	*2017*	*2018*	*2019*
Business Income or Loss	(60,736)	(16,980)	-11,693	-16,241	-$31,068	-
Capital gain or (loss)	4,805	-	-	-	-	-
Pensions and annuities	-	-	-	-	-	-
Rental real estate, royalties, partnerships, trusts, etc.	(9,519)	-	-	-	-112,320	-
Other Income	-	(65,444)	-82,424	-111,097	-	-
Adjusted Gross Income	(65,444)	(82,424)	-94,117	-127,338	-143,388	-

67. It is unclear if the incorporated entity filed Income Tax Returns. It is clear from her cross-examination regarding her income tax returns that she was taking business-related trips and she was writing this off on her personal returns. Errors and omissions were blamed on her accountant. She took more trips as time went on and testified that because she was now doing business in Las Vegas and Chicago from 2015-2017, her business activities had increased and she was buying more property to make up for lost income. Her partner [redacted] went to Las Vegas but only she went to Chicago. She would go deal with the properties, make calls, etc. Some of the trips were compensated for by casinos. She points to profit on properties, Tab 2 ($16,107.68), Tab 3 ($50,270.79, Tab 6 ($17,346.58) Tab 7 ($18,455.5) and Tab 8 ($9,267.19) as some evidence of the quantification of her loss.

68. Her evidence is that the only reason for her to sell the properties was lack of income due to the accident. She could not do the work associated with the properties such as on-site visits. It seems clear that her assets have been depleted.

69. The respondent argues that her assets have been depleted because of her gambling habits and her lifestyle. For instance, she received free trips to Las Vegas and Palm Springs, and cruises. She admitted that these were compensated for by casinos but would admit to a small amount of current gambling. Her evidence that this was based on her past history of gambling and that she had stopped is not credible.

70. In November 2015 she was sued by the Wynn Casino for failure to repay a casino marker for USD $50,000. She blames the casino for extending her too much credit and for allowing her to become impaired from alcohol. She lost all the money in one sitting playing cards. She eventually paid the sum owed to Wynn. She admits to being sued and to having to pay back that money. She owes other casinos money but those casinos did not sue her. This also suggests a significant gambling history.

71. She was also cross-examined on an affidavit in her family law action against [redacted] filed in February 2023. In her affidavit, she deposed that she had quit her job as a corporate comptroller for Bryers to buy her businesses. She owned eight properties when she met [redacted] in 2000 or so. She was selling one per year to provide funds for the restaurants. The relationship broke down in 2021 when she refused to pay a second mortgage on their apartment. Her affidavit states that she would go on cruises and to Las Vegas. This was once a year and twice per year after 2016. The casinos paid because they knew the couple liked to gamble. They also went to Palm Springs starting in 2016 and sometimes went for fancy dinners. Long weekend trips to Vegas occurred five to six times per year. She owed another 60K to other casinos. The trips gradually slowed down since she no longer gambles. She also testified that she put loans on her personal residence to support her lifestyle and that since 2013 this had increased to 1.2 million. Importantly, her affidavit contained a statement that her current financial worries are attributable to [redacted]:

> *Before I met [redacted] I lived a non-lavish lifestyle, I owned multiple investment properties. I did not gamble. [redacted] constantly needed to buy designer items, go on vacation and gamble. He graduated from Kits high school. He has a need to keep up with his friends from the area which has bene (sic) the root cause of our financial troubles.*

72. In cross-examination, she admitted this was "partly true" but also blamed the accident. I agree with the submission that this was inconsistent with her direct evidence. Although I was asked by respondent's counsel to find further that 8 investment properties were sold to run her businesses before the accident, I do not recall that this was specifically put to the plaintiff in a place less weight on it accordingly.

