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| Law 433C.001 | Personal Injury Advocacy | SPRING 2024 |
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**WEEK 5: FEBRUARY 5, 2024 - Pecuniary damages**

* 1. **Recommended Readings**
  + The BCCA “Trilogy” on Lost Earning Capacity claims:
    - *Rab v. Prescott,* [2021 BCCA 345](https://canlii.ca/t/jj7q6)
    - Lo v. Vos, [2021 BCCA 421](https://www.bccourts.ca/jdb-txt/ca/21/04/2021BCCA0421cor1.htm#SCJTITLEBookMark267)
    - *Dornan v. Silva*, [2021 BCCA 228](https://canlii.ca/t/jgb0s)
  + *McHatten v. ICBC*, [2023 BCCA 271 (CanLII)](https://canlii.ca/t/jz1z7)
  + *Steinlauf v Deol*, [2022 BCCA 96 (CanLII)](https://canlii.ca/t/jn2rr)
  + *Grabovac v Fazio*, [2021 BCSC 2362](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc2362/2021bcsc2362.html?autocompleteStr=2021%20BCSC%202362&autocompletePos=1) (Lost Earning Capacity)
  + *Kim v. Lin,* [2016 BCSC 2405](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2405/2016bcsc2405.html); aff’d [2018 BCCA 77](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html?autocompleteStr=kim%20v.%20lin'&autocompletePos=1) (Lost Housekeeping)
  + *Xu v. Balaski,* [2020 BCSC 940](https://canlii.ca/t/j8dft)(Lost Housekeeping & Childcare Capacity)
* Michael Slater, QC, “Future Cost of Care in Canada,” *The Verdict,* Issue 132, Spring 12, p. 49: <https://www.slatervecchio.com/wp-content/uploads/2014/10/FCCarticleVerdictedtion.pdf>
  + *Uy v. Dhillon,* [2020 BCSC 1302](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.html?autocompleteStr=2020%20BCSC%201302&autocompletePos=1#document)(Cost of Future Care and In Trust Claims)
  1. **Teaching Objectives - Weeks 5**
* Overview of pecuniary damages:
  + Wage loss (past and prospective); and
  + Expenses (past and prospective).
* *Restitutio in integrum* – a principled approach to full compensation, from the SCC Triology.
* Present value discount rates for future damages: *Riding-Brown v. Jenkins,* [2015 BCSC 1751](https://www.bccourts.ca/jdb-txt/SC/15/17/2015BCSC1751cor1.htm)
* Past wage loss and future lost earning capacity - case study:
  + *Grabovac v Fazio*, [2021 BCSC 2362](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc2362/2021bcsc2362.html?autocompleteStr=2021%20BCSC%202362&autocompletePos=1)
  + The BCCA “Trilogy” on Lost Earning Capacity claims:
    - *Rab v. Prescott,* [2021 BCCA 345](https://canlii.ca/t/jj7q6)
    - Lo v. Vos, [2021 BCCA 421](https://www.bccourts.ca/jdb-txt/ca/21/04/2021BCCA0421cor1.htm#SCJTITLEBookMark267)
    - *Dornan v. Silva*, [2021 BCCA 228](https://canlii.ca/t/jgb0s)
* Lost Homemaking Capacity: *Kim v. Lin,* [2016 BCSC 2405](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2405/2016bcsc2405.html); aff’d [2018 BCCA 77](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html?autocompleteStr=kim%20v.%20lin'&autocompletePos=1); See also *Ali v. Stacey,* [2020 BCSC 465](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc465/2020bcsc465.pdf)
* Special damages (out-of-pocket expenses) and “In Trust” Claims: *Uy v. Dhillon,* [2020 BCSC 1302](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.html?autocompleteStr=2020%20BCSC%201302&autocompletePos=1#document)
* Cost of future care – medical justification for future cost of care needs
  + [Slater M, “Future Cost of Care in Canada – Justice Requires Something Better” Verdict 2010;](https://lawsdocbox.com/Legal_Issues/113459629-Articles-the-verdict.html)
  + The total lifestyle approach for catastrophic injuries *Uy v. Dhillon,* [2020 BCSC 1302](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.html?autocompleteStr=2020%20BCSC%201302&autocompletePos=1#document)
  1. **Pecuniary Damages - *Restitutio in integrum* – a principled approach to full compensation, from the SCC Trilogy**
* Pecuniary losses simply refer to the plaintiff’s economic losses, including past wage loss, future loss of earning capacity, special damages (out-of-pocket expenses), and cost of future care.
* The Supreme Court of Canada endorsed the principle of “full compensation” for pecuniary losses in *Andrews v. Grand & Toy Alberta Ltd*., [[1978] 2 S.C.R. 229](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii1/1978canlii1.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20229&autocompletePos=1), *Thornton v. Prince George School District No. 57*, [[1978] 2 S.C.R. 267](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii12/1978canlii12.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20267%20&autocompletePos=1) and *Arnold v. Teno*, [[1978] 2 S.C.R. 287](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii2/1978canlii2.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20287%20&autocompletePos=1) (the "Trilogy"). In *Andrews*, Dickson J. confirmed that "full compensation" is the paramount concern of the courts and stated:

*The principle that compensation should be full for pecuniary loss is well established: see McGregor on Damages, 13th ed. (1972), pp. 738-39, para. 1097: The plaintiff can recover, subject to the rules of remoteness and mitigation, full compensation for the pecuniary loss that he has suffered. This is today a clear principle of law.*

* To the same effect, see Kemp and Kemp, Quantum of Damages, 3rd ed. (1967), vol. 1, at p. 4: "The person suffering the damage is entitled to full compensation for the financial loss suffered." This broad principle was propounded by Lord Blackburn at an early date in *Livingstone v. Rawyards Coal Co*. (1880), 5 App. Cas. 25 at 39 (H.L.), in these words:

*I do not think there is any difference of opinion as to it being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.*

* The emphasis on full compensation for pecuniary damages is recognized as being a response, in part, to the arbitrary limit placed on non-pecuniary damages. In his text, The Law of Damages (Loose-leaf ed), Professor Waddams states at page 3-63:

*. . . the tenor of Dickson J.'s judgment in Andrews v Grand & Toy makes it clear that the court will lean in favour of the plaintiff in judging the reasonableness of his claim. The court made it plain that the restraint imposed on damages for non-pecuniary losses was an added reason for insuring the adequacy of pecuniary compensation.*

* In *Agar v. Morgan,* [2003 BCSC 630](https://www.canlii.org/en/bc/bcsc/doc/2003/2003bcsc630/2003bcsc630.html?autocompleteStr=2003%20bcsc%20630&autocompletePos=1) aff’d [2005 BCCA 579](https://www.canlii.org/en/bc/bcca/doc/2005/2005bcca579/2005bcca579.html?autocompleteStr=2005%20BCCA%20579&autocompletePos=1) the trial judge affirmed the principle of full compensation for pecuniary damages in response to the arbitrary cap put on non-pecuniary damages at paragraph 143:

Because the Supreme Court of Canada has restricted the damages recoverable for non-pecuniary losses, the proven pecuniary losses should be compensated in full.  See:  ***Ontario Law Reform Commission* *Report On Compensation for Personal Injuries and Death***(Ottawa:  Ministry of the Attorney General, 1987) at 117.

* 1. **Loss of Future Earning Capacity**
* One of the most important heads of damage in a personal injury claim – and often the largest – is the plaintiff’s lost future earning capacity.
* In *Pololos v Cinnamon-Lopez,* [2016 BCSC 81](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc81/2016bcsc81.html?autocompleteStr=2016%20BCSC%2081&autocompletePos=1), Voith J. noted at para. 133 that the relevant legal principles regardless loss of future earning capacity are well established:

*a)        To the extent possible, a plaintiff should be put in the position he/she would have been in, but for the injuries caused by the defendant’s negligence; Lines v. W & D Logging Co. Ltd.,*[*2009 BCCA 106*](https://www.canlii.org/en/bc/bcca/doc/2009/2009bcca106/2009bcca106.html)*at para.*[*185*](https://www.canlii.org/en/bc/bcca/doc/2009/2009bcca106/2009bcca106.html#par185)*, leave to appeal ref’d [2009] S.C.C.A. No. 197;*

*b)        The central task of the Court is to compare the likely future of the plaintiff’s working life if the Accident had not occurred with the plaintiff’s likely future working life after the Accident; Gregory v. Insurance Corporation of British Columbia,*[*2011 BCCA 144*](https://www.canlii.org/en/bc/bcca/doc/2011/2011bcca144/2011bcca144.html)*at para.*[*32*](https://www.canlii.org/en/bc/bcca/doc/2011/2011bcca144/2011bcca144.html#par32)*;*

*c)        The assessment of loss must be based on the evidence, but requires an exercise of judgment and is not a mathematical calculation; Rosvold v. Dunlop,*[*2001 BCCA 1*](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html)*at para.*[*18*](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html#par18)*;*

*d)       The two possible approaches to assessment of loss of future earning capacity are the “earnings approach” and the “capital asset approach”; Brown v. Golaiy (1985),*[*1985 CanLII 149 (BC SC)*](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii149/1985canlii149.html)*, 26 B.C.L.R. (3d) 353 at para.*[*7*](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii149/1985canlii149.html#par7)*(S.C.); and Perren v. Lalari,*[*2010 BCCA 140*](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html)*at paras.*[*11-12*](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html#par11)*;*

