

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Risling v. Riches-Glazema*,
2016 BCSC 2423

Date: 20161228
Docket: M141665
Registry: Vancouver

Between:

Cory Danielle Risling

Plaintiff

And

**Amy Justine Riches-Glazema and
Betty Ann Glazema**

Defendants

Corrected Judgment: The text of the judgment was corrected on
the front page and paragraph 164 on February 16, 2017.

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Plaintiff:

K. L. Simon
A. Truong

Counsel for the Defendants:

C. E. York

Place and Date of Trial/Hearing:

Vancouver, B.C.
August 22-26 and 30-31, 2016

Place and Date of Judgment:

Vancouver, B.C.
December 28, 2016

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INTRODUCTION

[1] On March 22, 2012, the plaintiff was injured when a vehicle driven by the defendant Amy Justine Riches-Glazema turned left across the path of Ms. Risling's vehicle when it was unsafe to do so. A collision occurred and Ms. Riches-Glazema, who I will refer to as the defendant, admits it was her fault.

[2] The purpose of this trial is to assess damages. I heard six days of detailed evidence from the plaintiff, her mother, her friends and various experts. The parties take starkly different approaches to the facts of this case. In brief, the plaintiff urges me to find she had no significant health problems before the accident but the accident has left her with pain and permanent disabilities which impair her capacity to work as a house painter and which deprive her of most of the recreational activities that formed a large part of her pre-accident life. The defendant submits the plaintiff had numerous pre-accident health problems which help to explain her current condition. The defendant urges me to find that the plaintiff's accident related injuries had subsided within two years after the accident and that the plaintiff has exaggerated the extent of her pain and disability to experts and in her testimony at the trial. The defendant stresses what is said to be the contrast between the plaintiff's complaints and video evidence showing her engaging in strenuous physical activities without apparent restriction.

[3] To make findings of fact on which to assess damages it is necessary to review the evidence at some length. I will do so in the order the evidence was presented at trial.

THE EVIDENCE OF DEBORAH WALLIS

[4] Ms. Wallis is the plaintiff's mother. She has been the owner/operator of a house painting company called Pink Painters for over 30 years. Ms. Wallis deals with clients; provides quotes for prices; obtains the needed supplies; supervises painters, and keeps the company books. For many years she did much of the painting work herself but no longer does.

[5] Ms. Wallis is very close to her daughter. They speak to each other frequently and have dinner together once or twice a week.

[6] After the accident Ms. Wallis saw her daughter more frequently. Ms. Risling needed emotional guidance to take some of the “pressure off”. Ms. Wallis describes her daughter as not doing well.

[7] Ms. Wallis was on vacation when her daughter phoned to describe the accident. Ms. Wallis came home the following day and was “shocked” when she saw her daughter “stiff and in a lot of pain”. Ms. Risling could not lift her arms to wash her hair. In the month after the accident Ms. Wallis went to her daughter's home daily to help her dress and to help her shower.

[8] Ms. Risling was unable to perform any household chores for about six months after the accident. Ms. Wallis went to her daughter's home several times each week to assist with gardening, vacuuming and other types of housework. Before the accident the plaintiff had a substantial vegetable and flower garden but now only “a few herbs”.

[9] At the time of the accident Ms. Risling was living in a basement suite, but by the time of trial had moved to a home with acreage. Ms. Wallis helped her daughter when she moved to the home. She also helped her daughter to discard some of the “stuff” she had for her business because it was more than her daughter could deal with due to her injuries. She helped the plaintiff to organize her business. At that time the plaintiff had no income to pay for food or gas for her vehicles.

[10] Ms. Wallis describes the plaintiff before the accident as very outgoing, confident, and with a “strong work ethic”. Mother and daughter would go camping together on occasion. Ms. Risling went fishing frequently; she skied; played in a band, and wrote her own music. She was “very capable” and “very bubbly”. The plaintiff worked for clients of Pink Painters who “loved her”.

[11] The plaintiff has played guitars throughout much of her life. Before the accident she was getting paying “gigs” as a lead guitarist and lead singer. She had

acquired amplifiers, mixers, and miscellaneous sound equipment for the purpose of her band. Ms. Wallis witnessed her daughter set up the equipment for performances and along with other band members would take the equipment down and pack it to be taken home. Since the accident “the guys do that”. Ms. Wallis has seen the plaintiff require help to remove her guitar strap from across her shoulders because she is too stiff and sore at times to do it herself. That help was not needed before the accident.

[12] The plaintiff worked in her mother's painting business for about 18 years. For the 8 to 10 years before the accident, the plaintiff “ran the crew” and did interior and exterior painting on both residential and commercial sites. The work entailed the use of ladders, some as long as 40 feet. The plaintiff did rolling, “cutting”, and spraying of paint without difficulty.

[13] A spraying machine weighs about 40 pounds and in addition has about 20 to 25 pounds of hose which is attached to the spray gun. The work is physically demanding often with long hours. As well as working on painting itself the plaintiff also provided price quotations to potential customers.

[14] In 2009 the plaintiff left Pink Painters to start her own business. Ms. Wallis had specialty work that was “taking off”. It pays more than regular painting. Ms. Wallis asked the plaintiff if she would like to take over the specialty work which the plaintiff agreed to do. To assist the plaintiff Ms. Wallis gave her drop sheets, sprayers and ladders. She also helped financially “a couple of times” and referred clients.

[15] The plaintiff was particularly interested in specialty painting that revitalized old kitchen cupboards and repaired kitchen backsplashes. She did metallic glazes on ceilings, Venetian plaster, European stone troweling, and various “polished finishes”.

[16] Prior to the accident Ms. Risling appeared to have no difficulty with the physical demands of the work including lying on her back while she worked sometimes “for days on end”.

[17] At the time of the accident, Ms. Risling's business appeared to be growing, but Ms. Wallis recognized it would take 3 to 4 years to get it "on its feet".

[18] Prior to the accident Ms. Wallis planned to retire and give her business to her daughter. When the accident happened that was no longer immediately possible, so she kept the business operating in the hope the plaintiff's health would improve.

[19] Ms. Wallis now plans to retire in May 2017. Pink Painters is a "well-known brand" east of the Port Mann Bridge with a substantial client base. She does not believe the plaintiff is now capable of running Pink Painters. The plaintiff is not doing well emotionally or physically. She is irritable; cannot sleep and drinks too much in an effort to alleviate her pain.

[20] Prior to the accident the plaintiff was in good health and spirits. On one occasion she broke her foot at work; on another she broke ribs and suffered a concussion when a hammer fell on her head. The plaintiff returned to work after each of these injuries with no long-term effects.

[21] The plaintiff also injured her left shoulder when a dog on a leash pulled too hard on her arm. Ms. Wallis is aware that her daughter suffers from irritable bowel syndrome that can flare up when she is under stress.

[22] The duration of the work with Pink Painters varied from year to year. In some years the crew was let go in the winter months.

[23] Since the accident Ms. Wallis has not seen her daughter working on a job site except for the purpose of delivering supplies.

[24] At one time Ms. Wallis would refer specialty work to the plaintiff. Inquiries about that type of work have been more frequent in recent years but she no longer refers the work to Ms. Risling because she believes she is unable to do the work. Referrals are now "gone".

[25] Ms. Wallis describes the plaintiff before the accident as quite resilient but she is no longer. Ms. Wallis believes her daughter is now "emotionally depleted".

[26] In cross-examination Ms. Wallis described her workday as sometimes starting at 7:00 a.m. but the hours vary depending on the nature of the job. She herself prepares quotes and consults on colours and “checks on the guys” during the day.

[27] Ms. Wallis testified that she has no record of the potential work she has not referred to the plaintiff.

