

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hauer v. Clendenning*,
2010 BCSC 366

Date: 20100322
Docket: M109666
Registry: New Westminster

Between:

Joanne Denise Hauer

Plaintiff

And

Justin Scott Clendenning

Defendant

Before: The Honourable Mr. Justice Slade

Reasons for Judgment

Counsel for the Plaintiff:

J.A. Hanson

Counsel for the Defendant:

R.V. Burns

Place and Date of Trial:

New Westminster, B.C.
November 2-5, 2009
Vancouver, B.C.
November 6, 2009

Place and Date of Judgment:

New Westminster, B.C.
March 22, 2010

I. INTRODUCTION

[1] The plaintiff sustained soft tissue injuries in a motor vehicle accident on August 6, 2006. By the time of trial, her primary concerns were over persistent low back and shoulder pain. Although she had sustained soft tissue injuries affecting her back and shoulder in a 1996 motor vehicle accident, she had been free of pain symptoms for three years prior to the 2006 accident.

[2] The plaintiff was able to make changes at her workplace that have enabled her to sustain her pre-accident income level. However, work activities, and activities of daily living, result in pain, particularly in the shoulder. Orthopaedic surgeons have recommended arthroscopic surgery, and less invasive treatment modalities. She has not pursued these treatments, preferring instead to seek "natural" remedies.

[3] The plaintiff claims general damages, and damages for past income loss and diminished future earning capacity. She also seeks an award for cost of future care.

II. ISSUES

[4] These are the central issues:

1. causation of the persistent right shoulder and low back pain;
2. the effect of her injuries generally, and the shoulder injury in particular, on her work capacity, housekeeping, and enjoyment of life;
3. whether there has been a failure to mitigate and, if so, the consequence for the quantum of damages awarded.

III. EVIDENCE

Plaintiff

[5] The plaintiff is now 45 years of age. Although she did not continue in school beyond grade 9, she enrolled, in 1998, in a diploma course to qualify as a classroom and community support worker. She graduated in 2001.

[6] She has been employed since 1999 with an organization known as the Community Living Society. This non-profit organization provides services to persons with cognitive and physical disabilities.

[7] At the time of the accident, her duties included the supervision and coordination of care for two people. One, L.M., is a quadriplegic with cognitive challenges. The other, L.B., is legally blind, and suffers from physical disabilities that affect her mobility. She is afflicted with schizophrenia and Tourette's syndrome.

[8] The plaintiff sustained injuries in a motor vehicle accident in 1996. Her car was struck by another from the rear. She had soft tissue injuries to the neck, shoulder, and lower back. She underwent physical therapy for one year. Her symptoms had abated by November 1999, at which time she started her employment with Community Living Society. She had been symptom-free for three years prior to the August 2006 motor vehicle accident.

[9] On August 6, 2006, the plaintiff was a front seat passenger in a mid-sized SUV that, while crossing an intersection, collided with an automobile that was turning left across the SUV's lane. The SUV was being operated by her husband. The defendant admits liability for the purpose of this proceeding only.

[10] The impact was significant, causing extensive damage to both vehicles.

[11] The plaintiff was restrained by her three-point safety belt. Although winded, and panicky, she did not require transportation by ambulance to a hospital. The tow truck driver drove her home. She was shaky and upset. She experienced pain in her right shoulder, from the neck to the elbow, and in the groin. She also had a sore foot, and nausea.

[12] The plaintiff attended a walk-in clinic the following day. She received a prescription for Tylenol 3, and a recommendation that she also take Advil, an anti-inflammatory. Shortly after, she saw her family physician, who recorded complaints of pain to the chest, neck, shoulder, and upper and lower back. This was accompanied by nausea.

[13] On the advice of her family physician she remained off work until October 2006. By then, her pain had eased somewhat, but remained acute from her neck through to her elbow, on her right side. She continued in her coordinator's role with both women in her care, but found it too physically demanding. In January 2007, she ceased her role in the care of L.M. This resulted in a reduction of her hourly wage from \$19 to \$18.75.

[14] The plaintiff testified that she continued to experience pain in all areas affected by the accident, with the exception of her foot, through Christmas 2006. The low back pain was intermittent.