*e)        Under either approach, the plaintiff must prove that there is a “real and substantial possibility” of various future events leading to an income loss; Perren at para.*[*33*](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html#par33)*;*

*f)         The earnings approach will be more appropriate when the loss is more easily measurable; Westbroek v. Brizuela,*[*2014 BCCA 48*](https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca48/2014bcca48.html)*at para.*[*64*](https://www.canlii.org/en/bc/bcca/doc/2014/2014bcca48/2014bcca48.html#par64)*. Furthermore, while assessing an award for future loss of income is not a purely mathematical exercise, the Court should endeavour to use factual mathematical anchors as a starting foundation to quantify such loss; Jurczak v. Mauro,*[*2013 BCCA 507*](https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca507/2013bcca507.html)*at paras.*[*36-37*](https://www.canlii.org/en/bc/bcca/doc/2013/2013bcca507/2013bcca507.html#par36)*.*

*g)      When relying on an “earnings approach”, the Court must nevertheless always consider the overall fairness and reasonableness of the award, taking into account all of the evidence; Rosvold at para.*[*11*](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html#par11)*.*

* The standard of proof to establish a claim for future pecuniary loss is **“simple probability”**. All that has to be established is a real and substantial "risk" of pecuniary loss. It is not necessary for the plaintiff to prove on a balance of probabilities that a future pecuniary loss will occur. In *Athey v. Leonati,* [[1996] 3 SCR 458](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html?autocompleteStr=athey&autocompletePos=1) the Supreme Court of Canada made the following comments with regard to how the courts should deal with potential future for hypothetical events:

*27 Hypothetical events (such as how the plaintiff's life would have proceeded without the tortious injury) or future events need not be proven on a balance of probabilities. Instead, they are* ***simply given weight according to their relative likelihood****: Mallett v. McMonagle, [1970] A.C. 166 (H.L.), Malec v. J.C. Hutton Proprietary Ltd. (1990), 169 C.L.R. 638 (Aust. H.C.), Janiak v. Ippolito, [1985] 1 S.C.R. 146. For example, if there is a 30 per cent chance that the plaintiff's injuries will worsen, then the damage award may be increased by 30 per cent of the anticipated extra damages to reflect that risk. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Schrump v. Koot (1977), 18 O.R. (2d) 337 (C.A.), Graham v. Rourke (1990), 74 D.L.R. (4th) 1 (Ont. C.A.).*

* The criteria regarding whether an award for loss of future earning capacity is warranted are set out in *Perren v. Lalari*,[2010 BCCA 140](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html?autocompleteStr=2010%20BCCA%20140&autocompletePos=1). A concise summary of the law in *Perren*was provided by Savage J. in *Parker v. Lemmon*, [2012 BCSC 27](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc27/2012bcsc27.html) at para. 42:

*(1) A plaintiff must first prove there is a real and substantial possibility of a future event leading to an income loss before the Court will embark on an assessment of the loss;*

*(2) A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation;*

*(3) A plaintiff may be able to prove that there is a substantial possibility of a future income loss despite having returned to his or her employment;*

*(4) An inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss;*

*(5) It is not the loss of earnings but rather the loss of earning capacity for which compensation must be made;*

*(6) If the plaintiff discharges the burden of proof, then there must be quantification of that loss;*

*(7) Two available methods of quantifying the loss are (a) an earnings approach or (b) a capital asset approach;*

*(8) An earnings approach will be more useful when the loss is more easily measurable;*

*(9) The capital asset approach will be more useful when the loss is not easily measurable.*

* Garson J.A. further explained at para. 32 of *Perren* that a plaintiff is entitled to an award of damages for future loss of earning capacity even in circumstances where they have returned to their previous employment:

*A plaintiff must always prove, as was noted by Donald J.A. in Steward, by Bauman J. in Chang, and by Tysoe J.A. in Romanchych, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in Steenblok, or a capital asset approach, as in Brown. The former approach will be more useful when the loss is more easily measurable, as it was in Steenblok. The latter approach will be more useful when the loss is not as easily measurable, as in Pallos and Romanchych. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both Pallos and Parypa. But, as Donald J.A. said in Steward, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.*

* A person’s income earning potential can be viewed **as a capital asset which can be diminished as a result of injury and disability**. Finch J., as he then was, summarized four key questions to be asked in assessing a claimant’s lost future earning capacity, in *Brown v. Golaiy*, [(1985) 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii149/1985canlii149.html) at para. 8:
  + - 1. *The plaintiff has been rendered less capable overall from earning income from all types of employment;*
      2. *The plaintiff is less marketable or attractive as an employee to potential employers;*
      3. *The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and*
      4. *The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.*

The Court of Appeal recently provided guidance on assessing damages for lost future earnings in three separate decisions last year, colloquially referred to as the “BCCA Trilogy”:

* + - *Rab v. Prescott,* [2021 BCCA 345](https://canlii.ca/t/jj7q6)
    - Lo v. Vos, [2021 BCCA 421](https://www.bccourts.ca/jdb-txt/ca/21/04/2021BCCA0421cor1.htm#SCJTITLEBookMark267)
    - *Dornan v. Silva*, [2021 BCCA 228](https://canlii.ca/t/jgb0s)
* In *Rab v. Prescott,* [2021 BCCA 345](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca345/2021bcca345.html?autocompleteStr=rab%20v%20&autocompletePos=1), in which Grauer J.A. stated.

*[47] From these cases, a* ***three-step process*** *emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in Brown). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring—see the discussion in Dornan at paras 93–95.*

* In *Dornan v Silva,* 2021 BCCA 228 at para. 156, the Court cited *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32, to describe a claim for loss of future earning capacity:

[32]      *An award for future loss of earning capacity thus represents compensation for a pecuniary loss. It is true that the award is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the accident had not happened and the plaintiff's likely future after the accident has happened: Rosvold v. Dunlop,*[*2001 BCCA 1*](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html)*at para.*[*11*](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html#par11)*; Ryder v. Paquette, [1995] B.C.J. No. 644 (C.A.) at para. 8*.

* In *Lo v. Vos,* 2021 BCCA 421,
  + The trial judge found that as a result of the  plaintiff’s  chronic pain, she was totally disabled from working. However, there was a measurable risk of major depressive disorder absent accident, too, and therefore applied a negative contingency, reducing the awards for non-pecuniary damages, lost future earnings, and future care costs by 20%.
  + On appeal, the court found the evidence was not capable of supporting a conclusion that there was a measurable risk of depression absent-accident. The appeal was being allowed. The evidence was not capable of drawing this conclusion, resulting in a wholly erroneous estimate of the loss.
* *Ploskon-Ciesla v. Brophy*, 2022 BCCA.
  + Followed the criteria and the test set out in *Rab* and established that a judge must engage in an analysis.
  + Highlights that it is a central task to compare the likely future of the plaintiff’s working life after the accident, with their life if the accident had not occurred. Shows when the capital asset approach should not be used.
* *Brown v. Ponton* 2022 BCSC 2248
  + The court relied on *Ploskon-Ciesla v. Brophy*, 2022 BCCA, which highlights the purpose of loss of future earning capacity – "to put the plaintiff in the same financial condition they would have been had the accident not occurred”
  + The Court commented on the trilogy of cases in light of future loss, on a inherently hypothetical basis. At paragraph 74 the Court comments on when a hypothetical event can be taken in to consideration, relying on Kist Goepel’s dissent in *Grewel v. Naumann,* 2017 BCCA 158

**Capital asset approach**

* Where the plaintiff’s loss of income earning capacity cannot be measured precisely, or in a pecuniary way, the court will employ a “capital asset” approach.
* In *Rosvold v. Dunlop*, [2001 BCCA 1](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html?autocompleteStr=2001%20BCCA%201%20&autocompletePos=1) Huddart J. stated at para. 8-11:

*What is being compensated is not lost projected future earnings but the loss or impairment of earning capacity as a capital asset. In some cases, projections from past earnings may be a useful factor to consider in valuing the loss but past earnings are not the only factor to consider…*

* In *Rab v. Prescott,* [2021 BCCA 345](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca345/2021bcca345.html?autocompleteStr=rab%20v%20&autocompletePos=1), at para. 67, Grauer J.A. outlines the approach outlined in *Pallos v. Insurance Corp. of British Columbia* [(1995), 100 B.C.L.R. (2d) 260](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2871/1995canlii2871.html?autocompleteStr=pallos&autocompletePos=1) for the quantification of loss of earnings capacity under the capital asset approach:

*67 What this Court said in Pallos was this:*

*[43] The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff's remaining years of work, to multiply the annual projected loss times the number of years remaining, and to calculate a present value of this sum. Another is to award the plaintiff's entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so.*