73. She was also cross-examined on a series of withdrawals in the amount of $904.35 (7) and $504.25 (2) from a Coast Capital account at a local casino. She testified that she was withdrawing money to pay back her friend and that she was only going to the restaurant, Personas. Counsel with further respondent stays given the amounts taken, it is difficult to believe this amount was taken to pay her friends back for dinners and coffees. In addition, she did admit to playing a slot machine and winning $90,000 but denied this was a regular occurrence. She said she lived for a while off that. Her evidence that she stopped gambling is also contradicted by these withdrawals. I agree with the submission that series of withdrawals are more consistent with gambling.

74. All of this evidence suggests a significant issue with gambling. Her evidence that she had to sell the properties to fund her lifestyle is inconsistent with the increase on the mortgage on her primary residence to 1.2 million or so. Presumably this was also done to fund her lifestyle. It is also inconsistent with her statements made with regards to the lifestyle she enjoyed with her former partner.

75. The respondent's counsel also points to the small claims summons that she had a job as a construction manager waiting for her in Chicago as inconsistent with her discovery evidence that there were no US jobs that she could have earned money at. The alleged slip and fall is said to have occurred in January 2020 and a construction job was said to have occurred in cold weather. The closest Chicago project in Exhibit "5" tab 10 did not happen until August. He argues that I should view the American real estate sales cautiously since she had made prior inconsistent statements. I agree with this submission. This also causes me some concern with regards to her subjective recollection of the reason for the various sales.

76. The respondent states that there was fraud in the bankruptcy proposal. The specifics of the proposal were not put to her but she did sign it and it was filed in BC Supreme Court on September 4, 2013. She held the Smiling Cloud Property in her own name at that time and had purchased it in 2012. The respondent states that this amounts to a fraud on her creditors. She purchased properties in Las Vegas with the proceeds of Smiling Cloud. Smiling Cloud was sold on September 12, 2014 – eight days outside of the 12-month period in the bankruptcy. I was also urged to find lack of credibility given that her evidence did change when it was put to her that her limited company was not incorporated until November 14, 2013. She again blamed her accountant. Much of the proposal was not specifically put to her and I can only find that she should have at least made some enquiries as to whether or not Smiling Cloud should have formed part of the disclosure. She did not do so. This also causes me some concern in relying on the claimants evidence entirely.

77. The respondent states that her evidence that her friends pay for outings and that she has no other source of income other than from CPP and the B.C. government strains common sense. Entries from her bank account show thousands of dollars going in and out of her bank account. Counsel for the respondent states that it also strains common sense that the fact that the claimant has credit cards, a square account, a line of credit and a large mortgage with two Toronto Dominion Bank do not score up with her sources of income. He argues that I should find she has failed to declare all sources of income in her declaration to the government in obtaining welfare funds. I pause to note that there was no direct evidence as to any settlement that she may have received from her partner, [redacted]. While her finances are murky and inconsistent, I decline to impute undeclared income to the claimant. I do find that there are errors and omissions is stated above.

78. The respondent noted that the claimant had a tendency to blame others. This included the loss of $200,000 in the stock market being blamed on her friend. She blamed her accountant for any irregularities in her tax statements. I was also asked to consider statements made in the proposal to creditors however this was not put to the claimant in cross-examination. Although she signed off on it, I cannot place a good deal of reliance upon this part of the claimant's arguments. In the case of the confusion surrounding legal ownership of Smiling Cloud, the claimant blamed her accountant. However, she is a trained professional herself and this evidence does strain common sense.

79. The respondent's counsel also states that I must take into account that the claimant was in fact insolvent in 2013 and then purchased seven properties in the USA following the accident. He states that these purchases show that the work of the claimant purchasing and selling real estate continued possibly up to 2021. I agree with the submission.

80. She provided a previous inconsistent statement in the litigation on her slip and fall accident in 2020 seeking lost wages of $10,000 and pain and suffering of $5,000. Her statement included that she had a construction project in Chicago as project management making $5,000 per month. On May 11, 2020 she wrote that she had now lost the Chicago opportunity. This was inconsistent with her evidence at arbitration about her real estate loss. This is a prior inconsistent statement that also is problematic.