[15] The physical demands on the plaintiff have increased as L.B.'s mobility has declined. She is unsteady walking, and requires support. The plaintiff wears a special belt when walking with L.B. This permits L.B. to hold onto an attachment to the belt, rather than place a strain on the plaintiff's upper body.

[16] The plaintiff testified that she had, between February and August 2007, taken physiotherapy on her own initiative. As it did not give her relief from her pain, she stopped.

[17] In the fall of 2008, the plaintiff dropped one of her shifts. She was offered an opportunity to coordinate care at a group home, but as the residents were wheelchair-bound, she did not pursue it due to her lingering pain symptoms. Had she taken this assignment, her rate of pay would have increased by \$1 per hour.

[18] Before the accident, the plaintiff worked out at a gym between four and seven times weekly. Her exercise regime included weight training, walks, running, and stretching. Her leisure activities included gardening and camping. She is no longer, due to her shoulder pain, able to pursue weight training or running at the gym, although she does use a treadmill and continues to walk and stretch.

[19] The plaintiff is concerned that the increasing physical demands in her work with L.B. may prevent her from continuing as a caregiver. All work with persons in care is physically demanding, as it involves shopping, cleaning, and some home

maintenance. Her shoulder pain has affected her performance of these responsibilities, and some accommodations have been made. She is unable to continue her housekeeping and cleaning as formerly.

[20] The plaintiff's 2005 T4 earnings were \$47,655. Her earnings for 2006 totalled \$48,505. Her 2007 income was \$62,421. She earned \$65,826 in 2008. At an income of \$35,000 for fifteen of the twenty six pay periods, her projected 2009 income would slightly exceed \$60,000.

[21] The plaintiff explained that the maintenance of her income level in 2006, despite her injuries, is attributable to her having worked far more than her previous number of overnight shifts, for which she received a flat rate of \$80.

[22] The plaintiff testified that her hourly rate of pay has increased by \$3 per hour from August 2006 to the present.

[23] The plaintiff gained some relief from an injection in her shoulder, administered by an orthopaedic surgeon. This helped for around one month. Three specialists have recommended injections as a means of relieving her shoulder pain. Two specialists have suggested arthroscopic surgery. She avoids injections, as they are non-naturopathic, and does not wish to undergo surgery. She is also concerned by the advice of a friend, who told her that injections cause muscle tissue breakdown. She was advised by another physician that surgery was not likely to improve her shoulder condition.

[24] She does not feel that her family physician supports her in relation to her motor vehicle accident injury.

Theresa Huntley

[25] Ms. Huntley is the director of quality with the Community Living Society. The plaintiff has worked under her direction for 12 years.

[26] Ms. Huntley corroborated the plaintiff's evidence of the physical demands associated with the care of L.B. and L.M. It was her personal observation that the

plaintiff's ability to perform the heavier physical demands of her employment appeared diminished in the period following the accident. She also confirmed that the group home work demanded heavy lifting. It was her evidence that there are few jobs in the Society that have no physical requirements. Some clients require little or no physical effort; with others, the effort is extreme.

[27] On cross-examination, Ms. Huntley agreed that it was the plaintiff who considered herself unable to handle the group home opportunity.

[28] The Society discourages working in excess of 40 hours each week. The employer has an accommodation policy, but, due to the demands inherent in the work, it can be difficult to accommodate physical limitations in the long term.

[29] Ms. Huntley agreed that a September 5, 2008 employment plan for the plaintiff stated that she had a lot to offer. She agreed that the August 26, 2009 performance review of the plaintiff was very complimentary.

Lucie McKiernan

[30] Ms. McKiernan is the Society's Director of Employee Services.

[31] She testified that the Society is a "flat organization", which means that there are few opportunities to advance.

[32] The plaintiff's current rate of pay is \$21.93 hourly. She "guessed" that, as a "dual coordinator" meaning a role coordinating care for more than one client, the hourly rate would increase by \$1.

[33] She testified that the Society offers good job security, but that there is little opportunity for non-physical work. Eighty percent of the clients require lifting and supporting, and those who do not still require housekeeping services.