* While there is no mathematical certainty required for the calculation of damages under the capital asset approach, at para. 74 of the judgement, Grauer J.A. cautioned that there must be “*a factual mathematical anchor*” to a plaintiff’s pre- and post-accident circumstances in order to be consistent with the *Pallos* approach of valuing loss future earnings capacity.
* Further clarification of the need to rely upon the economic evidence was offered by the BC Court of Appeal in 2023, in *McHatten v. ICBC*, [2023 BCCA 271 (CanLII)](https://canlii.ca/t/jz1z7):
* [19]      As has oft been noted, assessing loss of future earning capacity is a particularly difficult exercise for a trial judge. The central task involves comparing the plaintiff’s likely future working life if the accident had not happened with the plaintiff’s likely future working life after the accident: *Rosvold v. Dunlop*, [2001 BCCA 1](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html) at para. [11](https://www.canlii.org/en/bc/bcca/doc/2001/2001bcca1/2001bcca1.html#par11); *Pololos v. Cinnamon-Lopez*, [2016 BCSC 81](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc81/2016bcsc81.html) at para. [133](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc81/2016bcsc81.html#par133). That comparison must be grounded in the evidence before the judge, as limited as it may be.
* [20]      The capital asset approach to valuing loss of future earning capacity is less exact and mathematical than an earnings approach. Nevertheless, the valuation cannot be done wholly at large; the judge cannot simply pluck a number from the air without any explanation as to how they got there: *Dornan* *v. Silva*, [2021 BCCA 228](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca228/2021bcca228.html)at paras. [151](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca228/2021bcca228.html#par151), 158.
* [21]      The respondent submits that the judge’s approach is no less arbitrary than awarding damages based on a plaintiff’s annual income for one or more years as described in *Pallos v. Insurance Corp. of British Columbia*(1995), 100 B.C.L.R. (2d) 260, [1995 CanLII 2871 (C.A.)](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2871/1995canlii2871.html). In that case, this Court identified three acceptable methods of assessing damages using the capital asset approach:
* 43        The cases to which we were referred suggest various means of assigning a dollar value to the loss of capacity to earn income. One method is to postulate a minimum annual income loss for the plaintiff’s remaining years of work, to multiply the annual projected loss times the number of year remaining, and to calculate a present value of this sum. Another is to award the plaintiff’s entire annual income for one or more years. Another is to award the present value of some nominal percentage loss per annum applied against the plaintiff’s expected annual income. In the end, all of these methods seem equally arbitrary. It has, however, often been said that the difficulty of making a fair assessment of damages cannot relieve the court of its duty to do so. …
* [Emphasis added.]
* [22]      The respondent says the judge’s approach is similar to the “annual income method”, in which a judge assesses damages based on a number of years of salary. However, as this court said in *Rab v. Prescott*, [2021 BCCA 345](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca345/2021bcca345.html) at para. [68](https://www.canlii.org/en/bc/bcca/doc/2021/2021bcca345/2021bcca345.html#par68), it is important to bear in mind the context of the cases in which that method has been used. After reviewing a number of such cases, Justice Grauer said in *Rab*:
* [72]      These are the sort of cases this Court had in mind in *Pallos*, where the plaintiff continues to earn income at or close to his or her pre-accident level, but has suffered an impairment that may affect that plaintiff’s ability to continue doing so at some point in the future. In such cases, using the plaintiff’s immediate pre-accident income as a tool in assessing her lost capacity makes sense: see *Mackie v Gruber*, [2010 BCCA 464](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca464/2010bcca464.html), where this Court upheld the trial judge’s award of twice the plaintiff’s average income in the five years leading up to the accident, which employment she continued thereafter but only with accommodations required by her injuries.
* [Emphasis added.]
* The case before us is not of this kind, and the trial judge’s reasons do not reflect the application of principles such as those underlying the annual income approach. The appellant had not worked for six years post-accident and was not employed at the time of trial. Her future loss of earning capacity thus fell to be calculated using the general statistical evidence before the court.

[23]      Both sides called experts to present statistical evidence about the general level of earnings the appellant might have achieved but for the accident. The parties agreed that earnings should be based on averages for individuals with three months to less than one year of post-secondary education. They also agreed that it was appropriate to use the converged statistics for male and female workers. Indeed, after adjusting for labour market contingencies, the experts’ economic evidence was largely consistent.

[24]      The judge also had evidence from various experts on the likelihood that the appellant’s injuries would impact her capacity to work in the future. Although Dr. Hirsch, a physiatrist called by the respondent, opined that the injuries sustained by the appellant would have no long-term impact on her future earning capacity, a contrary opinion was expressed by another expert for the respondent, Dr. van den Berg, a psychologist specializing in vocational rehabilitation of individuals experiencing chronic pain. The trial judge noted Dr. van den Berg’s testimony that the appellant’s capacity to work in the regular market had been reduced by 30 to 40% as a result of her injuries: at para. 118. I note parenthetically that the judge purported to accept in its entirety the contradictory evidence of both experts: Dr. van den Berg at para. 142 and Dr. Hirsch at para. 145. However, the judge subsequently made an express finding that the appellant’s injuries were likely to impact her capacity to earn income in future: at para. 188.

[25]      The respondent submits that the statistical earnings evidence was of limited value since it was not “specific to the appellant”. But where a young person does not have a settled history of earnings, statistical data is often the best evidence available. In any event, having proposed general statistical earnings for BC workers as a basis to calculate lost earnings at trial, it is not open to the respondent to change tack on appeal.

[26]      In my respectful view, in the circumstances of this case, it was an error for the judge not to analyze the economic evidence in comparing the appellant’s with and without accident earnings. As Justice Goepel noted in *Grewal v. Naumann*, [2017 BCCA 158](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca158/2017bcca158.html), dissenting but not on this point:

[49]      The assessment of past or future loss requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events. The use of economic and statistical evidence does not turn the assessment into a calculation but can be a helpful tool in determining what is fair and reasonable in the circumstances: *Dunbar v. Mendez*, [2016 BCCA 211](https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca211/2016bcca211.html) at para. [21](https://www.canlii.org/en/bc/bcca/doc/2016/2016bcca211/2016bcca211.html#par21).

* [Emphasis added.]

**Cases where the capital asset approach will be employed:**

**A young person whose career path is uncertain and the impact of his or her injuries is difficult to measure.**

* See *Miller v. Lawlor* [2012 BCSC 387](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc387/2012bcsc387.html?autocompleteStr=2012%20BCSC%20387&autocompletePos=1):

*[129] I find the capital asset approach suits these circumstances. As Tysoe J.A. observed in the appeal in Romanchych, at para. 15: … the quantification of the loss of future earning capacity is more at large when the injured plaintiff is a young person who has not yet established a career. This is in contrast to the situation in Steward v. Berezan, 2007 BCCA 150 (CanLII), 2007 BCCA 150, 64 B.C.L.R. (4th) 152, where the plaintiff was near the end of his working career and had no intention of returning to the trade which he was unable to perform due to his injuries.*

*[130] In order to ascertain a reasonable quantum of damages, it is appropriate to refer again in general terms to the considerations set out in Brown, at para. 8. The Court of Appeal in Romanchych agreed that it is appropriate to make reference to these considerations not only when finding the existence or absence of a loss of future earning capacity, but also when addressing “the quantum of the damages” (para. 11). I agree with the plaintiff when he says all four of these considerations apply to Mr. Miller.*

*[131] In global terms, it is also necessary to acknowledge the potential for various positive and negative contingencies occurring over the working career of any plaintiff. These include “potential improvements in health, opportunities for advancement, decline in the economy and loss of employment, as well as the usual chances and hazards of life” (see Trites v. Penner 2010 BCSC 882, at para. 228). This assessment necessarily requires that the trier of fact make what Finch J. (as he then was) termed in Brown* ***a “rough and ready” valuation, and similarly relieves the trier of fact from attempting a formulistic mathematical calculation*** *(Romanchych, BCCA, at para. 13).*

*[132] In fact, Mr. Justice Groberman has recently said in Bradshaw v. Matwick, 2011 BCCA 111, at para. 33: As this Court has noted on many occasions, an assessment of future income loss is an exercise in judgment and assessment, and not a mathematically precise calculation – see Parypa v. Wickware, 1999 BCCA 88 particularly at para. 36.*

*[133] One occasion was in Morris v. Rose Estate (1996), 75 B.C.A.C. 263. At para. 28, Donald J.A. said, “it is the judge’s sense of what is fair compensation that matters. There is much more art than science in the process.”*

*[134] Following these appellate directions, I agree with the defendant that in these circumstances, it is appropriate to use the capital asset approach put forward by Finch J.A. in Pallos at para. 43, and “to award the plaintiff’s entire annual income for one or more years.” I do so primarily because of the plaintiff’s youth, his ongoing apprenticeship, and the positive and negative contingencies outlined above.*

*[135] In fact, the plaintiff’s facts are similar to those in Romanchych. At trial, MacKenzie J. (as she then was) considered the loss of earning capacity for a 24 year old woman who at the time of the accident was a university student but working part time as a lab technician as part of the university’s co op program. Similarly, the plaintiff was 21 at the time of the accident and just embarking upon his apprenticeship program.*

*[136] In Romanchych -- unlike the decisions in Brown and Bray v. Gaete -- MacKenzie J. concluded that instead of one year of income, the equivalent of two years’ income would be a fair and appropriate assessment of Ms. Romanchych’s future loss of earning capacity.*

*[137] However, I have found no authority that restricts an award for loss of future earning capacity utilizing this method to one or two years of annual income, and the defendant agrees. Mr. Justice Finch in Pallos, again, uses the phrase “one or more years” [emphasis added]. Indeed, in Phoutharath v. Moscrop, 2002 BCSC 686, Garson J. (as she then was) referred at para. 57 to Kahle v. Ritter, 2002 BCSC 199, and Letourneau v. Min, 2001 BCSC 1519, as well as Pallos, and concluded that Mr. Phoutharath’s “risk of demotion is greater than” the plaintiffs’ in those three cases, adding that if she chose that method she “would award three years’ lost income.”*