81. The claimant also conceded that some properties were sold or let go due to the pandemic. I find that much of the claimant's need to sell her properties is from financial stress caused by her excessive lifestyle with [redacted], her gambling habit, the pandemic, and the breakdown of her marriage. There is also little evidence to support a quantum. I decline to make an award for loss of real estate development as I find it has not been proven on the balance of probabilities.

G. Non – Pecuniary Loss

82. The respondent argues that I should take that the claimant does not have the levels of pain claimed. Her evidence that her life was joyless was contradicted by the evidence of [redacted], the one to two yearly cruises she took with [redacted] and several trips to Las Vegas and Palm Desert per year starting in 2016.

83. Her credibility is marred, respondent's counsel submits, by her failure to admit low back pain from her 2020 accident and her failure to disclose it to Dr. Olch and her failure to provide Dr. MacKean with the subsequent MVA information.

84. Her failure to admit this does cause some concern. However, I have assessed her medical evidence keeping this in mind and keeping in mind my own observation of the claimant. She has neck complaints, soft tissue injures to her neck and left shoulder, a left hamstring syndrome/hip tendinosis; headaches, and low back soft tissue injuries exacerbated by the Cadillac Fairview injury and the 2024 accident. Her frozen shoulder complaints are not related. According to Dr. Olch, she is vocationally and avocationally disabled from her hip injury which is non contentious. There are some emotional complaints referenced in the report of Jasmine Shivji but no formal diagnosis. The evidence of [redacted] supported at least some of the plaintiff's evidence and in particular her evidence that she had difficulty with static positioning and walking.

85. Claimant's counsel argues ***Lindal v Lindal*** 1980 CanLII 467, for the factors influencing the award for non-pecuniary damages including the age of the claimant, the nature of the injury, the severity and duration of pain, disability, emotional suffering, impairment of life, family and social relationships, physical and mental abilities, and loss of lifestyle. He also cites Stapley ***v Hejslet*** 2006 BCCA 34 at 46, leave to appeal refused SCC 100.

86. I agree that these are the factors to consider. I must consider putting the claimant in the same position she would she would have been absent the accident as stated in ***Pan v Lau and Tai*** 2020 BCSC 288. The claimant states that the evidence clearly shows she lived a beautiful life prior to the collision enjoying the finer things in life and that she did not mind paying for them. She enjoyed travelling, dancing, fine dining, and other activities. Her travel was far less enjoyable post-accident. It should not be held against her that she could not afford to pay for services after the directions to pay relapsed.

87. The claimant has cited **Saadati v Moorhead** 2017 SCC 28 at 638. The court held that proof of mental injury in negligence law depends upon the claimant satisfying the criteria applicable to any successful action in negligence: a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage. Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. The ordinary duty of care analysis is therefore to be applied to claims for negligently caused mental injury. In particular, liability for mental injury must be confined to claims which satisfy the proximity analysis within the duty of care framework and the remoteness inquiry.

88. I agree that a finding of legally compensable mental injury need not rest, in whole or in part, on the claimant proving a recognized psychiatric injury. I agree that a trier of fact adjudicating a claim of mental injury is not concerned with diagnosis, but with symptoms and their effects. Emotional upset was reasonably foreseeable mental injury. To establish mental injury, claimants must show that the disturbance is serious and prolonged and rises above the ordinary annoyances, anxieties and fears that come with living in civil society. I find that her presentation on the stand and her self-reports to OT Shivji were consistent and that I can find that she has proven on a balance of probabilities the occurrence of mental injury. However, many of her other stressors were not considered in this diagnosis. On the evidence, I can only find that the plaintiff has developed anxiety and some feelings of sadness and loss. These are compensable. I do not agree with the submission that all of this is related to the accident. She has some unrelated complaints. At least part of the loss of her beautiful life relates to the breakdown of her marriage which was unrelated. However I accept that her physical complaints from the accident have had a significant impact on her ability to earn income and to enjoy her life.