S. Marwana

[34] This witness is a fellow worker. Before August 2006, she saw no indication of the plaintiff having upper body issues. It was different after the accident. The

plaintiff was in apparent discomfort, and complained of pain. She had attended the home of the plaintiff both before and after the accident, and observed that the standard of housekeeping had diminished in the period following the accident.

[35] On cross-examination, she testified that her own clients are very self-sufficient.

Angela Lackner

[36] Ms. Lackner is also a community living counsellor. She is also on call as an elementary school teacher.

[37] She has known the plaintiff for ten years, and she also works with L.B. She sees the plaintiff at a shift change, when she takes over from the plaintiff. It is apparent that she is in pain.

[38] She described the plaintiff as being less enthusiastic and innovative after August 2006. The plaintiff no longer mows the lawn at the residence rented for L.B. A service performs this chore.

[39] Ms. Lackner testified that L.B. suffers from cerebral palsy, and demonstrates a progressive advancement of disability. She pulls when on accompanied walks, and it is necessary to use a transfer belt so that she does not hold her caregiver's arm.

Expert Evidence

[40] Three medical reports were introduced:

1. Dr. Maloon, dated February 27, 2008, by the defendant;
2. Dr. Aitken, dated July 24, 2008, for the plaintiff;
3. Dr. Richardson, dated January 19, 2009, for the plaintiff.

[41] The authors of the reports are all orthopaedic specialists.

[42] Dr. Richardson and Dr. Maloon were called for cross-examination.

[43] The plaintiff's treating physician neither prepared a report nor testified.

Dr. Maloon

[44] This independent medical examination was conducted as requested by the defendant.

[45] The plaintiff presented complaints of right shoulder pain, low back pain, and headaches. The latter are occasional, and are aggravated by shoulder pain. The low back pain is not continuous, and varies in severity. There are no associated symptoms such as radiation into the limbs, or bladder dysfunction. The low back pain has improved since the motor vehicle accident.

[46] The plaintiff's primary concern is right shoulder pain, which extends down her arm to her elbow. There is also pain in the right side of her neck. The discomfort is continuous, and is aggravated by any use of her right arm. The severity of discomfort varies from day to day, and occasionally is rated by her as at the highest end of the scale of ten.

[47] Under the heading "Impression" Dr. Maloon says that the plaintiff probably sustained mild soft tissue strains to her neck, back, and right shoulder, as well as a contusion of her right knee and strain to her foot and right groin. He says that clinical evaluation failed to reveal objective evidence of injuries to the musculoskeletal or neurological components of her spine, trunk, or limbs. An MRI of the right shoulder revealed evidence of a degenerative process, with no evidence of acute bony or soft tissue injury. The MRI showed calcific tendonitis, which Dr. Maloon says is not the result of an acute injury, but rather that of wear and tear change in the tendon. He says "[h]er symptoms of mild rotator cuff tendonitis would be consistent with the MRI findings".

[48] Dr. Maloon discussed the possibility of a cortisone injection with the plaintiff, and reports that “[s]he did not feel that her symptoms were severe enough to warrant this”.

[49] He says that:

In the absence of specific structural injury, I do not believe that mild soft tissue strains that she may have sustained to her neck and back in the motor vehicle accident of August 6, 2006 would have been significant enough to alter the natural history of her pre-existing neck or back condition.

He would have expected her to have been partially disabled for six to eight weeks while the soft tissue symptoms settled, and then to have been able to resume her previous level of activity with no ongoing disability.

Dr. Aitken

[50] This was a report based on a clinical examination and a review of clinical material.

[51] The clinical records indicate that the plaintiff sustained a severe neck strain, moderate upper back strain, moderate shoulder strain, and mild chest contusion in an accident that occurred on August 17, 1996. The pain persisted for a considerable time, and there were frequent visits to her family physician. The last mention of neck pain was July 25, 2003. She had a physical on May 3, 2006, and there was no mention of neck problems.

[52] She saw her family physician on August 9, 2006, and again on August 23. She was complaining of chest pain, nausea, neck, shoulder, upper and lower back pain, soreness of the hands and wrists, and tenderness on the left thigh and left knee. The clinical records revealed ongoing complaints of right shoulder pain.