*[138] As in Pallos, the plaintiff continues in the same work he had prior to the accident. It is unknown how long that will last. He might realize his goal of taking over his father’s business if he can learn the business end of the operation. This might require him to reduce his number of hours on the job in order to understand and appreciate this aspect of the sprinkler fitting business. He might be able to secure employment that will not require as much over-the-shoulder, off-the-ground work. He might retrain for other “labouring” opportunities. He could follow in the footsteps of Mr. Noon and become a union representative. As in the past, he could be out of the work force for a considerable period of time depending upon what might happen in the construction industry in the future. However, with his strong work ethic I have little doubt he will continue to work in some capacity. Finally, given that Dr. Adrian concluded the plaintiff is “probably” permanently partially disabled, there is some prospect his shoulder and back pain might decrease to the point where he could manage all the heavy duties of a sprinkler fitter.*

*[139] Considering all of the evidence, I find the plaintiff also stands a higher risk of loss of future earning capacity than did the plaintiffs in the cases canvassed by Garson J. in Phoutharath, at para. 57. I conclude therefore that a fair award for the plaintiff would be* ***the equivalent of three years’ annual income*** *for a journeyman sprinkler-pipefitter on Vancouver Island. According to Mr. Noon, the suggested range of annual income is between $60,000 and $80,000.*

*[140]* ***Given the totality of the circumstances and taking into consideration the various contingencies I have referred to, I am satisfied a fair and reasonable award for loss of future earning capacity would be three years of annual income at the medium range, for a total of $210,000.***

**A plaintiff with chronic pain impacting his or her general ability to do physical work**

* *Rozendall v. Landingin*, [2013 BCSC 24](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc24/2013bcsc24.html?autocompleteStr=2013%20BCSC%2024%20&autocompletePos=1) – “*The essential task of the Court is to compare the likely future of the plaintiff’s working life had the accident not happened with the likely future given the accident.*”

*[97] As I view the evidence, there is a real and substantial possibility that Ms. Rozendaal’s ability to earn income as an LPN and in other fields of work will be limited by her injuries, by reason of the physical challenges of, specifically, LPN work, and the strain Ms. Rozendaal experiences in sedentary office work, particularly at a computer.*

*[98] I conclude that Ms. Rozendaal will for the most part suffer through her symptoms in order to achieve her dream of, ultimately, working as an RN. She also feels a heavy responsibility to support her family as best she can.*

*[99] In my view, the possibility of Ms. Rozendaal giving up an advantageous employment offer -- whether in nursing or in another field -- is slight, because of her natural determination to succeed as an individual and as a responsible spouse and parent. However, there is a real and substantial possibility that Ms. Rozendaal’s physical challenges will make her less attractive to prospective employers, delaying her entry into a competitive market. Ms. Rozendaal performed extremely well in the LPN program. However, Ms. Sharoom noticed that she required help with physical tasks, and testified that the work was therefore harder for her classmates.*

*[100] Ms. Rozendaal’s damages for loss of future capacity should reflect the present value to her of one year’s earnings as an LPN. On the basis of Mr. Carson’s evidence, that value would be $49,720.*

*[101] The award for loss of future earning capacity will therefore be $50,000.*

**A plaintiff who has returned to work but will struggle with overtime and various other aspects of his or her employment**

* See *Williams v. Loverock*, [2013 BCSC 153](https://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc153/2013bcsc153.html?autocompleteStr=2013%20BCSC%20153%20&autocompletePos=1) in which Goepel J. summarized the loss of capacity as follows:

*[57] As with the past earnings claim, there are two aspects to Mr. Williams’ claim for loss of future earning capacity. The first concerns the loss of opportunity to work overtime. The second concerns the possibility Mr. Williams may not be able to continue indefinitely in his present position and will, because of the limitations imposed by his injuries, have to find employment other than as a metal fabricator.*

*[58] For the reasons discussed under the head Past Loss of Earnings I find that Mr. Williams will suffer a future loss because of his inability to work as much overtime as he would otherwise have done absent the injury.*

*[59] As a result of his injuries, Mr. Williams has been rendered less capable overall of earning income from all types of employment. He is less marketable or attractive as an employee to potential employers. He has lost the ability to take advantage of all job opportunities which might otherwise have been open to him had he not been injured, and he is less valuable to himself as a person. If Mr. Williams’ present position terminates for any reason, his physical limitations will not allow him to return to work as a full-time journeyman fabricator.*

*[60] Other than in regard to unworked overtime, Mr. Williams is suffering no present financial loss. His future employment at Marcon cannot be guaranteed. There are any number of potential scenarios which could lead to the end of that employment. By way of example, if his present employer decided to sell the business, the new owner of the company may not be as willing to accommodate Mr. Williams. An economic downturn could cause Marcon’s business to suffer, limiting the amount of supervisory work available. I find that there is a real and substantial possibility of a future event leading to an income loss.*

*[61] Plaintiff’s counsel provided various calculations in relation to the loss of future earning claim. Using his 42-hour per pay period number, he noted that over five years the loss of overtime claim would translate into $155,000. Taking into account the potential loss of overtime claim plus other circumstances such as his loss of the job, he suggested an appropriate manner of calculating the loss of capacity would be to award the sum of $140,000 which represents two years of earnings.*

*[62] There is no exact method of determining loss in these circumstances. There certainly is a potential claim of loss of capacity under both heads which have been suggested. The loss of overtime claim is real, although the amounts lost cannot be determined with certainty. The other potential loss is uncertain and, indeed, it is possible that Mr. Williams could continue indefinitely through to retirement in his present position.*

*[63] Taking the various scenarios into account, I would award Mr. Williams $100,000 for loss of future earning capacity.*

**A plaintiff who was not employed (or had minimal or lesser earnings) at the time of the accident and is not employed after the accident.**

* + In *Kwei v. Boisclair* [(1991), 60 B.C.L.R. (2d) 393, 6 B.C.A.C. 314](https://www.canlii.org/en/bc/bcca/doc/1991/1991canlii645/1991canlii645.html?autocompleteStr=Kwei%20v.%20Boisclair%20&autocompletePos=1), Mr. Kwei had suffered a significant head injury with permanent sequelae that impaired his intellectual functioning. However, both before and after the accident, he worked at a variety of low paying jobs, thus making it difficult for him to demonstrate a pecuniary loss. Taggart J. cited the Brown factors with approval and made an award for future loss of earnings capacity based on the capital asset approach.
  + In *Pallos v. Insurance Corp. of British Columbia* [(1995), 100 B.C.L.R. (2d) 260](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2871/1995canlii2871.html?autocompleteStr=pallos&autocompletePos=1), the Court of Appeal concluded Mr. Pallos’ earning capacity had been reduced even though he presently earned more than before he was injured. It was found that Mr. Pallos would only be able to continue lighter work in the future. Even though he continued full time employment following his return to work, and earned more after the accident than in any pre-accident year, the medical evidence of partial permanent physical disability which could have an effect on his capacity to work and his employability resulted in damages for loss of capacity.

**A plaintiff who went off work shortly before trial, but intended to return to work at some point. The plaintiff’s income-earning capacity would likely continue to be affected in the long-term.**

* *Da Silva v Pollard,* [2019 BCSC 2249](https://www.canlii.org/en/bc/bcsc/doc/2019/2019bcsc2249/2019bcsc2249.html?autocompleteStr=2019%20BCSC%202249&autocompletePos=1)
  + Adair J. found that the capital asset approach was preferable in this case, given the uncertainties in the plaintiff’s vocational future.
  + The plaintiff’s loss of future earning capacity was assessed on the basis of three years’ earnings.

**Case Study on the capital asset approach:**

***Grabovac v Fazio,*** [**2021 BCSC 2362**](https://www.canlii.org/en/bc/bcsc/doc/2021/2021bcsc2362/2021bcsc2362.html?autocompleteStr=2021%20BCSC%202362&autocompletePos=1)

* We represented Daniela Grabovac for injuries suffered in two separate accidents, one taking place on August 12, 2015 (MVA #1), with the other taking place on February 23, 2018 (MVA #2).
* Daniela was born in Germany on May 29, 1995. Her parents were forced to flee Serbia, when it was part of the former Yugoslavia, while it was embroiled in the Yugoslav Wars. The Grabovac family immigrated to Canada in 1999, and settled in Burnaby BC. Her first languages were German and Serbian, and she did not speak any English at the time.
* During the summer of 2015, just before MVA #1, Daniela was accepted into the 18-month program at the Vancouver College of Dental Hygiene. This was an intensive program that required 40 hours per week of in-class study and clinical practice.
* After MVA #1, Daniela was able to continue her dental hygiene studies, but experienced ongoing neck and back pain that was aggravated with sitting, lying down, and bending. By 2017 Daniela felt that her injuries were significantly improving. She graduated from the dental hygienist program, had written her qualifying exams, and was able to maintain a relatively active lifestyle. She loved to travel and went on several trips abroad. She had a loving relationship with her partner Dejan, with whom she had aspirations of starting a family.
* In MVA #2, Daniela was a front seat passenger in a vehicle driven by her sister when the defendant lost control of his vehicle, which started spinning in circles and struck her sister’s vehicle on the passenger side where she was sitting. MVA #2 left her with a chronic pain disorder, a somatic symptom disorder, a major depressive disorder, a generalized anxiety disorder, and post traumatic stress disorder.
* MVA #2 rendered Daniela effectively unemployable. The issue at trial was not the legal method of assessing her damages, as both plaintiff counsel and defence counsel submitted that the capital asset approach was appropriate. The issue that Hinkson C.J.S.C. was tasked with was determining which of the scenarios proposed by counsel for the plaintiff and for the defendants was the most likely and applicable.