89. The claimant relied on a number of cases to support an award of $150,000 for non-pecuniary damages. These included ***Forghani Ashrafi v Pena*** 2023 BCSC 1126 in which a 61-year-old accountant was awarded $122,000 for non-pecuniary loss. The claimant also cited ***Banic-Govc v Timm*** 2018 BCSC 1073 aff 2019

BCCA 413 where a 61-year-old youth counsellor with similar injuries was awarded $156,000. The claimant relied upon ***Debou v Besemer*** 2014 BCSC 1766 where a 62-year-old lawyer suffered similar injuries and the court awarded hundred $179,000. Lastly, the claimant cites ***Morena v Dhillon*** 2014 BCSC 141 wherein a 43-year-old hairdresser was awarded $167,000. In that case, she was diagnosed with depression and post-traumatic stress disorder and sleep disruption. These numbers were all adjusted for inflation. After being accounted for inflation, the cases cited by the claimant range from $122,421 - $179,000.

90. The respondent relies upon ***Kular v Bajaj*** 2019 BCSC 2140 where the male claimant was involved in three accidents and sustained soft tissue injuries to his neck, shoulder, back, and hip, as well as an anxiety disorder. The court found he had exaggerated the effect of the accidents and was prepared to manipulate the income on his return when it was in his interest to do so. The court awarded $60,000 for non-pecuniary damages. This amount has not been adjusted for inflation. In ***Wang v Johal*** 2019 BCSC 1036, the 56-year-old female claimant sustained soft tissue injuries resulting in back and leg pain. The court awarded the equivalent of $88,003 (adjusted for inflation). In ***Bains v Innes*** 2021 BCSC 2037, a pedestrian was knocked down causing soft tissue pain that became minor and infrequent after three years and was accompanied by a depression.

The court awarded just under $90,000 but applied a discount of 15% for pre-existing conditions.

91. After considering all of the arguments, I find that the claimant has proven a claim for soft tissue injuries to her neck, left shoulder, left arm, left hip, left leg, back, and headaches and fatigue. She also has insomnia. She has also developed some emotional response to the events in her life which include the accident, the 2020 injury at Cadillac Fairview, her 2022 relationship breakdown, and the 2024 injury. Many years have passed and there is little prospect of improvement on her disabling hip condition. I fix non-pecuniary damages at **$120,000**.

H. Loss of Earning Capacity

92. The claimant cites ***Morgan v. Galbraith*** 2013 BCCA 305, the Court of Appeal cited its earlier decision in ***Perren v. Lalari*** 2010 BCCA 140, describing the approach to take in assessment of a claimant's loss of earning capacity:

> **[53] [...] in Perren, this Court held that a trial judge must first address the question of whether the claimant had proven a real and substantial possibility that his earning capacity had been impaired. If the claimant discharges that burden of proof, then the judge must turn to the assessment of damages.**

93. In ***Ploskon-Ciesla v. Brophy*** 2022 BCCA 217, the Court of Appeal restated the operative principles which had previously been revisited in ***Dornan v. Silva*** 2021 BCCA 228, ***Rab v. Prescott*** 2021 BCCA 345, and ***Lo v. Vos*** 2021 BCCA 421:

> **[7] the assessment of an individual's loss of future earning capacity involves comparing a claimant's likely future had the accident not happened to their future after the accident. This is not a mathematical exercise; it is an assessment, but one that depends on the type and severity of a claimant's injuries and the nature of the anticipated employment**

in issue: Gregory v. Insurance of British Columbia, 2011 BCCA 144. Despite the lack of mathematical precision, economic and statistical evidence "provide[s] a useful tool to assist in determining what is fair and reasonable in the circumstance". Dunbar v. Mendez, 2016 BCCA 211 at para. 21, citing Parypa v. Wickware, 1999 BCCA 88 at para.70.