[53] Dr. Aitken reviewed the January 30, 2008 MRI, and said the findings were consistent with tendonopathy, as also observed by Dr. Maloon. There was a marked reduction of range of motion of the right shoulder. The left was normal.

[54] Dr. Aitken observed that the clinical records indicate that the plaintiff had made a good recovery from the August 1996 accident by 1999 “although she remained slightly symptomatic thereafter”. It is his opinion that, as the plaintiff was significantly recovered following the 1996 collision, the current problems are “either de novo or a re-aggravation and reactivation of the pre-existing problem”. He recommends treatment by “wet and/or dry needling of the tender spots around the base of the skull, the neural spine and C7, the right scapula, and the muscles of the neck. She may be a candidate for arthroscopic decompression.

[55] As for the future, he says that:

Since she is so considerably symptomatic, the duration of her ability to work on in this job remains to be seen.

Dr. Richardson

[56] This was an independent medical examination conducted at the request of counsel for the plaintiff.

[57] Dr. Richardson conducted a physical examination and reviewed the plaintiff's clinical records and Dr. Aitken's report.

[58] Based on his review, he says that “the symptoms from the 1996 motor vehicle accident abated by 2001 with a single recurrence noted in 2003”.

[59] Dr. Richardson reviewed the January 30, 2008 MRI, which he said “revealed a tendonopathy in the supraspinatus tendon with some calcific deposit as well”. This he said is the main tendon of the rotator cuff. He testified that he is unable to say whether the calcification occurred before or after the MVA. It can be there, but asymptomatic. He testified that tendonopathy indicates something has happened to the tendon, consistent with trauma. If calcification was present before the traumatic event, it predisposes a person to infringement and inflammation.

[60] Dr. Richardson refers to incidents subsequent to the 2006 accident: a fall in 2006, and a problem after lifting a heavy case of water in a care home. Increased pain was “merely aggravation of the symptoms arising in the indexed 2006 motor

vehicle accident". He says "certainly Ms. Hauer's symptoms were aggravated by her job after the motor vehicle accident".

[61] Under the heading "Opinion", Dr. Richardson says that the plaintiff, as a result of the accident, sustained soft tissue injury of the cervical spine, soft tissue injury to the lumbar spine and right SI joint, soft tissue injury to the right shoulder; and probably a rotator cuff injury resulting in tendonitis and impingement. As for causation, he says "it is my opinion that in the absence of evidence to the contrary that the motor vehicle accident in question of August 6, 2006 bears the majority of the responsibility for Ms. Hauer's current symptoms in her right shoulder, cervical spine and low back". He adds that "it is clear that there's been some aggravation of Ms. Hauer's symptoms in her neck, low back and right shoulder by her activities of daily living, most particularly, her job". This, he says, is "a secondary minor cause of her current symptomatology; the primary cause being the motor vehicle accident of August 6, 2006.

[62] Dr. Richardson says that the prognosis for the cervical spine is good. He would expect continuous improvement over time "as she did after the previous motor vehicle accident". The expected time is two or three years. With respect to the low back pain, it should become less of a problem over the course of time.

[63] His prognosis is guarded with respect to the right shoulder, as the plaintiff shows findings of rotator cuff tendonitis and impingement. He strongly advises a referral to an orthopaedic surgeon who specializes in shoulder surgery for evaluation and treatment. He notes that the plaintiff obtained some relief from shoulder pain after the injection of freezing administered by Dr. Aitken.

[64] With regard to the lumbar spine, he says that if her symptoms continue to get worse "which they currently have in the lumbar spine", or she develops neurological problems in the lower extremities, he would recommend an MRI.

[65] I note that in his July 2008 report, Dr. Aitken reported that the plaintiff complained of "some lower back pain especially within the last month".