**Hinkson C.J.S.C.:**

***(g) Loss of Future Income Earning Capacity***

*289 In 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.), Justice McLachlin (as she then was) explained at 78:*

*The plaintiff, in addition to cost of future care, is entitled to an award for lost future earning capacity. The amount is determined, where evidence permits, by comparing what the plaintiff would have earned had he not been injured with what he will earn in his injured state. Where evidence is not available, statistics as to average earnings, adjusted as necessary for the individual situation of the plaintiff, may serve as the basis of the award for lost earning capacity.*

*290 There are two approaches used to assess an award for loss of future income earning capacity: the earnings approach discussed in Brown v. Golaiy (1985), 26 B.C.L.R. (3d) 353 (S.C.), and the capital asset approach discussed in Pallos v. Insurance Corp. of British Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.).*

*291 Both approaches assess the impact of the plaintiff's loss of capacity, considering the plaintiff's likely future ability to work but for the compensable injury. In either case, the assessment is not a mathematical calculation, although, mathematical aids can be used in the analysis: Gregory v. Insurance Corporation of British Columbia, 2011 BCCA 144 at para. 32; Parypa v. Wickware, 1999 BCCA 88 [, at para. 36; Jurczak v. Mauro, 2013 BCCA 507 at paras. 36–38.*

*292 As the Court of Appeal noted in Parypa:*

*[29] One of the fundamental principles of tort law is that, to the extent a monetary award can accomplish it, the plaintiff should be placed in the same position he or she would have been in had the accident not occurred, but not more.*

*[30] An award for loss of earning capacity is based on the recognition that a plaintiff's capacity to earn income is an asset which has been taken away. In Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229 at 251, Dickson J., as he then was, said:*

*We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: . . . A capital asset has been lost: what was its value?*

*293 The defendant Meszaros contends that the plaintiff's claim for loss of future earning capacity should be assessed on the capital asset approach. He says the plaintiff should recover $500,000 for future loss of earning capacity, arguing that but for the Second Accident, the plaintiff would have worked as a dental hygienist periodically for a couple years until she started her family and would have then pursued an academic career that satisfied her professional ambitions while accommodating her desire to raise her children and fulfill her other interests and extended family obligations.*

*294 He argues that the plaintiff planned to forego her vocation in order to establish her family, as she was prepared to leave her academic ambitions to follow her sister as a dental hygienist. He suggests a pattern indicating that the plaintiff would be prepared to forego her vocation if alternative opportunities or interest arose.*

*295 I do not accept that the plaintiff would have left her career in dental hygiene for another career or to pursue academe. I find that her return to studies through Thompson Rivers University arose only because of her extreme limitations, and but for those, I find she would not have pursued them. I will address her family plans below.*

*296 The plaintiff also submits this is a case where the capital asset approach is the most appropriate measure for her loss of future earning capacity, and I accept the joint submission of the plaintiff and the defendant Meszaros that this approach should be used.*

*297 The plaintiff proposed three alternate future scenarios upon which her loss of future earning capacity could be calculated:*

*(a) Scenario A: loss of ability to work as a dental hygienist in U.S.*

*(b) Scenario B: loss of ability to work as a dental hygienist in Vancouver, B.C.*

*(c) Scenario C: Scenario A or B, less any nominal residual capacity (i.e., 10 hours per week).*

*298 As I have explained above, there is an insufficient evidentiary basis upon which Scenario A could be supported.*

*299 Under Scenario B, the plaintiff seeks an award under this head of damages until age 65. She anticipates that she and Mr. Posavljak will have a future together, with children. Her biggest concern is how she will manage the increased burden of having children, along side her ongoing disability and limitations.*

*300 I am unable to accept that there is any real prospect that the plaintiff will be capable of carrying a pregnancy. I accept the pragmatic conclusion that Mr. Posavljak reached in that regard. Accepting, as I have, that her condition is chronic and unlikely to measurably improve, I find that she will not likely have children.*

*301 As noted above, the determination of the plaintiff's future loss of income earning capacity is intended to place her in the position that she would have been in but for the Second Accident. Accordingly, I have concluded that I must assess this head of damages on the basis that, but for the Second Accident she likely would have had two children, and faced the pressures that children would have placed on her ability to work full-time, without incurring the expenses of childcare.*

*302 Under Scenarios B and C, as with her claim for past loss of income earning ability, she contends that she would have earned somewhere between $48 and $58 per hour (averaging approximately $52 per hour, or $99,000 per year in Canada), into her future only taking time off for maternity leave, and even more if she moved to the U.S.*

*303 I have explained that there is no evidentiary basis upon which I can assess the income that she might have earned in the U.S., and therefore will not endeavour to do so.*

*304 The plaintiff proposes that Scenario B would result in an estimated loss of $100,000 per year to the age of 65, equalling a total award of $2,900,000. This scenario assumes that the plaintiff would earn $52 per hour, working 40 hours per week, for 48 weeks per year, earning a total of $99,840 per year (rounded to $100,000).*

*305 Using the income loss multipliers to the age of 65 prepared by Mr. Pivnenko, the loss would amount to $2,894,000 (i.e., $100,000/1000 x $28,940 = $2,894,000).*

*306 The defendant Meszaros contends that if the plaintiff had continued to work in her vocation despite the obstacles presented to her in terms of her loose attachment to the work force or, more positively, given the opportunities for other fulfilling interests, she would not have worked full-time hours like her sister or friends, as she has not shown any such inclination in the past.*

*307 He further submits that but for the Second Accident, the plaintiff would not have worked until age 65 because Mr. Posavljak works in a highly paid profession, and thus she would not have the financial imperative to remain in the workforce. He argues that while the plaintiff has expressed a desire to work, unlike her mother and grandmother, she would not have to work in order to support herself, and therefore would have devoted her time to other aspects of life, whether travel or study, at the expense of her vocation.*

*308 I find this submission to be antiquated at best, and misogynistic at worst, and reject it on both bases.*

*309 I find that the plaintiff is totally disabled from working as a dental hygienist due to the constellation of injuries she suffered in the Second Accident, and thus there is a real and substantial likelihood she will suffer pecuniary loss as a result.*

*310 The plaintiff proposes that Scenario C would assume that the plaintiff obtains a health science job earning $20 per hour, working 10 hours per week, 48 weeks per year, earning $9,600 per year (rounded to $10,000), thus amounting to $130,230 in residual earning capacity to age 65.*

*311 Using Mr. Pivnenko's income loss multipliers to the age of 65, the residual earning capacity amounts to $289,400 (i.e., $10,000/1,000 x $28,940 = $289,400).*

*312 I find that this is an overestimation of the plaintiff's loss of future income earning capacity absent the Second Accident.*

*313 I have concluded that the plaintiff's condition is chronic, and unlikely to measurably improve, I am not persuaded that Scenario C has any application, and I will ignore it.*

*314 As with her claim for past loss of income earning capacity, I find that the plaintiff would have chosen to work less than full time, due to her recreational interests, and to participate in the life and activities of her children.*

*315 I conclude that but for the Second Accident, the plaintiff would have worked roughly two-thirds of the time, and assess her entitlement to damages under this head of damages at $1,930,000.*

*316 I must, however, consider whether other contingencies may apply.*

*317 The plaintiff contends that positive contingencies to be considered include that her rate of pay would likely increase over the years, particularly if she was working in the U.S.*

*318 It is my view that the multipliers determined by Mr. Pivnenko, which take into account both productivity and inflation pursuant to the Law and Equity Act, R.S.B.C. 1996, c. 253, address potential wage increases in Canada. Likewise, I have previously explained that I do not accept that there is reliable evidence about U.S. earnings.*

*319 Negative contingencies to be considered arguably include time off for maternity leave and brief periods of time off from work unrelated to any injuries in the Accidents, such as extended holidays, sick children, and general health issues. I have accommodated these possibilities in my above-finding that the plaintiff would have worked roughly two-thirds of the time available to her.*

*320 The defendant Meszaros submitted that the choice between staying at home with her young children or continuing to work as a dental hygienist would have created the kind of disruption evident in both February 2014 and March and April 2017, and this disruption would occur with each new employer or jurisdiction in which the plaintiff sought to work at her vocation.*

*321 The defendant Fazio raised the plaintiff's previous working history, and pre-accident vulnerabilities, arguing that there was a real risk that she would not have continued to work full-time as a dental hygienist until age 65, even absent the Accidents, as normal life stressors and other stressful events would likely have had a disproportionate effect on her.*

*322 Based on the evidence of the plaintiff's pre-accident physical and emotional condition, I find that there is a real and substantial possibility that she would have faced challenges that may well have affected her had the Second Accident never occurred. Accounting for the relative likelihoods that she would have faced such challenges absent the Second Accident, and that these challenges would have arisen to a level so as to impact her earning capacity, I will apply a further negative contingency of 10%. With this contingency, the award for the plaintiff's loss of future income earning capacity absent the Second Accident is reduced to $1,737,000, which I round up to $1,750,000.*