[8] Courts should undertake a tripartite test to assess damages for the loss of future earning capacity. In Rab v. Prescott, 2021 BCCA 345, Grauer J.A. clarified this approach. Although the judge did not have the benefit of Rab when he wrote his reasons, the principles summarized therein are not novel; they have been the applicable law for a considerable time.

94. In ***Rab***, supra, Justice Grauer described the three steps to assess damages for loss of future earning capacity as follows

[47] ... The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown v. Golaiy (1985), 26 B.C.L.R (3d) 353 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of the possible future loss, which step must include assessing the relative likelihood of the possibility occurring- see the discussion in Dornan at paras. 93-95.

95. Part of assessing any claim for loss of future earnings is to consider any positive or negative contingencies that may impact future earnings. In *Dornan*, supra, the Court stated:

92 In approaching this part of the appeal it is useful to remember that we are dealing with a specific contingency, not general contingencies. The importance of evidence in cases involving a specific contingency was discussed in Graham (and cited with approval by this Court in Hussack):

> **46 ... [C]contingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular claimant, e.g. a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingences, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.**
>
> **47 If a claimant or respondent relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports and allowance for the contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is realistic as opposed to be speculative possibility: Schrimp v. Koot, supra, at p.343 O.R.**

93 The process, then, as discussed above at paras 63-64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from Athey quoted above at paragraph

94 It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what has happened to the appellant in the past, which has to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in Athey, could be taken into account only to the extent they were found to be real and substantial possibilities. As Mr. Justice Savage put it in Gao v. Dietrich, 2018, BCCA 372:

[34] With respect to past facts, the standard of proof is the balance of probabilities. With respect to hypothetical events, both past and future, the standard of proof is a "real and substantial possibility". The standard of a "real and substantial possibility" is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative.

96. The claimant seeks an award on future wage loss in the amount of $408,318. She submits that her injuries, both physical and psychological, impaired her earning capacity and she had no training or skills to pursue any other profession. She asked me to find that she would have continued to earn income in accordance with the past wage loss assessment and that she would have worked until age 70. This amounted to an assessment of $544,424 using a six-year multiplier with 1.5% discount rate. She would reduce this by 25% to include negative contingencies and argues a claim of $408,318.

97. The respondent states that I should not make an award. Counsel relies upon an assessment of credibly.

98. Dr. Olch has made a medical finding that the left hip impingement is related to the accident and that it has caused a permanent disability. The next step in the test is whether or not, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. The answer to this question is yes. The claimant cannot work.

99. The third and more difficult step is to assess the value of the possible future loss. There has been insufficient evidence lead for me to make a strict arithmetical calculation as suggested by the claimant. The evidence on pre-accident wage loss does not support an income stream that can be used with precision. The claimant has since had further injuries in 2020 and 2024. Her date of birth is December 30, 1960. There is no evidence before me to suggest realistically that she would have worked to age 70. I find age 65 is a more reasonable retirement expectation. I assess the loss at **$60,000**.

I. Loss of Housekeeping Capacity

100. The claimant seeks an award of $12,180. The respondent does not agree to an award.

101. The claimant cites ***Kim v. Lin*** 2018 BCCA 77 for the principle that a loss of housekeeping capacity can be compensated as a pecuniary damages award when the individual has suffered a true loss. This means that they are unable to perform household chores and duties like they did prior to the accident. He further opined that the value of this pecuniary damage should be determined by looking at things such as cost of hiring replacement services and tying the value to the actual loss of capacity.

102. The claimant cites ***Hinagpis v. Adaza III*** 2019 BCSC 880, in which the claimant had sustained permanent injuries resulting in vocational and domestic impairment. Honorable Madame Justice Donegan took a similar approach as Honorable Chief Just Bauman in her assessment. She assessed housekeeping capacity as pecuniary damages due to a true loss of capacity which she found existed due to the individual's loss of capacity to do household chores and duties that would have been valuable to the individual and the family. She looked at the cost of replacement services and tied the award to actual loss of capacity.