[28] In recent months the plaintiff has lived in Chilliwack and Ms. Wallis has not visited her there because it is too far for Ms. Wallis to drive. Recently the plaintiff has decided to move to Langley where some of her therapy takes place.

[29] Ms. Wallis is aware the plaintiff is now working often long hours. She understands the work is on less physically demanding jobs than was the case before the accident.

[30] Ms. Wallis acknowledged that before the accident the plaintiff drank alcohol socially. Her drinking has increased since the accident. She has spoken to the plaintiff on the telephone on occasion when the plaintiff has been slurring her words. These conversations have taken place only after the accident.

[31] Ms. Wallis has no knowledge the plaintiff suffered a stroke in 2013. Nor does she know about arsenic in the plaintiff's water, but had heard that “the doctors” believe the plaintiff's hair loss after the accident may have been caused by arsenic in her drinking water.

THE EVIDENCE OF THE PLAINTIFF

[32] The plaintiff was born on November 23, 1969. At the time of the trial she was 46 years old. She is unmarried and presently not in a romantic relationship. She has no children.

[33] At the time of the trial Ms. Risling was living in Chilliwack. She shares a small home with Terry Leger with whom she once had a romantic relationship.

[34] The plaintiff's intention is to move to a home in Langley. It is not in a residential area such as where she now lives. She needs space for her painting

equipment and a boat. She will be on a five acre property where she hopes she will be able to practice her music, which is loud, without disturbing the neighbours.

[35] One month before the accident she had moved temporarily to a basement suite, but after the accident she could not tolerate the noise of being in a home with other occupants.

[36] At the time of the accident the plaintiff had been engaged to be married but that engagement came to an end. She attributes this to the effects of her injuries.

[37] The plaintiff is a sole proprietor of a company called Cory's Infinity Specialty Painting.

[38] Ms. Risling did not complete grade 12. On leaving school she took a fashion merchandising course. She later took a diamondology course and worked in a jewelry store. In her early 30s she obtained a diploma in restaurant management. She has not had any formal training in house painting, but in 2000 took night classes on faux finishing; "old world mosaics"; furniture antiquing, gilding and trompe l'oeil. These services were offered through Pink Painters.

[39] Prior to leaving Pink Painters Ms. Risling had been doing little specialty painting work because her time was occupied in supervising her mother's painting crews. Her mother suggested that the type of work she was doing was perhaps holding her back from developing other kinds of work and that she ought to be out on her own.

[40] Ms. Risling's first year on her own was difficult. She injured her shoulder when walking a dog and injured her ribs. In that year she experimented with the application of various paint finishes such as developing a means to "burn Venetian plaster".

[41] When the accident happened she was driving with her dog. She testified the dog later needed treatment of various kinds as a result of the car accident. I will return to this claim later in these reasons.

[42] The plaintiff struck her head on the driver's side window when the collision occurred and she has a poor memory of the events immediately after it. The dog was “howling and barking” which clearly upset Ms. Risling. Ms. Risling's right hand was numb and tingling. She had pain in both shoulders and in her lower back. Her vision was blurred.

[43] With her dog in the back of her vehicle along with band equipment she declined the police suggestion that she be taken to hospital by ambulance. After a lengthy wait her car was towed to her home. She went along in the tow truck. She had a rental vehicle delivered and then went to the hospital. Her symptoms by that time had worsened. She was “in shock” and in a lot of pain. She had right hip pain and experienced difficulty in standing. Her vision was “fuzzy”.

[44] The plaintiff was discharged from hospital on the day of the accident and went home. The next day she felt worse and several days later went to a walk-in clinic. She noticed that being in the sun made her sick to her stomach. She was prescribed Flexeril and advised to have physiotherapy. She had no treatment for the next month because she felt “too rough”.

[45] The plaintiff saw a doctor in Cloverdale who recommended physiotherapy and chiropractic treatments. She went to Langley Sports Medicine for such treatment. It left her in greater pain.

[46] The plaintiff had massage therapy “years before the accident” and physiotherapy in 2008 when the dog pulled her shoulder. About two years before the accident she had chiropractic treatments. She testified that at the time of the accident she was well.

[47] By the end of 2012 the plaintiff was not recovering from her accident injuries. She could not lift her right arm. She is right hand dominant.

[48] The plaintiff hoped to find a family doctor for various purposes, but had difficulty in being taken on as a patient. She eventually went to Dr. Benjamin Baby, but did not tell him about her accident injuries until her second visit. Dr. Baby agreed

to take her on as a patient and gave her a requisition for physiotherapy. Since that time she has seen a kinesiologist “at least 72 times”.

[49] The plaintiff had lost work in 2011 for about six months for a variety of medical reasons. She had liver and kidney problems. She broke two fingers and a hammer had fallen on her head at work. She had experienced an incident at a club where she was surreptitiously drugged. None of these incidents continued to have adverse effects at the time of the accident.

[50] The plaintiff operated her business without employees or subcontractors from 2009 to the date of the accident. She gave quotations for prices and also organized and performed the work herself. Most aspects of the job made substantial physical demands. Nevertheless she enjoyed her work, which she testified “can transform a home”.

[51] The plaintiff's particular interest is specialty painting which she finds more creative than regular painting. There are few if any competitors in the geographic area where her business operates.

[52] The plaintiff planned to take over her mother's business who had intended to retire at age 60. That has not happened. Her intention was to do as much specialty painting as possible, but to supervise the crew who would do the Pink Painters jobs. Prior to the accident Ms. Risling was doing about 50% Pink Painters work as well as her own specialty work. After the accident her work has been 75% regular painting. From 2009 to 2012 her income had been derived about 75% from specialty painting and that continued after the accident because regular painting had much smaller profit margins. An eight hour project doing speciality stone work or back splashes will pay \$2,000 where eight hours on a regular painting will pay \$250-\$300.

[53] The plaintiff testified she works more slowly since the accident than she had before. She now leaves a job earlier in the day and takes breaks to “ice” her shoulders. A week long job before the accident may now take a week and a half.

[54] A painting job on a kitchen requires considerable cleaning preparation. The plaintiff finds scrubbing kitchen cabinetry painful. She often needs to be in awkward positions that cause pain to her shoulders, neck and arms. She now must hire other workers to spray paint. She has tried spray painting a fence since the accident, but found it too painful to continue. She had to hire helpers to finish that particular job.

[55] Some kinds of “pounded metal” finishes are the most painful for the plaintiff to perform. They are popular but the plaintiff avoids doing that kind of work. The same is true for European stone finishes. The plaintiff is now slow with that work and recalled that she took so long to complete a particular job that she was required to reduce the price by about 50%. She has done one Venetian plaster job for \$1,000 since the accident only because she needed the money, but it was so painful that she will not attempt that type of work again.

[56] Rolled on paint is often applied overhead using a pole. The plaintiff finds she cannot use a pole while lifting her arms higher than her waist.

[57] During the year after the accident the plaintiff hired others to do the work that her business had attracted, but she had to be at the job site herself because the clients expect her to be there. If a client arrived at the job site Ms. Risling would pick up a roller as if she was working and put it down once the client left.

[58] In 2013 the plaintiff could not take active steps to “grow the company”. She was “not doing well” and did not have regular helpers that she could hire. Such work as she performed in that year was through Pink Painters.

[59] In 2014 the plaintiff did a little bit more work, but needed help which was difficult to find. She continued to have pain in her shoulders and back. These problems continued into 2015, but in 2016 she found more “stable” people to work for her and she was getting referrals from old clients. She now has a woman working for her who enjoys detailed work and who may eventually be able to supervise the work of others.