1. **Earnings approach**

* In some cases, the plaintiff’s loss of income earning capacity **is quantifiable in a measurable way** and the Court will use the “earnings approach” for quantifying this loss of capacity.
* In *Fox v. Danis* [2005 BCSC 102](https://www.canlii.org/en/bc/bcsc/doc/2005/2005bcsc102/2005bcsc102.html?autocompleteStr=2005%20BCSC%20102%20&autocompletePos=1) aff’d [2006 BCCA 324](https://www.canlii.org/en/bc/bcca/doc/2006/2006bcca324/2006bcca324.html?autocompleteStr=2006%20BCCA%20324&autocompletePos=1), Sinclair Prowse J. awarded $750,000 for future wage loss in circumstances where the plaintiff had not missed any time from work but suffered a significant impairment and disability resulting from her injuries:

*[103] It is recognized that this type of award cannot be calculated in accordance with a mathematical formula. Therefore, the task of the Court is to assess the damages rather than apply such a formula: Rosvold v. Dunlop, supra. In Rosvold, the Court held that* ***one method of making this assessment was to compare the likely future income of the Plaintiff if the accident had not occurred with the likely future income of the Plaintiff now that the accident has occurred****.*

*[104] To say the least, the evidence showed that the Plaintiff was a very good employee. Given her administrative and managerial abilities, she likely would have risen to the managerial level of the financial institution for which she works. That is,* ***she would have become a manager****.*

*[105] I accept that because of her injuries it is unlikely that she will rise to this level. As was set out earlier, the Plaintiff no longer has the capacity to maintain full-time employment, let alone take on the additional community activities that are an essential part of the managerial responsibilities at her place of employment.*

*[106] Unfortunately, as the evidence showed, there are no part-time positions at the Plaintiff's present level of employment, nor are there any senior part-time positions. To work part-time* ***the Plaintiff will have to take a demotion*** *– namely to the position of part-time personal accounts associate.*

*[107] Given all of these circumstances, I am satisfied that the likely future income of the Plaintiff will be that of a part-time personal account associate.*

***[108] Using as a guideline the method suggested in Rosvold, without the accident, as a manager the Plaintiff was likely to earn $1,935,987 (being $1,639,067 in earnings and $296,927 in pension benefits). Now with the injuries the Plaintiff is likely to earn, as a part-time personal account associate, $763,740 (being $659,998 in earnings and $103,742 in pension benefits). The difference between these two incomes is $1,172 247.***

*[109] The figures for the likely incomes are drawn from the Report of Mr. Taunton. They include a modest adjustment for such contingencies as unemployment and premature death. They do not include any type of adjustment for various other contingencies such as permanent lay-offs, strikes, voluntary early retirement etc.* ***Also, given the high regard that the Plaintiff's employer has for her, another contingency to be considered is the possibility that her employer will devise some alternative more lucrative part-time employment for her, albeit the possibility of such a contingency occurring is admittedly small****.*

*[110] Furthermore, the figure for the part-time associate income, tendered in evidence, began in 2004. At least at the time of trial (April 2004), the Plaintiff was not working part-time, but rather was still working as an assistant manager on a full-time basis. Therefore, this figure may be too low.*

***[111] Upon considering all of these factors, I have concluded that damages for the Plaintiff's loss of capacity should be assessed at $750,000.***

**For Discussion: *Steinlauf v. Deol,*** [2021 BCSC 1118 (CanLII)](https://canlii.ca/t/jgbkt), aff’d, [2022 BCCA 96 (CanLII)](https://canlii.ca/t/jn2rr)

[77]      The appellants submit that some of the judge’s findings inherent in this conclusion—for instance, that the respondent would achieve the rank of Chief Superintendent by age 46—are the far-fetched, relatively unlikely equivalent of predicting that a bright articling student would become a Justice of Appeal (though perhaps at a more advanced age).

[78]      I would use a different simile. It is more like finding that a young and unusually well-qualified associate in a law firm would become a partner, based on an assessment of the associate and his or her career plans together with the evidence of the firm’s partners that the associate had proven to be precisely the sort of person they wished to invite into the partnership.

[79]      Nevertheless, as indicated, the judge did not treat the respondent’s career path as a certainty. He addressed aspects of the respondent’s career projection that he did not consider the evidence supported and applied a general contingency deduction where he considered it appropriate. In my view, for the purpose of assessing capacity, the ‘sort of career the accident victim would have had’, the judge did not err in his approach.

**Key factors for proving future loss of earning capacity**

* What are the relevant factors for showing future loss of earnings capacity:
  + Historical earnings – note that the past wage loss often anchors the future wage loss, and conversely, ICBC will often argue there can be no future wage loss if the plaintiff has not lost wages to date.
  + Comparative earnings from co-workers in similar positions both before and after the accident. This is particularly helpful if the plaintiff is not meeting industry standards after the MVA.
  + Opportunities for promotion – this is used to show changes in the plaintiff’s trajectory within their place of employment.
  + Opportunities for change of vocation or advancement.

**1.5 Present Value Discount Rates for Future Losses**

Economists are engaged by the parties to assist the Court to calculate the “present value” of any future loss, whether that be future lost earning capacity or future cost of care.

* Section 56 of the [*Law and Equity Act*, RSBC 1996, c. 253](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96253_01), empowers the Chief Justice of the Supreme Court to prescribe the discount rate used to calculate the present value of future damages. Chief Justice Hinkson revised the rate on April 30, 2014, to 1.5% for lost future earnings, and to 2.0% for cost of future care:  B.C. Reg. 74/2014. The previous rates of 2.5% and 3.5% had not been changed since August 25, 1981:  B.C. Reg. 352/81.

<https://www.bccourts.ca/supreme_court/documents/Discount_Rates_%20Information.pdf>

* The discount rate is deemed by the Court to be the “future difference between the investment rate of interest and the rate of increase of earnings due to inflation and general increases in productivity”.
* The application of the new discount rate was explained in *Riding-Brown v. Jenkins,* [2015 BCSC 1751](https://www.bccourts.ca/jdb-txt/SC/15/17/2015BCSC1751cor1.htm):

*[9]             The old discount rates were in force for over three decades. They were replaced because they were thought to be outmoded and inadequate for calculating the present day value of future damages awards in personal injury cases. The rates were changed only weeks after I ruled on the case, while the future damages awarded to Mr. Riding-Brown, who is a reasonably young man, were assessed to compensate him for losses to be incurred over decades. He argues that the up-to-date thinking behind the new rates ought to be applied as the best, fairest and most accurate means of calculating his future losses.*

*[10]         The parties did not refer me to Chief Justice Hinkson’s ruling in Walker v. Leung, 2014 BCSC 1623, but I consider it to be of assistance on the point:*

*[163]    The second reports were necessitated by the amendment to the discount rates which came into effect before the conclusion of the trial. While Mr. Benning’s report for the plaintiff, and that of Mr. Szekely for the defendant, were filed as expert reports, the calculation of present value multipliers for the discount rates to be applied pursuant to s. 56 of the Law and Equity Act, R.S.B.C., 1996, c. 253, is simply the application of a mathematical formula. As such, I do not consider that this aspect of the two reports requires any notice.*

*[11]         Damages are assessed, in other words, but the application of discount rates is a matter of simple mathematics imposed by regulation. The new rates merely represent considered modern thought about the correct multipliers to be used in calculating the present value of future loss awards.*

*[12]         As I am not functus and the matter has only just been put to me, I see no reason to deprive the plaintiff of the benefit of the new rates. I hereby declare that the new discount rates of 1.5% and 2.0% apply to Mr. Riding-Brown’s awards respecting future damages.*

**1.6 Past Lost Earning Capacity**

* Compensation for past loss of income is actually a claim for loss of earning *capacity* and is premised on the value of the work that the plaintiff would have, not could have, earned, but for the injury (*Beardwood v Sheppard,* [2016 BCSC 100](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc100/2016bcsc100.html?autocompleteStr=2016%20BCSC%20100&autocompletePos=1), at para 107, citing *Rowe v Bobell Express Ltd.,* [2005 BCCA 141](https://www.canlii.org/en/bc/bcca/doc/2005/2005bcca141/2005bcca141.html?autocompleteStr=2005%20BCCA%20141&autocompletePos=1)).
* “Past” means from the date of the accident to the date of trial.
* Let’s discuss the various ways in which a plaintiff may suffer a past income loss:
* Time missed from work, including missed shifts and overtime
* Lost opportunities – job offers, promotions, educational opportunities
* Lost pension
* Lost seniority
* In *Piper v. Hassan,* [2012 BCSC 189](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc189/2012bcsc189.html?autocompleteStr=2012%20BCSC%20189%20&autocompletePos=1) Pearlman J. summarized the legal framework for analyzing past wage loss as follows at paragraphs 153-156:

*153 The assessment of damages for past loss of income is properly characterized as an assessment of damages for loss of past earning capacity: Lines v. W & D. Logging Co. Ltd., 2009 BCCA 106 at para. 153, leave to appeal ref’d [2009] S.C.C.A. No. 197, (S.C.C.).*

*154 Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury caused by the defendant’s negligence: Rowe v. Bobell Express Ltd., 2005 BCCA 141; M.B. v. British Columbia, 2003 SCC 53.*