[66] Dr. Maloon, in his report, said he could find no evidence to suggest that the plaintiff has been physically impaired by musculoskeletal injuries that she may have sustained in the August 6, 2006 accident. He says, "I would have expected her to have been partially disabled for six to eight weeks while acute soft tissue symptoms settled". In rebuttal, Dr. Richardson disagreed. He said that the six to eight week time frame for recovery from soft tissue injuries is an outdated measure. More recent published findings show a longer period of a year or more for recovery from soft tissue injuries to the neck. He suggested an average time for recovery from pain associated with soft tissue injuries to the neck was approximately six months. Injuries to the rotator cuff take three to six months, and hers had been aggravated by the physical demands of the workplace.

Other***Functional Capacity Evaluation***

[67] Mr. Winter, an occupational therapist, conducted an assessment on February 25, 2009. His report is dated March 20, 2009.

[68] Mr. Winter put the plaintiff through a series of work simulation tasks. He says in his report that "at the end of the simulated work activities, Ms. Hauer noted the presence of her neck, low back and right shoulder pain. Her symptom experience did not reportedly increase with exposure to such testing demands".

[69] Mr. Winter found that the plaintiff's subjective experience of her limitations "were relatively accurate and reliable measures of her functioning". These generally fell within a range in which symptoms result in slower or more guarded movement patterns in the work tasks. This may require short breaks before continuing with work demands, and may change the manner of working to complete the tasks.

[70] He found that Ms. Hauer underestimated her lifting and carrying and strength capacities.

[71] Mr. Winter expresses the opinion that Ms. Hauer "can continue in her present position (i.e. modified hours and duties) under the behavioural model of care". He

explains his understanding of the behavioural model of care as primarily verbal direction to her client. This could include occasionally dealing with aggressive behaviours, and does include aspects of housekeeping. He described the operation of the transfer belt. This is a tool to assist the client in the transition from sitting to walking. This, he said, goes around the waist of the client. Some models have looped handles so the attendant can hold on to the client.

IV. ANALYSIS OF EVIDENCE AND FINDINGS OF FACT

[72] It is not a matter of contention among the medical experts that the plaintiff sustained soft tissue injuries in the August 6, 2006 accident. These injuries were to the neck, shoulder, and back.

[73] It is also not disputed that the plaintiff had not, for several years before the accident, had symptoms from injuries sustained in previous accidents.

[74] There is no suggestion in any of the medical reports that the plaintiff is not experiencing the pain that she reports.

[75] The medical experts are all of the view that the plaintiff will benefit from injections in the shoulder area, that being the most problematic of the plaintiff's injuries. Dr. Aitken and Dr. Richardson say that she may benefit from arthroscopic surgery on the shoulder.

[76] The areas of disagreement among the medical experts are as follows:

1. causation of the shoulder injury: Dr. Maloon attributes this to a pre-existing calcification in the area of the rotator cuff. Dr. Richardson agrees that calcification is shown on the MRI, but says that the soft tissue injury sustained in the accident has caused the underlying disorder to become symptomatic. None of the medical experts offer a prognosis for recovery from the shoulder injury, whatever the cause, without treatment. Dr. Maloon says that he does not believe that the plaintiff will require medical or surgical treatment in the future for

musculoskeletal injuries that she may have sustained in the accident, but he does not believe that the shoulder injury was sustained in that accident.

2. Dr. Maloon says that he would have expected the plaintiff to have been partially disabled for six to eight weeks “while acute soft tissue symptoms settled”. Dr. Richardson, in rebuttal, says that the more recent view, expressed in published medical journals, suggests a six month period of recovery from pain symptoms associated with soft tissue injuries.

[77] The main focus of Dr. Aitken's report was the shoulder injury. It is his opinion on causation that her “current problems are either de novo or a re-aggravation and reactivation of the pre-existing problem”. Dr. Richardson, on causation, says that it is his opinion that “...in the absence of evidence to the contrary that the motor vehicle accident in question of August 6, 2006 bears the majority of responsibility for Ms. Hauer's current symptoms in her right shoulder, cervical spine and low back”.

[78] I accept the evidence of the lay witnesses that the plaintiff was active and fully able to perform the physical demands of her employment before the accident, and after the accident, is no longer as active or able to perform to the pre-accident level. The evidence of the plaintiff, the lay witnesses, and Dr. Richardson, establish a causal connection between the accident and the plaintiff's ongoing shoulder pain, and establish, as fact, the contribution of injuries sustained in the accident to the present condition of her shoulder.