[60] Ms. Risling remains optimistic she will be able to take over her mother's business in the spring of 2017. She finds, however, that mentally she "is not there anymore". Her memory is not good and she finds organizing her company a struggle. If she has a bad day she can call a customer to make an excuse, but when she takes over Pink Painters that will no longer be possible.

[61] Ms. Risling averages three hours sleep each night with the aid of Zopiclone. Before the accident eight hours was her normal sleeping duration without the need for medication.

[62] Before the accident the plaintiff played her music four times a week. She now finds that is no longer possible but she will nevertheless "push herself" because it makes her happy to play her guitar. Afterwards she is in a lot of pain.

[63] Prior to the accident Ms. Risling went fishing year-round. She would leave work and take her boat to various fishing places. She has not used her boat to any extent since the accident. She can no longer lift the boat off its trailer nor can she lift a boat battery.

[64] Before the accident she would grow her own vegetables and hosted many dinner parties. She does not plant a garden now and finds cutting and preparing food painful.

[65] The plaintiff has six guitars but can play only one because of its light weight and size. Her bass guitar is too heavy for her to play. She has drums but cannot use them. She can no longer remember songs and uses "cheat sheets" which she attaches to her guitar. When her right hand becomes cold and numb she will drop guitar picks. She tapes extra ones onto her microphone or guitar. She has difficulty lifting her left arm to remove her guitar strap.

[66] At the time of the accident the plaintiff was engaged to be married to a man who was then living in the United States. She hoped eventually to have children. The relationship ended when, as she put it, he did not want anything to do with her because of her mental and physical state.

[67] The plaintiff has had several relationships with men in the years since the accident, but each she says grew tired of “just sitting on the couch”. She met Terry Leger and they started dating but that ended for the same reasons.

[68] The plaintiff testified she can do little housework; cannot cook, and cannot walk her dog. Her friends no longer want to see her because “people do not want to see you anymore when you are not happy”.

[69] Ms. Risling has found that exercise under the supervision of a kinesiologist is helpful mentally but has not assisted her to recover from her physical pain and disability. She has discontinued going to the gym where she had seen a kinesiologist because she cannot afford to attend.

[70] Dr. Baby referred the plaintiff for acupuncture but it only caused pain without relief from physical symptoms. Dr. Abeer Syal recommended ultrasonic shock therapy for her shoulders. The cost is \$55 for each therapy session and she cannot afford to pay. She is on a wait list for platelet rich plasma injections. The injections will cost \$700-\$900 and they are not covered by MSP. Dr. Barry Vaisler, an orthoped, has discussed surgery with her. She understands that if she had surgery on each shoulder that would mean a significant amount of lost time from work. She cannot afford to have surgery in that circumstance and has decided against it.

[71] The plaintiff acknowledges she has been drinking too much alcohol since the accident. She uses it as a means of relaxing but she also recognizes it is damaging to her health. In recent months she has reduced her drinking “drastically”.

[72] In cross-examination the plaintiff agreed that prior to the accident she had missed work during two January’s in a row because of uterine cysts. She could not remember the dates with any precision. She agreed she had liver and kidney problems prior to the accident and was an outpatient and missed work. She testified she had recovered from these difficulties prior to the accident. She had also experienced spasms in her back which she said could be from “overuse” or “many other problems”.

[73] After the surreptitious drugging incident in 2008 she went to Trinity Western University for counselling. She was told she would be fine physically but may experience other repercussions. She testified she was not experiencing those repercussions.

[74] The plaintiff testified that she now has frequent headaches, constant neck pain, her upper back is constantly stiff and she has considerable pain in her shoulders. She finds driving induces anxiety. She is usually “stressed out” when she reaches her destination.

[75] The plaintiff agreed that before the accident she had not worked full time throughout the year. She also agreed there has been no such thing in her working life as a “typical day”. Her time at work varies from week to week. She agreed she may have worked only about nine months of the year before the accident.

[76] The plaintiff agreed she has not attempted to borrow money to pay for the cost of medical therapies. She has not approached her mother to discuss working for Pink Painters as a supervisor. She explained that Pink Painters already has a supervisor and she would not wish to supplant that person.

[77] Prior to the accident when not working she played music; looked at job postings, and went fishing or just enjoyed the outdoors.

[78] The plaintiff denies she has ever had a stroke.

[79] The plaintiff tried swimming pool therapy following the accident but she has an allergy to bleach and going to a public pool “didn’t work”. Her chiropractor has said she is not ready for yoga and although she has looked into Pilates it seems to her to be similar to yoga for which she is not suited.

[80] Defence counsel showed the plaintiff’s chiropractor records from 2007 which referred to headaches, dizziness, sleep difficulties and depression. The “problem area” for which the plaintiff attended on the chiropractor is noted to be “neck, usually

lower back, especially right hip” and under the notation “date problem began” the record reads “many many years”.

[81] The plaintiff agreed she had experienced shoulder problems for years before the accident but only “on occasion”; she denied chronic pain before the accident. The plaintiff was also shown a kinesiology report from September 30, 2013, in which it is recorded that her “demonstrated ability” included “shoulder press down 50 pounds times three sets times 10 repetitions” and “shoulder raises 15 pounds times three sets times 10 repetition”. The report reads in part “Ms. Risling is now able to tolerate a one hour exercise program three times weekly; however she is still reporting right shoulder pain”.

[82] The plaintiff was shown video taken on May 23, 2014. It depicts the plaintiff at a performance playing a guitar and singing along with other members of a country music band. The plaintiff is seen playing a 40 minute “set”. She was also seen dancing. There are no discernible signs of pain or discomfort seen in the video. The plaintiff testified that “when you are up there you do not notice the pain until you are done”. She described herself as being on a “high, on a rush but when you are done you crash. You feel everything.”

[83] In the video the plaintiff is also seen reaching for a new guitar pick and she testified that she had the chords and keywords for the songs attached to the top of her guitar so that she could see them and thereby recall them when her memory failed. The plaintiff is also seen on video in April 2015 in various activities including carrying a wooden step ladder with her right arm.

[84] The plaintiff is seen in the video using a “chuck it” ball thrower. She is seen throwing a ball with her right arm for a dog to fetch it.

[85] She is also seen on a day in April 2015 wearing her work clothes, carrying a paint can in her left hand and a ladder in her right hand. Later she is seen carrying what appears to be a number of drop cloths and a painting tray.

[86] In re-examination the plaintiff testified she carried the various painting items “with difficulty”; the ladder weighed only about 20 pounds, and in order to carry it she partially supported it on her hip. She testified she can use the “chuck it” stick only with difficulty. Ms. Risling also testified that after the band performance shown in the video she was driven to the home of a friend where she stayed for three days. She said that during that time she was hardly able to move and her arms were very sore.

[87] The plaintiff testified that when she reported to a chiropractor in 2007 that she had problems with her neck, lower back and right hip that had begun “many many years ago” she did not mean that the problems continued over many years.

THE EVIDENCE OF DR. JANKE

[88] Dr. Paul Janke is a forensic psychiatrist. He provided a letter of opinion at the request of the plaintiff's counsel and testified at the trial.

[89] It is Dr. Janke’s opinion that as a result of the physical pain and “marked disruption” in her personal life the plaintiff has experienced since the accident she has developed an “adjustment disorder with depressed and anxious mood”. He characterizes the plaintiff's “worrisome” level of alcohol consumption as a “substance use disorder” which has arisen because of the accident injuries.

[90] Dr. Janke recommends a course of psychological treatment of 12 to 18 sessions using cognitive behavioural techniques. In Dr. Janke’s opinion Ms. Risling will continue to experience psychological difficulties if she is unable to achieve “meaningful physical recovery” and, if her recreational activities remain restricted by pain he expects her depression and anxiety to persist. He recommends a course of treatment with a selective serotonin reuptake inhibitor such as Prozac.