*155 Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: Hudniuk v. Warkentin (2003), 9 B.C.L.R. (4th) 324.*

*156 The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: Athey v. Leonati, at para. 27.*

* In motor vehicle actions, the plaintiff is entitled to recover damages for only his or her past *net* income loss after taking into account the applicable taxes on the gross income loss. For example, if the plaintiff’s past income loss is 100K, the applicable taxes are roughly 30% (we rely upon economists to tell us the applicable taxes), and the court would award 70K for past wage loss.
* **There are two important points essential for understanding past wage loss:**
  + There is a distinction between the standards of proof required for past ***actual*** events versus past ***hypothetical*** events.
    - **For past actual events** (i.e. where the plaintiff missed one month from work due to injury and those lost earnings are claimed) the SOP is the **balance of probabilities**. This means you need to show that it is more likely than not (51%) that the plaintiff missed one month from work due to his or her injuries.
    - For **past hypothetical events** (i.e. where the plaintiff was potentially promotable but could not apply for the promotion because of his or her injuries) the SOP requires that there was **a real and substantial possibility regarding the hypothetical event** (i.e. showing that the plaintiff was promotable, the promotion came due while the plaintiff was injured, and those injuries prevented the plaintiff from applying for the promotion), and once this threshold is met, the court takes into account the likelihood that this would have occurred. For example, if the loss of promotion is 100K and there is a 25% chance that the plaintiff would have obtained the promotion absent the accident injuries then the court will award 25K. See *Grewal v. Naumann*, [2017 BCCA 158](https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca158/2017bcca158.html?autocompleteStr=2017%20BCCA%20158&autocompletePos=1) at paras. 44, 48-49).
* **Past lost earning capacity claims in historical sexual abuse cases: *Anderson v. Molon,*** [2020 BCSC 1247](https://canlii.ca/t/j9c1f)

## Loss of Past Income

[220]     In addition to non-pecuniary damages, the plaintiff seeks pecuniary damages for loss of past income. This is a claim for loss of earning capacity. More specifically, an award for loss earning capacity has been defined as “compensation for the loss of the use of that capacity over time”, or in other words, “the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury”: *M.B. v. British Columbia,*[2003 SCC 53](https://www.canlii.org/en/ca/scc/doc/2003/2003scc53/2003scc53.html) at para. [27](https://www.canlii.org/en/ca/scc/doc/2003/2003scc53/2003scc53.html#par27); *Rowe v. Bobell Express Ltd.*, [2005 BCCA 141](https://www.canlii.org/en/bc/bcca/doc/2005/2005bcca141/2005bcca141.html) at para. [30](https://www.canlii.org/en/bc/bcca/doc/2005/2005bcca141/2005bcca141.html#par30).

[221]     It is well settled there are two primary approaches to assessing loss of income: the “earnings” approach and the “capital asset” approach. Both require proof of a real and substantial possibility of pecuniary loss: *Perren v. Lalari*, [2010 BCCA 140](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html) at para. [32](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html#par32).

[222]     The primary difference between these approaches lies in the nature of the loss in question. Under the “earnings” approach, a plaintiff must demonstrate a real and substantial possibility of some specific future or hypothetical event leading to a loss of income. Under the “capital asset” approach, the plaintiff must demonstrate that the nature of her injuries are such that her general capacity to work, considered as a capital asset, has been lost or devalued. The “earnings” approach asks whether there is a real and substantial possibility that the plaintiff would have earned a specific sum of money, absent the tort; the “capital asset” approach, in effect, asks whether there is a real and substantial possibility her working life in general would have turned out differently, even if it is impossible to know exactly how.

[223]     These approaches are not mutually exclusive. Indeed, they are simply different ways of attempting to assess the same head of damages: *Pallos v. Insurance Corp. of British Columbia*(1995), [1995 CanLII 2871 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2871/1995canlii2871.html), 100 B.C.L.R. (2d) 260 at para. [27](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2871/1995canlii2871.html#par27). It is open to a plaintiff to adduce evidence of a specific hypothetical possibility foreclosed by her injuries. It is equally open to a plaintiff to demonstrate that her injuries have generally impaired her ability to pursue income-earning opportunities in circumstances where it is impossible to say that she would not have pursued these opportunities over the course of her working life: *Palmer v. Goodall*(1991)*,*[1991 CanLII 384 (BC CA)](https://www.canlii.org/en/bc/bcca/doc/1991/1991canlii384/1991canlii384.html), 53 B.C.L.R. (2d) 44 at 59, cited in *Pallos*at para. [25](https://www.canlii.org/en/bc/bcca/doc/1995/1995canlii2871/1995canlii2871.html#par25).

[224]     The plaintiff has advanced what is essentially an earnings-based argument. In particular, she claims she is entitled to compensation in relation to the specific possibility of her becoming a medical doctor or an educator with a Ph.D. The plaintiff submits there was a real and substantial possibility that she would have become a doctor, or failing that, a Ph.D., had she not been abused by Fr. Molon. On this basis, she claims she is entitled to damages in an amount corresponding to the income she would earned in either of these professions.

[225]     For the reasons that follow, I cannot accede to this argument on an “earnings” approach. Nevertheless, I find that the plaintiff has established some degree of loss on a “capital asset” approach, and would make an award of damages accordingly, although on much smaller scale.

[226]     I have found that Fr. Molon’s abuse caused serious psychological harm to the plaintiff. I accept, as Dr. Jaffe opined, that these psychological injuries had an impact on all aspects of the plaintiff’s life, including her vocational pursuits.

[227]     The plaintiff’s earnings-based argument turns on the possibility that, absent these injuries, she might have become a doctor, or obtained a Ph.D. The plaintiff submits the likelihood of her becoming a doctor should be assessed at 75%. She relies on the opinion of Dr. Quee Newell, who gave evidence that approximately 45% of female candidates with an MCAT score in the same range as the plaintiff were offered at least one place in a Canadian medical school in the 1979–1980 school year. The plaintiff argues her odds were even better because she applied to multiple schools, and because she intended to continue taking classes and apply again in future years.

[228]     Certainly on the evidence I would not place this likelihood anywhere near 75%. I would place it around 25% in relation to a medical career and perhaps 35% concerning pursuit of a Ph.D. and a career in academics. My conclusions, however, render this assessment moot. While I accept there is a real and substantial possibility the plaintiff could have become a doctor, had she continued to work towards that goal (or the pursuit of a career in academia), this is not what actually happened.

[229]     Instead, the plaintiff decided to abandon her pursuit of higher education or medical school to marry and have children. Having decided to get married, the plaintiff appears to have given up entirely on the pursuit of higher education. In fact, she stated it was impossible for her to carry on with her academic studies, because her new husband lived too far from the university; at least the university where she wanted to apply.

[230]     The plaintiff claims it is the loss of this possibility itself that forms the basis of her entitlement to damages. She argues that her psychological injuries caused her to rush impetuously into a marriage she did not want. Her marriage, and the consequent loss of opportunity to pursue higher education, was thus a product of Fr. Molon’s abuse, for which she is owed compensation.

[231]     In particular, the submission of the plaintiff is as follows:

Moreover, she would not have chosen to marry Maxwell Anderson when she did, abandoning her pursuit of further courses that would have permitted her to reapply the following year. Suddenly, and impulsively, she chose to marry a man who lived so far from her university that it would be impossible for her to carry on with her academic studies in support of a career path that she worked so tirelessly to pursue.

[232]     And further:

In short, Ms. Anderson’s life took a wrong turn, a turn she would not have taken but for the tortious wrongs of the defendants.

[233]     The plaintiff’s claim for loss of past income rests on the proposition that her decision to get married was caused, at least in part, by Fr. Molon’s abuse. Absent this causal connection, her marriage is properly characterized as an “independent intervening event”. As explained in *Athey*(at para. 32)*,*such events form part of the plaintiff’s “original position” — that is, the position the plaintiff would have been in, but for the tort, and for the disappointments of which the defendant need not compensate the plaintiff:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant’s negligence (the “original position”). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff’s position after the tort but also to assess what the “original position” would have been. It is the difference between these positions, the “original position” and the “injured position”, which is the plaintiff’s loss. In the cases referred to above, the intervening event was unrelated to the tort and therefore affected the plaintiff’s “original position”. The net loss was therefore not as great as it might have otherwise seemed, so damages were reduced to reflect this.

[234]     This in turn raises the question of the applicable standard of proof to demonstrate a causal connection. The plaintiff relies on the recent Ontario case of *MacLeod* for the proposition that she need only demonstrate a real and substantial possibility of loss to prove her entitlement to damages. She suggests that if there is a real and substantial possibility that she would not have married Mr. Anderson, but for the abuse she suffered, she is entitled to damages to the extent of that possibility.

[235]     In my view, however, the reasoning in *MacLeod*does not absolve the plaintiff of the burden of proving the existence and causation of actual past events on the balance of probabilities. *MacLeod*simply stands for the proposition that hypothetical events need not be proven to this standard: paras. 17–18.

[236]     As an event that actually took place in the past, the plaintiff’s decision to get married is neither a hypothetical nor a future event, and must therefore be proven on the ordinary civil standard of proof: *Athey*at para. [27](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html#par27). In this case, the plaintiff’s entitlement to damages does not turn on what might have happened, but what did, in fact, happen.