103. In terms of the claimant's household activities, her evidence was that she sometimes cooked. For meals, she would place things lower down so she would be stretching downward rather than upward. She does not do her own housecleaning but no one helps her. Stretching bothers her. Her mother does the laundry and takes care of the yard. Notably, her mother is in her 90s. The claimant's evidence was that her house is a "mess". She states that her mother does the things that she should be doing. She appeared to be distressed by this.

104. The claimant estimated she needs 2 to 3 hours a week and the occupational therapist states that she needs 2 to 3 hours each month. She also needs seasonal assistance. She asserts a loss of $12,180 since the collision for loss of capacity.

105. The evidence from [redacted] is that she is no longer capable of doing housework, laundry and yard work. As a result, her 95-year-old mother has had to take over the cleaning, vacuuming, laundry and yard work. There being no evidence to the contrary, I award **$8,000** for this head of damage which takes into account additional injuries sustained in 2020 and in 2024 that may have affected her ability to clean and to yardwork in the past.

J. Cost of Care

106. The claimant relies on the report of Jasmine Shivji OT.

107. Her recommendations were summarized as follows:

	Service	**Replacement Time**	**Annual Costs**
1.	Medical Follow up	Yearly	Covered under MSP
2.	Sleep study	No replacement	Covered under MSP
3.	Occupational Therapy	No replacement	1,021.80 – 1,703.00
4.	Active rehabilitation	No replacement	2414.00
	Follow up	Yearly x 3 years	368.00
5.	Gymnasium Pass	Yearly to age 64	517.97
		65+	362.58
6.	Massage Therapy	Yearly	940.00 – 1,128.00

7.	Counselling	No replacement	1,680.00 – 2,700.00
8.	Pain Management program	No replacement	14,550.00
9.	Chronic Pain Self-management programs	No replacement	No cost
10.	Housekeeping -	Yearly	840.00
	Housekeeping - Seasonal	Yearly	420.00
11.	Transportation Allowance	Yearly	165.00-330.00

	Equipment	**Replacement Time**	**Annual Costs**
1.	Reclining chair	No replacement	1500.00
2.	Neck pillow	2 years	119.00
3.	Obus Forme	5 years	79.99
4.	Low stool on castors	No replacement	215.00
5.	Anti-fatigue mat	2 years	69.99
6.	Tub grab bar	3-5 years	85.00
7.	Fitness Tracker	3-5 years	164.95
8.	Massage tools	No replacement	130.00
9.	TENS	10 years	129.99
10.	Household cleaning items	n/a	n/a

108. The claimant submits that the correct principles applicable to an award for cost of future care are summarized in ***Warick v. Diwell*** 2017 BCDC 68 paras. 203-209, aff's 2018 BCCA 53:

> **[203] Claims made for future care must be both medically justified and reasonable. An award "should reflect what the evidence establishes is reasonably necessary to preserve the claimant's health": Milina v. Bartsch (1985, 49 B.C.L.R (2d) 33 (S.C.) at paras, 199 and 201; aff'd (1987), 49 B.C.L.R (2d) 99 (C.A.)**
>
> **[204] This requirement of medical justification, as opposed to medical necessity "requires only some evidence that the expense claimed is directly related to the disability arising out of the accident, and is incurred with a view toward ameliorating its impact". Harrington v. Sangha, 2011 BCSC 1035, at para.151.**
>
> **[205] The question has often been framed as being whether a reasonably-minded person of ample means would be ready to incur a particular expense: Andrews v. Grand & Toy Alberta Ltd. [1978] 2 S.C.R. 229 at p. 245.**
>
> **[206] The evidence with respect to the specific care required does not need to be provided by a medical doctor: Jacobsen v. Nike Canada Ltd. (1996), 19 B.C.L.R. (3d) 63, (S.C.) at para. 182.**