[91] In cross-examination Dr. Janke was asked about clinical notes concerning the plaintiff dated May 2, 2008, which read in part “drug + robbed x 2/7 not sure if violated or not”. Dr. Janke testified that the plaintiff had not told him about this incident, but if there was no indication of ongoing concerns by the plaintiff about that

event he would have no reason to change his opinion that the car accident is the source of the plaintiff's present psychological difficulties.

EVIDENCE OF NATALIE GAIL HULL

[92] Ms. Hull performed a cost of future care analysis for the plaintiff, provided a written report and testified. To prepare her report Ms. Hull performed a functional capacity evaluation of the plaintiff and conducted a “review of her home environment”.

[93] The plaintiff had undergone a work capacity testing by Michelle Noel and Ms. Hull relied on that report in preparing her own opinions. Ms. Hull assumed the plaintiff would have shoulder surgery which would improve her functioning.

[94] Ms. Hull concluded that Ms. Risling's “self-reports of function and effective pain on function were largely consistent with observed function”. While lifting and carrying various objects Ms. Hull testified the plaintiff was protective of her shoulders. For example while carrying a guitar she used her right arm and “maintained her elbow flexed and held her elbow tight to her body”. Ms. Hull wrote:

She was observed playing her guitar, first in a seated position and subsequently in standing. Her right shoulder was observed to internally rotate to a greater extent in sitting which is consistent with her self-reports of immediate right shoulder pain while playing in a seated posture. She was observed to remove the guitar strap from her left shoulder using her right arm. She was observed to flex her neck and shrug her shoulders to remove the strap (while minimizing flexion at the shoulder).

[95] In appendix A to her report Ms. Hull provided a “summary of costs” of future care as follows:

ITEM	COST	REPLACEMENT TIME
I. TREATMENT/REHABILITATION		
PHASE 1 - Non-Surgical Treatment		
Shockwave Treatments	\$350-\$750	One time budget
Platelet Rich Plasma Injections	\$150	One time budget
- Consultation	\$700-\$900	2-6 times
- Treatments		
Active Rehab Program		
- Assessment	\$265	One time budget
- Program	\$78-\$1,170	One time budget
Occupational Therapy	\$1,890	One time budget
Psychological Treatment	\$2,160-\$3,600	One time budget
Chiropractic Treatment	\$550	One time budget
Dietitian Consultation	\$700	One time budget
PHASE II - Surgical Intervention and Post-Surgical Rehabilitation		
Shoulder Surgery		
- Public (through MSP)	\$0	
- Private Clinic	\$10,550-14,550	One time budget
Post-operative Physiotherapy	\$1,505-\$1,920	1-2 times
...		
III. EQUIPMENT/SUPPLIES		
Medications	\$453.80-\$624.20	Yearly
- Symptom Management Aids/adaptive aids for home	\$500	5-10 years
- Work tools/modifications	\$1,000-\$2,500	10-15 years
- Lifestyle aids/Modifications	\$3,000-\$5,000	One time budget
III. SERVICES		
Homemaking	\$4,160-\$5,720	Yearly
Home maintenance/yard work	\$7,280	Yearly
IV. FUTURE CONSIDERATION		
Future plans - Childrearing		
- Occupational therapy	\$840-\$1,050	One time budget
- Symptom Management	\$720-\$1,200	One time budget
- Homecare support - 1 st year postpartum	\$4,160-\$5,720	One time budget
- Homecare support - year 2 and 3 postpartum	\$2,080-\$2,860	Yearly for 2 years

THE EVIDENCE OF DR. BARRY VAISLER

[96] Dr. Vaisler is an orthopedic surgeon. On November 12, 2014, he assessed the plaintiff at the request of her counsel and provided a letter of opinion. He testified at the trial.

[97] Dr. Vaisler detected symptoms in the plaintiff's low back. He recommended a regular exercise program. In his view, even with an "active back rehabilitation" program, she is likely "to continue to experience intermittent annoying and possibly limiting low back pain especially with activities involving sustained or repetitive bending and heavy lifting for the foreseeable future".

[98] In Dr. Vaisler's opinion the plaintiff's bilateral shoulder pain is "consistent with a diagnosis of subacromial impingement of both shoulders, more painful and limiting on the right side". He found "moderate soft tissue calcification in the supraspinatus tendons of both shoulders". He also opined that:

Although it is possible to achieve some pain relief with needling of the calcific deposits under radiology control, or with high frequency locally directed ultrasound, in my experience the shoulder pain associated with subacromial impingement due to thickening of the subacromial bursa continues to persist. She is probably going to require a surgical arthroscopic subacromial decompression of both shoulders, initially on the more severe right side, under general anesthetic on a day care basis. This involves excising the thickened subacromial bursa, excising the anteroinferior portion of the acromion to widen the subacromial space and needling the calcific deposits to express the calcium.

[99] Dr. Vaisler commented that in his experience:

Post-operatively, physiotherapy is started within several days and is usually necessary for three to four months followed by a graduated return to reaching and lifting activities over the following two to three months. If surgery on the contra-lateral shoulder is still indicated, which it probably will be, this could be carried out approximately five to six months following the initial shoulder once sufficient recovery has occurred. In my experience there is approximately an 85% to 90% success rate with this surgery in relieving shoulder pain with activities below shoulder level and approximately an 80% success rate in terms of relieving shoulder pain with activities involving sustained or repetitive reaching at and above shoulder level and lifting above waist level on a permanent basis. There is no risk of her developing degenerative osteoarthritis in either shoulder as a result of injuries sustained in the motor vehicle accident.

[100] If the surgery that Dr. Vaisler recommends occurs it will mean 1 to 2 months away from work for each shoulder followed by “light duties at waist level with gradual increasing reaching and lifting activities over the following 3 to 4 months”. In Dr. Vaisler's opinion with the surgery there is a 20% risk of permanent limitation for sustained or repetitive reaching above shoulder level.

[101] Dr. Vaisler examined the plaintiff again in May 2016. He commented that without surgery the plaintiff will probably experience pain and limitation in both shoulders permanently. He wrote:

I assessed Ms. Risling on May 17, 2016 and in view of the work capacity evaluation report dated September 29, 2015 it is more likely than not that she was limited with respect to work activities involving prolonged sitting and driving, sustained or repetitive bending, heavy lifting and heavy labour on account of her neck and low back symptoms. Her tolerance to those activities would probably improve with the above noted recommended rehabilitation and exercise programmes, but it is also more likely than not that she will have a permanent limitation with respect to heavy lifting, heavy labour and possibly sustained or repetitive bending as a result of the motor vehicle accident of March 22, 2015.

THE EVIDENCE OF DR. BENJAMIN BABY

[102] In December 2012 Ms. Risling started seeing Dr. Baby as her family physician for her accident symptoms as well as unrelated matters. Dr. Baby provided a letter of opinion and testified at the trial.

[103] Dr. Baby found limited abduction of both the plaintiff's shoulders. He “suspected bilateral biceps tendinitis and possibly rotator cuff impingement”. The plaintiff saw Dr. Baby again in December 2012 to determine if she was fit to attend a gym for exercise which ICBC had authorized. Dr. Baby recommended a gradually increasing supervised exercise program.

[104] On January 18, 2013, Dr. Baby reported that the plaintiff complained of “headaches, bilateral shoulder pain, right elbow pain, right hip pain, rib pain on the left side, a cold and numb left-hand and blurred vision”. Dr. Baby found decreased range of motion in both shoulders “with painful arc”. The plaintiff had “reduced

sensation in all four limbs and reduced left arm deep tendon reflexes”. She had been undergoing physiotherapy, massage therapy and chiropractic treatment.