[79] The plaintiff's shoulder pain has persisted, largely undiminished, from the time of the accident. She also reports intermittent low back pain that varies in severity. In July 2008 she reported to Dr. Aitken that she had lower back pain, “especially within the last month”. In January 2009 she reported to Dr. Richardson that her low back pain was worse than ever. He says that this is a soft tissue injury, and that it should become less of a problem over the course of time.

[80] The medical evidence explains the persistence of pain symptoms emanating from the plaintiff's right shoulder. The evidence does not explain the persistence and worsening of the plaintiff's low back pain, almost 2½ years after the accident. I find that the causal connection between the accident and the plaintiff's present symptoms of a low back injury has not been established. The evidence does establish that the plaintiff sustained a soft tissue injury to the back, and I accept Dr. Richardson's evidence that a six month recovery from the disabling effect of a soft tissue injury is indicated.

[81] As I understand the plaintiff's evidence, the most significant injury that she associates with the accident is that to her shoulder. As I understand the medical evidence, the shoulder injury is the likely explanation for the pain she experiences from the neck to the right arm.

[82] I find that the accident is a significant contributing factor to her shoulder injury, and that the plaintiff has established causation on the "but for" test described in *Resurface Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333.

V. DAMAGES

General Damages

[83] The plaintiff's enjoyment of life has been significant diminished by her persistent pain from her shoulder injury. Her other injuries resolved within the times that would be expected for soft tissue injuries. Her present experience of low back pain does not appear to be causally related to the accident.

[84] Counsel for the plaintiff has referred to two decisions of this court in which injuries having similar impacts were the subject of damages assessment. These are the following:

(1) *Mattu v. Fust*, 2009 BCSC 624

Here, a 39 year old plaintiff experienced headache, back pain, shoulder, neck, arm and leg pain, and the aggravation of asymptomatic disc herniations. Non-pecuniary damages were assessed at \$60,000.

(2) *Joyce v. Dorvault*, 2007 BCSC 786

Here, a 54 year old plaintiff suffered moderate soft tissue injuries, causing pain to his arm, shoulder, neck and back. There was an aggravation of a pre-existing degenerative spinal condition. Damages were assessed at \$50,000.

[85] Considering these authorities and the factors set out by Kirkpatrick J.A. in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46, 263 D.L.R. (4th) 19, leave to appeal ref'd [2006] S.C.C.A. No. 100, I award the plaintiff \$50,000 in non-pecuniary damages.

Past Loss of Earnings

[86] Due to her injuries, the plaintiff worked fewer hours in 2006 than in 2005. The difference is 1,767.5 hours (2005) less 1,575.5 hours (2006), which equals 192 hours. Her pay rate was approximately \$20 hourly. The loss of income was \$3,840.

[87] In 2007, the plaintiff worked 2,025 regular hours. As her rate of pay had been reduced by \$0.25 hourly due to her giving up her coordinator role with L.M., she sustained a modest income loss of \$506.

[88] In 2008, the plaintiff, due to her injuries, lost the opportunity to take the role as coordinator of a group home, at an hourly wage increase of \$1. She worked 2,014 hours. The loss for 2008 was \$2,014.

[89] Up to the date of trial in 2009, the plaintiff had worked 863 regular hours. For 2009, I award the sum of \$863 up to the date of trial. This takes into account that, had she been able to take the group home coordinator's role, her pay rate would have been \$1 higher.

[90] The plaintiff's hours worked per pay period in 2009 up to the date of trial were lower than in the previous post-accident years. It has not been established that this is linked to accident-related injuries. There is no evidence that her shoulder injury is progressive, and the functional capacity evaluation conducted in February 2009 indicated her ability to continue with the employment duties she had undertaken since surrendering her care of L.M. in 2007. She worked 2025 regular hours in 2007, and 2014 regular hours in 2008.

[91] The total award for past earning loss is \$7,223.

Future Income Loss

[92] I am satisfied that the plaintiff's ability to perform all employment tasks associated with the care of disabled clients has been impaired. This being so, her circumstances bring her within the considerations set out in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), which were quoted with approval by Mr. Justice Taggart in *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 393 (C.A.).