Her counsel further cites that there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional: ***Gregory v. Insurance Corporation of British Columbia*** 2011 BCCA 144 at para. 39 and that an award for the cost of future care is notional and imprecise in nature ***Strachan (Guardian ad Litem of) v. Reynolds*** 2006 BCSC 362. The court must consider evidence regarding what care is likely in the injured person's best interest and calculate its present cost, with appropriate adjustment for contingencies in all of the circumstances of the case: ***Courdin v. Meyers*** 2005 BCCA 91. He says that in making an award for future care costs, the court must consider both what is medically required and what expenses the claimant will likely incur. Items and services that the claimant is unlikely to use in future cannot be justified as reasonably necessary aspects of the cost of future care: ***Izony v. Weidlich*** 2006 BCSC 1315. He says that the test for assessing an appropriate award for the cost of future care is an objective one based on the medical evidence. It is twofold: first, there must be a medical justification for the cost; and second, the claim must be reasonable: ***Tsalamandris v. McLeod*** 2012 BCCA 239 at paras. 62-63.

109. The claimant stated that she got the most benefit from massage therapy and housekeeping. Her evidence was that she needed more housekeeping than was set out in the occupational therapist's report. The claimant asserts that I should consider the claimant's desires as well and as her fear of needles. Accordingly, the claimant removed from the occupational recommendations any physiotherapy or treatment involving needles and any recommendations related to surgery for her shoulders or her hips. The net present value of her future care costs is $25,827 to age 65 and $40,016 to age 70. Counsel for the claimant also added massage therapy costs of $6,760 based on Dr. MacKean's recommendations of 10 to 12 therapy sessions a year. Counsel also adds the annual cost of $1,820 for housekeeping assistance. With these adjustments, the net present value of the claimant's care costs is $32,494 to age 65 and $78,257 to age 70. She makes the claim at $78,257.

110.The respondent submitted that housekeeping was duplicated, the fitness tracker was unlikely to be used and stated that I should not award for counselling because the claimant would not likely attend and that physiotherapy was also unlikely. The respondent relies upon ***Liu v Bipinchandra*** **2016 BCSC 283** where the Court found the law to be that a claimant is entitled to compensation based on what is reasonably necessary to restore the claimant to his pre-accident condition. This is an objective test based on medical evidence. The claimant must also prove it is likely he or she would avail themselves of the requested services.

111. I agree that the principles applicable to the assessment of claims and awards for the cost of future care are:

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party...fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;

- the test for determining the appropriate award is an objective one based on medical evidence;
- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists etc.) can be taken into account to determine future care needs;
- it is sufficient that the whole of the evidence supports the award for specific items;
- a little common sense should inform the analysis however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the claimant would have incurred in any event.

See: ***Andrews v. Grand & Toy Alberta Ltd.*, supra; *Krangle v. Brisco*, 2002 SCC 9; *Milina v. Bartsch* (1985), 1985 CanLII 179 (BC SC), 49 B.C.L.R. (2d) 33 (S.C.), affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Langley Township* 2008 BCCA 428; *Gregory v. ICBC*, 2011 BCCA 144; *Jacobsen v. Nike Canada Ltd* (1996), 19 B.C.L.R.), (3d) 63 (S.C.); *Penner v. ICBC*, 2011 BCCA 135; *Shapiro v. Dailey*, 2012 BCCA 128.**

112. The respondent's counsel also takes issue in particular with the pain clinic and notes that the claimant had chosen the most expensive pain clinic. Although the witness stated that this was the best clinic and that they did not use needle-based therapies, I decline to award the most expensive option to the claimant and will award an allowance. I find that the housekeeping recommended is somewhat high as the expert did not assess for decreasing functionality with age. The claimant believes she needs more than the expert recommends. I decline to award on her subjective opinion. I find it unlikely she would be doing heavier housekeeping in any event. I have added an additional allowance for massage therapy to take into account the evidence of Dr. McKean. I have assessed ongoing losses to age 70. Unlike wage loss, this head of damage is not limited to working life expectancy.