[105] Dr. Baby ordered ultrasound scans of both shoulders and rotator cuffs. These scans revealed bilateral calcific tendinosis in both shoulders.

[106] Dr. Baby referred the plaintiff for x-rays and MRI scans of her shoulders. It was not until June 2014 that the plaintiff saw Dr. Baby again to discuss the results of the MRI scans. These demonstrated bilateral calcific tendinosis as well as a right sided partial tear of the supraspinatus tendon and left-sided biceps tendinitis. Dr. Baby referred the plaintiff to an orthopedic surgeon Dr. El-Koussey.

[107] Dr. El-Koussey injected a steroid into the plaintiff's right shoulder. It did not appear to help. He referred her to Dr. Abeer Syal for treatment.

[108] Blood tests in November 2014 demonstrated abnormal liver function. In Dr. Baby's opinion the plaintiff was drinking too much alcohol. He recommended medication instead of alcohol to reduce her anxiety, but testified that “she was not interested in trying medication”.

[109] The plaintiff's anxiety was caused in Dr. Baby's opinion by her pain and functional limitations and from her inability to work at her usual occupation as a painter. Her anxiety was increased by the fact she had no income and therefore was on social assistance.

[110] Dr. Baby wrote the following:

Her last visit to my office related to her motor vehicle accident prior to the creation of this report was on April 29, 2016. She stated that she had continuing neck stiffness and problems turning her neck. Her lower back and right pelvic area were painful with movement. She also stated that both her shoulders hurt with movement. She confirmed that there was no pain in the shoulders before the accident. Ms. Risling was still not working full time but returned to work part time in approximately August 2012. She told me that she was unable to perform stone work, plastering, pounded metal work, ceiling work or high ladder work due to her injuries and has to contract these positions out. She avoids hobbies such as fishing, water and snow skiing, golf, swimming, hiking, going to the gym and plays her guitar less often. She has to have her mother or her boyfriend help her with house work, lawn-

mowing, pruning and cleaning. She has not received funding for extracorporeal shockwave therapy as recommended by Dr. Syal or platelet rich plasma infusion. On examination there was reduced bilateral rotation of the cervical spine, reduced flexion of the lumbar spine and global decreased range of motion of both shoulders.

[111] Under the heading “Ms. Risling’s present symptoms and current diagnosis regarding her injuries” Dr. Baby wrote:

Clearly, Ms. Risling’s injuries have not resolved. She continues to experience ongoing pain and stiffness in multiple areas of her body.

In terms of diagnosis, it is my opinion that Ms. Risling suffers from:

- a) Right shoulder partial supraspinatus ligament tear
- b) Right shoulder calcific tendinitis
- c) Aggravation of pre-existing left shoulder calcific tendinitis
- d) Left biceps tendinitis
- e) Chronic pain, both shoulders
- f) Adjustment disorder with depressed and anxious mood
- g) Alcohol misuse disorder
- h) Chronic myofascial pain of the neck and lumbar back
- i) Headaches, dizziness, fatigue, insomnia likely due to a combination of mood disturbance, alcohol overuse and chronic pain

[112] Under the heading “Pre-existing injuries” Dr. Baby wrote:

It is my opinion that the motor vehicle accident of March 22, 2012 is, on the balance of probabilities, the direct cause of the injuries suffered by Ms. Risling and listed in section three above.

Upon review of the medical records from external practitioners provided to me by Ms. Risling’s legal counsel, Ms. Krista Simon, the following was noted which are relevant to her motor vehicle accident related injuries with respect to pre-existing conditions:

- there is reference in Dr. Somani’s notes of a visit on December 27, 2007 which states ‘Rx Refill Percocet x 40 for shoulder tendinopathy’; it is not clear what side he is referring to from the encounter note.
- January 23, 2008 - X-ray left shoulder ordered by Dr. Rizwan Somani, showing multiple coarse calcifications suggestive of calcific tendinopathy.

- Another entry on January 25, 2008 details an MRI scan being ordered for left shoulder calcific tendinopathy.
- August 23, 2008 - X-ray left shoulder ordered by Dr. Trevor Newton - ' A 1.2 x 0.3cm calcified density is seen at the insertion of the supraspinatus...consistent with calcific tendonitis.
- August 25, 2008 - left shoulder pain visit due to injury associated with her dog pulling her arm, reference to attending emergency room, reference to being unable to tolerate MRI scan due to claustrophobia, steroid injection given to the left shoulder plus prescription for Percocet.
- August 26, 2008 'Faxed req to Valley for Shoulder U/S'
- September 24, 2008 - Ultrasound of both shoulders (limited view of right shoulder only) demonstrating left supraspinatus calcific tendinosis.
- October 9, 2008 - Initial assessment report from Glover Physiotherapy with a clinical impression of 'impingement syndrome with calcific tendinitis (left shoulder).

Therefore, I cannot attribute the left shoulder calcific tendinitis solely to the motor vehicle accident. However, according to Ms. Risling, both of her shoulders were not bothering her prior to the motor vehicle accident. Therefore it is my opinion that the motor vehicle accident aggravated the pre-existing but at the time quiescent left shoulder calcific tendinitis. There are a few references in the Fort Family Chiropractic records between 2007 and 2009 to neck, shoulder and back pain but I have no information to suggest Ms. Risling was suffering from these issues prior to her motor vehicle accident in 2012.

[Emphasis added.]

[113] In Dr. Baby's opinion Ms. Risling would benefit from "ongoing access to rehabilitation therapies such as physiotherapy and registered massage therapy". Further she "would benefit from having access to counselling or psychological services to better manage her symptoms of anxiety and depression which in turn we might reduce her alcohol intake".

[114] Dr. Baby's prognosis is as follows:

It is now more than four years since the motor vehicle accident and in my clinical experience, when a patient is still experiencing chronic pain at this sort of timeframe, it is likely that the pain will not totally resolve. It is likely, on the balance of probabilities, that Cory Risling will continue to experience chronic pain in the future and her injuries should be considered permanent. It is therefore foreseeable that this will have an effect on her occupational and

non-occupational capabilities. With respect to her mood, the prognosis remains guarded.

[115] Dr. Baby testified that although the plaintiff has been unwilling to consider medication to manage her mood it has improved particularly because she has reduced her consumption of alcohol.

[116] In cross-examination it was pointed out to Dr. Baby that his clinical notes indicate that Ms. Risling mentioned nothing about her accident related injuries when she consulted him on the first occasion. Dr. Baby explained that each appointment occupies only about ten minutes and during that appointment he attempts to deal only with a complaint that he considers to be a medically necessary priority.

[117] Dr. Baby was taken by defence counsel through his clinical notes concerning the plaintiff. One note dated November 7, 2012 reads “no abdominal or back pain”. Dr. Baby explained that the plaintiff had seen him for gynecological concerns and had told him that she had no back pain in relation to those concerns. In another note Dr. Baby recorded that the plaintiff had full range of motion in her cervical and lumbar spine but limited abduction of her shoulders. In a further note Dr. Baby recorded the plaintiff “was improving markedly with the kinesiology but ICBC had withdrawn the funds for that. She has regressed”.

THE EVIDENCE OF TERRY LEGER

[118] Mr. Leger lives in the same house in Chilliwack with the plaintiff. He is a Federal corrections officer and also has a dog training business.

[119] The plaintiff and Mr. Leger met online in October 2015 and began to date the next month. Their romantic relationship ended in 2016.

[120] Mr. Leger describes the plaintiff as having a lot of pain and doing a lot of drinking. A few months before the trial Ms. Risling began to make an effort to reduce her consumption of alcohol to about a glass or two in the evening.