[93] In *Rosvold v. Dunlop*, 2001 BCCA 1, 84 B.C.L.R. (3d) 158, Huddart J.A. set out the standard by which awards for future losses should be made (at para. 9):

Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

[94] Where a real potential for future loss is present, taking account of the considerations in *Brown v. Golaiy, supra*, the loss is compensable even in the absence of any actual loss of income: see *Palmer v. Goodall* (1991), 53 B.C.L.R. (2d) 44 (C.A.), leave to appeal ref'd [1991] 1 S.C.R. xii; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.).

[95] In the present matter, the plaintiff's future income loss has been established, even on the balance of probabilities test, by her having to forego the opportunity to serve as coordinator of a group home. The related loss of income is, however, modest. Had she taken this assignment, her hourly pay rate would have increased by only \$1.

[96] The plaintiff is 45 years of age. When account is taken of her educational and employment history, there seems little possibility that an opportunity for more remunerative employment than she had before the accident would present itself.

[97] There is no evidence that the plaintiff's shoulder injury will worsen in time, leading to increased disability.

[98] The plaintiff's employment is reasonably secure, and her employer has to some extent accommodated her by employing a service for yard care at L.B.'s place of residence.

[99] The plaintiff may be exposed to some real and substantial risk to her employment, due to shoulder-related physical limitations, if she should require reassignment, in the future, to another client. Most clients of her employer have some level of physical disability, and it may be difficult to match the plaintiff's abilities, as affected by her injury, to a future client's needs.

[100] After taking account of the proven loss, the risk of future loss in the event, albeit remote, that her income is reduced due to an inability to match her abilities with the needs of a client, and the absence of any prior realistic potential for advancement, I award the sum of \$60,000 for loss of earning capacity.

Special Damages

[101] The plaintiff will receive an award of \$675 for special damages.

Cost of Future Care

[102] The plaintiff claims a one-time cost, for assessment, of between \$720-\$960. She also claims a yearly amount of \$1,440 for physiotherapy for symptom

management. There is a claim for a one-time assessment of her home and work settings, at a cost of \$400. She claims between \$1,219-\$1,687 for annual housekeeping services.

[103] I do not accept the claim for physiotherapy. The plaintiff has not found this effective in the past. One of the physicians has recommended that she continue with an at-home exercise program for symptom relief. None have recommended physiotherapy.

[104] I award the annual sum of \$1,200 for housekeeping services. The net present value, using the multiplier provided in the report of Ronald Tidball, is 20.81. The award is \$24,972.

VI. MITIGATION

[105] The defendant bears the burden of establishing that the plaintiff has failed to mitigate her loss, in this case that she failed to follow medical direction, and that had she followed that advice, she would have recovered further or faster: *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[106] The plaintiff prefers naturopathic remedies. She was influenced by advice given by a friend on the effect of injections. A physician advised her, informally, that she may not benefit from surgery. On these bases, she declined to act on the recommendations of three well-qualified orthopaedic surgeons to take injections into the shoulder area, and to consider arthroscopic surgery. Dr. Richardson puts the percentage chance of improvement from arthroscopic surgery at between 70-80%.

[107] There are, of course, risks associated with surgery, though these seem minimal. If the plaintiff underwent surgery, there may be some losses during the recovery period.

[108] There will be a reduction of 30% of the amounts awarded for general damages, loss of income earning capacity, and cost of care due to the plaintiff's failure to mitigate.

VII. SUMMARY

[109] The plaintiff is awarded the following:

1.	General Damages	\$50,000 less 30%	\$35,000
2.	Past Income Loss	\$7,223	\$7,223
3.	Loss of Earning Capacity	\$60,000 less 30%	\$42,000
4.	Special Damages	\$675	\$675
5.	Cost of Future Care	\$24,972 less 30%	\$17,480
	TOTAL:		<u>\$102,378</u>

VIII. COSTS

[110] The parties are at liberty to make submissions on costs. In the absence of further submissions, I would award the plaintiff her costs based on Scale B.

"H.A. Slade J."
The Honourable Mr. Justice H.A. Slade