113. I will estimate the future values using the claimant's methodology and award the following:

1.	Occupational therapy	No replacement	$1,335.70
2.	Active rehabilitation	No replacement	$2,414.00
		Follow up 3 years	$1,061.00
3.	Gymnasium Pass	Yearly to age 64	$507.82
		to age 65 – 70	$1,675.00
4.	Massage Therapy	allowance to age 70	$ 30,000.00
5.	Counselling		$1,680.00
6.	Pain Management	Program Allowance	$8,000.00
7.	Housekeeping -	Yearly 940 to age 70	$4,707.00
	Housekeeping – Seasonal	Yearly 420.00	No Award

8.	Transportation Allowance	Yearly 165.00-330.00 (net mileage increase not proven)	No Award
9.	Reclining chair	No replacement	$1,470.60
10.	Neck pillow	2 years 119.00	$100.00
	(deduction for usual cost of pillow required in any event)		
11.	Obus Forme		$149.45
12.	Low stool on castors		$215.00
13.	Anti-fatigue mat	1 year	$69.99
14.	Tub grab bar	1 replacement	$85.00
15.	Fitness Tracker	3-5 years	$164.95
16.	Massage tools	No replacement	$127.45
17.	TENS	10 years	$129.99
Total			**$53,892.95**

K. Special Damages

114. These have been agreed upon at **$32,019.00**.

L. Mitigation

115. I agree with the claimant that the respondent bears the onus of proving the claimant acted unreasonably; and had she acted reasonably, her losses would be reduced or eliminated: ***Janiak v. Ippolito*** [1985] 1 SCR 146 at 163- 166. This must be based on evidence: ***Chiu (Guardian ad item of) v. Chiu*** 2002 BCCA 618. The claimant took treatment until cut off by COVID. This was reasonable in the circumstances and is a high standard: ***Middleton v. Morcke and Lee*** 2007 BCSC 804.

116. Consideration as to whether damages would have been reduced is a "hypothetical event", and therefore the standard of proof is not a balance of probabilities. Rather, a respondent must prove that there was a "real and substantial possibility" that any part of the losses could have been avoided. If that is established, then the court will assess the degree of probability that the loss or some part thereof would have been avoided and assess damages accordingly: ***Forghani-Esfahani v. Lester*** 2019 BCSC 332.

117. Prior to the pandemic, the claimant was receiving treatment pursuant to a direction to pay. Treatment stopped with the pandemic and the directions to pay were never reinstated. She does not have the funds to pay out-of-pocket and so she stopped treatment. There is no evidence that her failure to take treatment would have resolved her injuries. In fact, her shoulder resolved without the recommended treatment.

118. The medication did not agree with her. ***Morgan v. Allen*** 2017 BCSC 1958, suggests that there should be no deduction. Impecuniosity is a defence: ***Brown v. Raffan*** 2013 BCSC 113. She was unable to continue without a direction to pay. Counsel for the respondent argues that I should deduct for failure to seek physiotherapy treatment depriving her of temporary relief. Under the circumstances, I decline to deduct for failure to mitigate.

M. Summary of Award

119. A summary of the award is as follows:

Head of Damage	Award
Past wage loss	$348,000.00
Non-pecuniary Damages	$120,000.00
Real estate loss	$0
Loss of future earnings	$60,000.00
Housekeeping	$8,000.00
Cost of future care	$53,892.95
Special damages	$32,019.00
Total	**$621,911.95**

The parties have fifteen (15) days to contact me if clarification of the award is required. Costs will be in the cause.

120. Subsequent to the issuance of the original reasons, the parties confirmed the following UMP deductions:

Tort payment	$342,750
Part 7 medical expenses paid	$2,368.04

The Net amount awarded is $276,793.91.

Dated: June 4, 2025

Carla A. Bekkering B.A. LL. B. Q Med. C Arb.