[121] Mr. Leger does the majority of the household work, including loading or unloading the dishwasher and the laundry. The plaintiff seems unable to lift objects onto a high shelf.

[122] When the plaintiff comes home from work Mr. Leger notices that she needs help to take ladders off her van. She asks Mr. Leger almost every day to rub her shoulders, more so on the right.

[123] Mr. Leger has been a painter on jobs where Ms. Risling is present. He does that work part-time. He testified that she is cheerful when on the job when other people are nearby. She does some painting herself but finds rolling paint difficult particularly while reaching overhead. He has not seen Ms. Risling apply paint to a ceiling.

[124] Mr. Leger commented that playing her guitar brings out a different side to the plaintiff. Mr. Leger encourages her to perform because it is a good distraction from the pain which he notices is virtually always present. He frequently sees the plaintiff both morning and evening.

THE EVIDENCE OF CHERYL ANNE KELLEHER

[125] Ms. Kelleher has known the plaintiff for 33 years. They went to junior high school together and have remained good friends. Ms. Kelleher now lives in the Yukon.

[126] Before the accident of March 2012 Ms. Kelleher describes the plaintiff as outgoing, vibrant, energetic, kind, loyal and loving. She enjoyed singing and was “passionate” about her music. Ms. Kelleher has seen the plaintiff perform many times. Her style before the accident was always “energetic”. Ms. Kelleher testified that the plaintiff never drank alcohol before performances in her experience but after the event was over “we had social drinks”.

THE EVIDENCE OF HASSAN LAKHANI

[127] Mr. Lakhani has a Master of Arts degree in economics. He testified as an expert in that field and provided a written report. Using Ms. Hull's report on the plaintiff's future care cost he calculated the lump sum present value of those costs on three bases namely that she will not have the surgery suggested by Dr. Vaisler, alternatively she will have the surgery within the public health care system, or she will have the surgery in a private clinic. Mr. Lakhani's calculations are \$316,116 if there is no surgery or \$320,089 for surgery in the public system or \$344,143 in a private clinic.

[128] Mr. Lakhani calculated the cost of modifying Ms. Risling's tools only to age 67 and homemaking and maintenance yard work costs to age 80.

[129] Mr. Lakhani was also asked to provide an opinion on the means of calculating Ms. Risling's loss of capacity to earn an income in the future assuming her injuries restricted her ability to work at gainful employment. Mr. Lakhani performed calculations based on "economic" and on "actuarial" income lost multipliers. Economic multipliers take account of lost income because of the contingency of premature death as well as negative labour market contingencies such as part-time work. Actuarial multipliers take account only of premature death. Using an economic multiplier Mr. Lakhani calculated that an annual loss of income of \$10,000 to age 67 leads to a present value of \$121,030 to replace that loss using an economic multiplier or \$170,560 using the actuarial multiplier.

THE EVIDENCE OF DALE EDWARD LOT

[130] Mr. Lot plays in a band with Ms. Risling. He described the difficulties the plaintiff appeared to experience while playing her guitar. He has had to help her remove her guitar from her shoulder. On some occasions she has telephoned to say she cannot play in the band because she is too sore. At some performances she only sang and did not play her guitar, complaining she was too sore to play it.

[131] There was a band competition at the Columbia Theatre in New Westminster in 2014 which the plaintiff attended. The video of her playing at that concert became evidence at the trial. Mr. Lot was present. He believed the plaintiff had “soldiered through”. The other band members had to set up the equipment and take it down. The plaintiff could not assist. She does not usually complain of pain. She “tries to keep a positive attitude”.

THE EVIDENCE OF DR. ABEER SYAL

[132] Dr. Syal is an orthopedic surgeon. He provided an opinion on the plaintiff's condition to her counsel and testified at the trial. His opinion is primarily related to the plaintiff's right shoulder. Dr. Syal recommends “extra corporeal shock wave therapy” for the plaintiff's shoulders and injections with “platelet rich plasma”. If these therapies are used Dr. Syal opines that the prognosis for the plaintiff's right shoulder is quite good. He has advised the plaintiff against having the surgery suggested by Dr. Vaisler.

[133] Dr. Syal conducted a review of clinical records and noted that the plaintiff “had a pre-existing medical history of stroke in 2013”. The plaintiff did not mention a stroke to Dr. Syal.

[134] Dr. Syal's diagnosis of the injuries suffered to the plaintiff's right shoulder in the accident is “bursal sided partial thickness supraspinatus tendon tear with tendinosis”.

THE EVIDENCE OF MICHELLE NOEL

[135] Ms. Noel is an occupational therapist. She assessed the plaintiff on March 29, 2015, provided a written report and testified. Her assessment includes the following:

- a) the plaintiff “is not suited to work requiring competitive end range reaching with the right arm”;
- b) the plaintiff “is not suited to work requiring prolonged/sustained above shoulder level/overhead reaching”;

- c) the plaintiff “is not suited to work involving repetitive, forceful gripping with the right hand”;
- d) the plaintiff “is not suited to frequent lifting [of any weight] at shoulder level or above”; and
- e) the plaintiff “is able to perform full-time work in sedentary and light strength jobs” that meet the limitations that Ms. Noel described.

[136] Ms. Noel testified that the plaintiff is capable of performing office work and capable of supervising on painting jobs. She does not meet the full physical demands for a self-employed painter.

THE EVIDENCE OF DR. ROBIN RICKARDS

[137] Dr. Rickards is an orthopedic surgeon. He assessed Ms. Risling at the request of the defence on April 27, 2016, reviewed medical records and provided a written report as well as testifying.

[138] Dr. Rickards’ evidence in part is that the plaintiff told him that she had experienced a stroke in 2012, after the accident, which she “associated with visual problems”.

[139] Dr. Rickards’ diagnosis does not differ from that of other medical doctors, but in his opinion the incidence of partial thickness rotator cuff tears “with a mean age of 45 to 55 years” is approximately 8% in symptomatic patients. He described this as an “age related phenomenon”. He also describes the plaintiff as presenting with degeneration “involving the AC joints at both right and left shoulders”. By degeneration Dr. Rickards was referring to arthritic changes. In his opinion these were present before the accident.

[140] Dr. Rickards recommends therapeutic methods which he describes as “time, local rest, application of cold or heat, massage, nonsteroidal and anti-inflammatory medication, modification of activities, gentle exercises for maintaining an increasing range of movement, and, later, muscle strengthening...”.

SUBMISSIONS OF THE PLAINTIFF

[141] The plaintiff submits all medical experts who testified as part of her case agree her accident related injuries will continue to cause pain and dysfunction into the indefinite future. Some “modes of treatment” will be beneficial but no treatment is available which will lead to complete resolution of her symptoms.

[142] It is submitted that physical exertion exacerbates her symptoms. She has not returned to her pre-accident outdoor activities such as fishing and tending a vegetable garden. Her work as a house painter causes discomfort and pain. Some painting activities, such as using a roller on a ceiling or using heavy spraying apparatus, are no longer feasible without serious discomfort. Ms. Risling submits the medical opinions and the opinion of Ms. Hull support her submissions about her symptoms and the extent of her disability.

[143] The plaintiff has decided against surgery on her shoulders both because Dr. Syal has recommended against it and because the surgery and recuperation from it would involve a prolonged absence from her work, which she cannot afford. It is submitted Dr. Syal’s opinions regarding her shoulder should be treated with particular respect because he has a subspecialty in disorders of the shoulder. It is his opinion that although the plaintiff had pre-accident complaints of left shoulder pain which was caused by calcification with tendinitis, this did not limit her activities until it was aggravated by the accident. The right shoulder had no pre-accident history of symptoms and the current limitations of pain and movement in that shoulder have their source only in the accident.

[144] The plaintiff stresses the functional capacity evaluation of Michelle Noel, which indicates that although Ms. Risling is capable of meeting some of the basic physical demands of her work as a painter she nevertheless has many limitations. These include difficulty with “end range” reaching with her right arm; difficulty with above shoulder reaching with either arm; weakened grip with her right hand and constraints on her ability to sustain prolonged forward bending or stooping.

[145] The plaintiff relies on Ms. Noel's opinion that she does not meet the full physical demands of her pre-accident work as a self-employed house painter.

[146] Dr. Rickards testified for the defence. The plaintiff submits his opinion should be treated with caution. The plaintiff did not suffer a stroke. He was mistaken that the plaintiff had symptoms in her right shoulder before the accident. Dr. Rickards conceded during cross-examination that the accident was a cause of the plaintiff's ongoing complaints of pain and disability although it is his opinion that some of those complaints are attributable to age-related degeneration.

[147] The plaintiff refers to *Athey v. Leonetti*, [1996] 3 S.C.R. 458, in which the Court held that causation is established for the purposes of an action for personal injury damages if the negligence of the defendant caused or contributed to the plaintiff's injury and loss.

[148] Ms. Risling submits she has undergone multiple treatments and therapies in an endeavour to recover from her injuries. She submits there has been no failure on her part to act reasonably to mitigate her losses and that to some extent her lack of money has prevented her from having treatments that may provide some amelioration of her symptoms.

[149] Ms. Risling submits that applying the criteria summarized in *Karim v. Li*, 2015 BCSC 498, and by reference to *Gulati v. Chan*, 2015 BCSC 431; *Han v. Chahal*, 2013 BCSC 1575; *Marois v. Pelech*, 2009 BCCA 286; and *Redmond v. Krider*, 2015 BCSC 178 non-pecuniary general damages should be assessed in the range of \$130,000 - \$150,000.

[150] Ms. Risling submits she lost some of her capacity to earn income from the date of the accident to the date of trial. She refers to *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 where the court relied on *M.B. v. British Columbia*, 2003 SCC 53 in which Chief Justice McLachlin held that the value of "a particular plaintiff's capacity to earn is equivalent to the value of the earnings she or he would have received over time, had the tort not been committed".

[151] The plaintiff submits that before the accident she was building her business particularly in the area of specialty finishes but was frustrated by her injuries. The plaintiff submits that but for the accident she would have continued to build her business. She refers to a decline in the revenue of her business in 2013 and 2014 and the loss of specialty work for which she could not provide quotations to prospective customers because of her inability to perform that work.

[152] Ms. Risling calculates a pretrial loss of earning capacity in the range of \$99,000 - \$123,000 and suggests an award of \$110,000 would be appropriate.

[153] The plaintiff seeks an award of damages for loss of capacity to earn income in the future. She relies on *Palmer v. Goodall* (1991), 53 B.C.L.R 2d 44 (C.A.) and *Brown v. Golaiy* (1997), 26 B.C.L.R 3d 353 for the principle that she is entitled to an award for the loss of capacity to earn income in the future because her accident related injuries have rendered her less capable of earning an income from all types of employment including her chosen occupation of house painting. The burden of proof the plaintiff must meet is said to be simply the relative likelihood of future events. The plaintiff submits that in *Arletto v. Kin*, 2016 BCSC 77 Dillon J. relying on *Hoy v. Williams*, 2014 BCSC 234 at paras. 153-161 articulated the following principles to determine lost earning capacity in the future:

- (a) the assessment of those damages is not a mathematical calculation;
- (b) the essential task is to compare the likely future of the plaintiff's working life if the accident did not happen with her likely future working life with the accident injuries;
- (c) the loss can be determined by taking an "earnings approach" or a "capital asset approach". Either is correct but the former is more readily applied when the loss is easily measurable; and
- (d) the capital asset approach involves a determination of whether the plaintiff is less capable of earning an income from all types of employment; is less marketable or competitive as a potential

employee, or is less able to take advantage of job opportunities that might have been open if the accident injuries had not happened.

[154] It is submitted the plaintiff is entitled to be compensated for “real and substantial possibilities” of a future loss depending on the chance of that loss occurring. All of the evidence is to be considered when the court considers that chance.

[155] The plaintiff submits she has 14 more years of working life at her present job to age 60 and that applying the multipliers provided by the economist witness Mr. Lekhani a yearly loss of \$15,000 will result in an overall loss up to \$198,000, while an annual loss of \$20,000 will result in an overall loss up to \$264,000.

[156] Determination of the loss will depend on the extent of the plaintiff's injuries and the rate at which she could have grown her business if the accident had not happened and the rate it may grow with the accident injuries.

[157] The plaintiff submits a “fair award” for loss of income earning capacity is about \$175,000.

[158] I agree with the plaintiff's legal analysis on the issue of lost earning capacity and I will return to the question of the appropriate assessment of those damages.

[159] The plaintiff submits she is entitled to an award of damages for her cost of care in the future. She relies on *Dzumhur v. Davoody*, 2015 BCSC 2316 at para. 244 where Kent J. wrote:

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

- the purpose of any award is to provide physical arrangement for assistance, equipment and facilities directly related to the injuries;
- the focus is on the injuries of the innocent party... Fairness to the other party is achieved by ensuring that the items claimed are legitimate and justifiable;
- the test for determining the appropriate award is an objective one based on medical evidence;

- there must be: (1) a medical justification for the items claimed; and (2) the claim must be reasonable;
- the concept of "medical justification" is not the same or as narrow as "medically necessary";
- admissible evidence from medical professionals (doctors, nurses, occupational therapists, *et cetera*) can be taken into account to determine future care needs;
- however, specific items of future care need not be expressly approved by medical experts..... It is sufficient that the whole of the evidence supports the award for specific items;
- still, particularly in non-catastrophic cases, a little common sense should inform the analysis despite however much particular items might be recommended by experts in the field; and
- no award is appropriate for expenses that the plaintiff would have incurred in any event.

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

[160] Ms. Risling submits that the present value of the following costs of future care ought to be awarded based on the medical evidence and the recommendations of Ms. Hull:

- (a) extracorporeal shockwave therapy with a present value cost of \$530;
- (b) platelet rich plasma injections with the present value cost of \$3,316;
- (c) an active rehabilitation program with a physiotherapist at the present value cost of \$1,240;
- (d) occupational therapy with concentration on appropriate ergonomics for workplace and home purposes with a present value cost of \$1,870;
- (e) psychological counselling as recommended by Dr. Janke with a present value cost of \$2,850;
- (f) chiropractic treatment with a present value cost of \$544;

- (g) consultation with a dietitian as recommended by Ms. Hull to facilitate the plaintiff losing weight that she has gained since her injuries;
- (h) evidence was given of the cost of surgery in a private clinic but the plaintiff concedes that she is unlikely to have surgery on her shoulders;
- (i) prescription and non-prescription medication. The prescription medication is for muscle relaxants and for medication to assist the plaintiff in sleeping. The non-prescription medication is for a variety of analgesics and for over-the-counter sleep medication. The present value cost of that medication is said to be almost \$16,000;
- (j) Ms. Hall has recommended adaptive aids and equipment to assist the plaintiff in her work and in household tasks. The present value of those items is \$1,880;
- (k) Dr. Vaisler has recommended further aids for the plaintiffs work including such items as a back support for sitting and driving and some custom modifications to her work van to assist her in dealing with stepladders, sprayers and wheeled carts. The present value cost of those items is calculated at \$3,057;
- (l) Ms. Hull has recommended a telescoping dog ramp to assist the plaintiff in lifting her 80 pound dog in and out of her vehicle. She also recommends a boat trailer and a narrow width guitar to increase the plaintiff's playing tolerance. The present value cost of those items is \$4,000;
- (m) homemaking services is given a present value cost of \$112,908; and
- (n) home maintenance and yard work costs are calculated to have a present value of \$166,390.

[161] The total for the cost of future care that the plaintiff seeks is \$272,515.44.

THE DEFENDANT’S SUBMISSIONS

[162] The defendant submits the plaintiff’s accident injuries largely resolved in somewhat more than a year and that any continuing complaints are likely due to the natural progression of her “pre-accident conditions” which the defendant submits were extensive.

[163] It is also submitted the plaintiff has had 20 years of painting experience during which she enjoyed only a limited income averaging about \$27,000 each year of which a portion was employment insurance.

[164] Further, it is submitted there is little documentary evidence to support an award for lost opportunities to earn income since the accident until trial nor any expert evidence to support such an award but if an award is made \$9,100 is appropriate.

[165] The defendant emphasizes that the plaintiff reported a stroke to Dr. Richards in 2012 or 2013. Further, the defendant submits that the plaintiff was drinking about 400 ml of alcohol nightly before the accident and had been doing for many years. The defendant submits the evidence indicates that in recent months the plaintiff has reduced her alcohol intake significantly so that it “is no longer an issue”.

[166] The defendant submits the plaintiff was not a credible witness. This submission is based on several factors and including the fact that the plaintiff gave many hours of “animated testimony without any sign of distress”, and that the surveillance video of the plaintiff in 2014 and 2015 shows her demonstrating “a fluid ease of movement”.

[167] The defendant submits there is no evidentiary basis to find the plaintiff has been deprived of an opportunity to have children because of her accident related injuries.

[168] It is submitted the plaintiff will take over Pink Painters from her mother in early 2017 and carry on, as her mother has, with her time largely devoted to customer relations, supervision of work and administration which she is capable of doing.

[169] The defendant submits Dr. Baby saw the plaintiff on many occasions when there were no complaints related to the accident injuries. Further Dr. Baby reported that the plaintiff's condition had improved markedly with active kinesiology.

[170] The defendant submits Dr. Syal is optimistic that the plaintiff will recover with a regime of active supervised exercise and with the use of extracorporeal shockwave therapy and platelet rich plasma injections.

[171] The defendant discounts the evidence of the plaintiff's mother who was "very supportive of her daughter" but "incredibly" would not hire her to work for Pink Painters.

[172] The defendant also discounts the evidence of Mr. Leger who has known the plaintiff only since 2015. Mr. Leger also testified that the plaintiff's dog, which is now about 13 years old, has reached the usual lifespan for that breed of dog and in any event the defendant submits the plaintiff's damage claim regarding her dog has no substance.

[173] The defendant suggests an adverse inference should be drawn from the failure of the plaintiff to have any witness testify who worked with her before or after the accident and did not have any client of the plaintiff testify.

[174] The defendant relies on various authorities to submit that an award of \$30,000 - \$60,000 in non-pecuniary general damages is appropriate.

[175] The defendant submits that a loss of earning capacity in the future has not been proven. In *Jossy v. Johnson*, 2016 BCSC 1023 Skolrood J. observed that such a loss must "be based on more than a hope and optimistic belief about a possible future opportunity". The defendant submits that observation applies to the plaintiff's

case and if an award is made it ought not to exceed one year's gross income of \$27,000 to \$33,000.

[176] The defendant proposes that \$6,244.41 is the appropriate award for special damages which represents the expenses incurred by the plaintiff for the year after the accident.

[177] If an award is made for the cost of future care the defendant submits it should be only for the cost of an exercise program. The defendant emphasizes that in Dr. Vaisler's opinion the plaintiff is "unlikely to have any lasting benefits from acupuncture, chiropractic treatments or injections. She needs to be involved in a regular exercise program".

[178] The defendant submits the plaintiff has failed to take reasonable steps to mitigate her losses and in particular has failed to engage in a proper exercise program or to take less physically demanding work through Pink Painters.

[179] The defendant submits that the total damages to be awarded should be no greater than \$106,900 subject to a deduction for the plaintiff's failure to mitigate.

FINDINGS OF FACT

[180] I make the following findings of fact:

- (a) The plaintiff had physical conditions before the accident which had limited her ability to work but which no longer manifested themselves by the time of the accident;
- (b) the plaintiff consumed alcohol on a frequent basis before the accident. Her consumption of alcohol increased considerably with the accident but has decreased in recent months. Any psychological disorder associated with excessive drinking in response to her accident pain and anxiety had begun to diminish prior to trial;

- (c) the plaintiff's accident injury significantly reduced her capacity to work in the years before the trial;
- (d) the plaintiff's accident injuries will significantly limit her capacity in the future to carry out all her pre-accident work as a house painter and any other occupation to which she is suited;
- (e) these limitations are likely to be long-term;
- (f) to be able to carry on working until about age 60 as a house painter the plaintiff will need modifications to her working tools;
- (g) the plaintiff has made a reasonable decision not to have surgery on her shoulders;
- (h) the plaintiff has taken reasonable steps to mitigate her losses both by taking on work and by a variety of exercise;
- (i) the plaintiff did not suffer a stroke;
- (j) because of the accident, the plaintiff will continue indefinitely to experience limitations to her housekeeping, home maintenance and yard work abilities;
- (k) the absence of children in the plaintiff's life cannot be attributed to the accident;
- (l) there is no basis to award of damages in relation to the plaintiff's dog;
- (m) the plaintiff has experienced anxiety and depression from the effects of the accident and needs psychological counselling to assist in overcoming those effects;
- (n) the extracorporeal shockwave treatments and platelet rich plasma injections suggested by Dr. Syal are not recommended by Dr. Vaisler whose opinion I prefer;

- (o) the accident injuries have significantly interfered with the plaintiff's enjoyment of life. Playing a guitar in a band has become painful. Outdoor activities such as camping, boating and fishing have become very limited at best. Entertaining friends in her home has not been reasonably possible since the accident. I find that each of these problems are likely to be gradually overcome but only to a limited extent;
- (p) the plaintiff's pain and disability in particular in her shoulders will be long-lasting; and
- (q) I decline to draw an adverse inference.

ASSESSMENT OF DAMAGES

Non-pecuniary general damages

[181] I assess damages for the pain and suffering, loss of enjoyment of life and loss of amenities the plaintiff has suffered from the date of the accident and on into the future at \$150,000.

Loss of capacity to earn income to the date of trial

[182] I find the plaintiff lost about one-half the income earning capacity she had prior to the accident until the date of trial. I assess the total amount of the plaintiff's pretrial income loss for the approximately four years before the trial at \$90,000.

Special damages

[183] I assess the out-of-pocket expenses the plaintiff incurred as a result of her accident injuries to the date of trial at \$7,500.

Future lost capacity to earn income

[184] I accept the submission of the plaintiff that the present value of her future loss of income until age 60 should be assessed at \$175,000.

The cost of care in the future

[185] I do not accept that the plaintiff will require the extent of care in the future that she submits is appropriate if she engages in an active supervised exercise program; undertakes psychological counselling, and has an improvement in her mood for replacing some of the lost pleasures in life through the award of non-pecuniary general damages. I assess the cost of future care at \$200,000.

SUMMARY OF DAMAGE AWARD

[186] In summary, the damage award is as follows:

non-pecuniary general damages	\$150,000
loss of capacity to earn income to the date of trial	\$ 90,000
special damages	\$ 7,500
loss of capacity to earn income in the future	\$175,000
cost of future care	<u>\$200,000</u>
Total	\$622,500

COSTS

[187] Unless there are factors in which I am unaware of the plaintiff is entitled to her costs.

“Mr. Justice Affleck”