[237]     That causation in these circumstances must be proven on a balance of probabilities is implicit in *Athey*itself. In *Athey*, the defendant’s negligence caused minor back injuries to the plaintiff. Some time after, the plaintiff suffered a herniated disc while stretching. The effects of this second injury were debilitating. The trial judge found that the first injury was a necessary cause of the second on a balance of probabilities. At the Supreme Court of Canada, the defendant argued that the second accident was an intervening event, and that the plaintiff’s damages should be reduced accordingly. The Court rejected this argument as follows:

33        In the present case, there was a finding of fact that the accident caused or contributed to the disc herniation. The disc herniation was not an independent intervening event. The disc herniation was a product of the accidents, so it does not affect the assessment of the plaintiff’s “original position” and thereby reduce the net loss experienced by the plaintiff.

[238]     In other words, once causation has been established on a balance of probabilities, the defendant is responsible for 100% of the effects of a subsequent event that occurs prior to trial. The necessary corollary of this conclusion, in my view, is that if causation is not established on a balance of probabilities, the defendant is not responsible for any of the effects of that event.

[239]     In this case, I am not persuaded that Fr. Molon’s abuse was a cause of the plaintiff’s marriage on a balance of probabilities. I find the plaintiff’s position and logic on this point is not sufficiently supported by the evidence. The evidence simply does not support the suggestion the decision of the plaintiff to accept the marriage proposal was impulsive, or driven by the plaintiff’s psychological injuries. In particular, it is not supported to the requisite threshold by the medical evidence; nor, in fact, the evidence of the plaintiff.

[240]     I find there is not a sufficient causal connection between the abuse and the plaintiff’s decision to get married. Accordingly, her decision to get married must be considered an independent intervening event, which does not in itself give rise to any compensable damages, but forms part of her “original position”. To the extent the plaintiff’s claim for loss of past income flows from this decision, I would dismiss it accordingly.

[241]     However, I do not consider this the end of the inquiry. Marriage did not mark the end of the plaintiff’s working life. Her decision to abandon her career for her family was neither permanent, nor inevitable. Her injuries persisted throughout her marriage. They continued to affect her as she re-entered the job market. They were with her as she decided to leave teaching to pursue a new career as a real estate agent. In my view, an award of $125,000 is appropriate to compensate the plaintiff for loss of earning capacity on a “capital asset” approach, in light of the general factors set out in *Brown v. Golaiy,*(1985), [1985 CanLII 149 (BC SC)](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii149/1985canlii149.html), 26 B.C.L.R. (3d) 353. These include the extent to which:

1. the plaintiff has been rendered less capable overall from earning income from all types of employment;

2. the plaintiff is less marketable or attractive as an employee to potential employers;

3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and

4. the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[242]     I do not base this award on any particular career trajectory the plaintiff might have pursued; rather, it reflects a bundle of possibilities, including the possibility that, but for her psychological trauma, the plaintiff might have renewed her attempt at higher education after getting married; that she might have re-entered the job market sooner; that, having entered the job market, more and better opportunities would have presented themselves; and that she might have made more of those that did come her way.

[243]     None of these possibilities were developed in any detail. I do not consider any of them to be particularly likely, or if they were, to have made a significant difference in themselves. Viewed as a whole, however, and in light of the nature and extent of her injuries, again, with due allowance for her pre-existing condition, I am satisfied that there is a real and substantial possibility that the plaintiff’s working life would have turned out differently, were it not for the abuse she suffered. Though incapable of precise calculation, an award for loss of earning capacity is therefore warranted.

*For discussion: Was the award of $125,000 for past lost earning capacity “just”?*

\***Note**: for historical claims, pre-judgment interest is applicable to past lost earnings, which can effectively *double* the award: see section 1, [*Court Order Interest Act* (gov.bc.ca)](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96079_01) [RSBC] 1996, c. 79.

**1.7 Special Damages**

* Special damages are the plaintiff’s out-of-pocket expenses caused by his or her injuries, up to the date of trial.
* Consider the various types expenses that may arise in a personal injury claim:
  + Treatment costs: physiotherapy, massage therapy, acupuncture, active rehabilitation, chiropractor, occupational therapy, counselling, etc.
  + Medications
  + Home / attendant care
  + Gym membership
  + Dental appliances
  + Home/work modifications for more serious injuries: this can include new orthotics, pillows, mattresses, ergonomic changes to work stations, safety features at homes, etc…
  + Vocational counselling for retraining
  + Mileage, parking, or taxi costs associated with seeking treatment
  + Funding for various programs: pain programs, drug rehabilitation, etc.
  + In-trust claim on behalf of family members who have been working as unpaid care-providers.
* These expenses are also found in future cost of care awards i.e. future out-of-pocket expenses incurred from the date of the trial forward*.*
* The test for awarding special damages is whether the expenses are **reasonably incurred and related** to the plaintiff’s injuries, and **medically justified.**
* The defence will often argue against these expenses on the following basis:
  + The expense was unreasonable: the cost was too high, the treatment went on for too long, the treatment provided no benefit, etc…
  + The expense was not related to the plaintiff’s injuries: this often comes up when the defence can show the plaintiff would likely have incurred the expense in any event (for example, when they were going to massage therapy before the MVA) or the treatment is for something not related to the accident (for example, a sports injury).
  + The expense was not medically justified: this occurs when there is no medical recommendation for the treatment (example, marijuana for pain control, some unconventional treatments e.g. Reiki). To claim the cost of such therapies or drugs, there must be enough evidence to find causation.
  + See *Torchia v. Siegrist*, [2015 BCSC 57](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc57/2015bcsc57.html?autocompleteStr=2015%20BCSC%2057&autocompletePos=1#_Toc409009370) where the claim for medical marijuana was denied despite it being prescribed by the GP, versus *Joinson v. Heran,* [2011 BCSC 727](https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc727/2011bcsc727.html?autocompleteStr=%2C%202011%20BCSC%20727&autocompletePos=1), where the cost of medical marijuana was allowed because it was approved by the plaintiff’s psychiatrist in order to reduce the plaintiff’s dependence on morphine. Note the Court’s comment in *Joinson v. Heran, supra* at para. 418, cited by the Court in *Torchia, supra,* at para. 183:

*[418] I accept the medical literature is controversial and this subject remains generally controversial among experts and authorities. Medical use of marijuana has many supporters, professional and lay, particularly for use in cases of intractable pain such as cancer, but also detractors who raise legitimate grounds for challenging its safety and health benefits. Given the conflicting medical opinions, scientific controversy and safety concerns, all the more reason for a judge requiring compliance with rules and regulations established for the legal purchase of medical marijuana.*

* + The Court in *Torchia,* at para. 183: “*Just because another case finds marihuana useful for one patient does not automatically infer that it is medically necessary for another plaintiff*.”
  + In *Murphy v Hofer,* [2018 BCSC 869](https://www.canlii.org/en/bc/bcsc/doc/2018/2018bcsc869/2018bcsc869.html?autocompleteStr=2018%20BCSC%20869&autocompletePos=1), Sewell J. agreed with the judgment in *Torchia* on the appropriateness of the court requiring a party to pay for the cost of cannabis (see paragraphs 216-219). Sewell J. noted that the plaintiff had not established that he had complied with the regulations for the legal purchase of medical marijuana. He also noted that the plaintiff “did not lead any evidence of any medical professional that the beneficial effects of CBD oil are unavailable from other analgesic or sedative medications which would cost far less.” Sewell J. made no award for cannabis.
  + Private treatments – although the defence may argue that if the treatment could have been covered by MSP, but the plaintiff chose to pursue private treatment in lieu, this is not recoverable. A doctor’s note is usually helpful, as is evidence about wait times in the public queue. See *Engqvist v. Doyle et al*, [2011 BCSC 1585](https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1585/2011bcsc1585.html?autocompleteStr=2011%20BCSC%201585%20&autocompletePos=1) and *G.P. v W.B.,* [2017 BCSC 297](https://www.canlii.org/en/bc/bcsc/doc/2017/2017bcsc297/2017bcsc297.html?autocompleteStr=2017%20BCSC%20297&autocompletePos=1).
  1. **Cost of Future Care**
* See [Mike Slater’s article](https://docs.wixstatic.com/ugd/cd08b4_169d7099a5e041728332e446a5a3463f.pdf) – this summarizes everything you need to know about cost of future care (CFC).
* CFC refers to expenses that the plaintiff will incur in the future because of his or her injuries (same as the list for special damages, but going forward after trial).
* In *Milina v. Bartsch* [(1985) 49 B.C.L.R. (2d) 33](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii179/1985canlii179.html?autocompleteStr=(1985)%2049%20B.C.L.R.%20(2d)%2033&autocompletePos=1), McLachlin J., as she then was, summarized the principles relating to the assessment of damages for CFC as follows:

*1. The fundamental governing precept is restitutio in integrum. The injured person is to be restored to the position he would have been in had the accident not occurred, insofar as this can be done with money. This is the philosophical justification for damages for loss of earning capacity, cost of future care and special damages.*

*2. For those losses which cannot be made good by money, damages are to be awarded on a functional basis to the end of providing substitute pleasures for those which have been lost. This is the philosophical justification for awarding damages for non-pecuniary loss.*

*3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is* ***reasonably necessary******on the medical evidence******to promote the mental and physical health of the plaintiff****.*

* McLachlin J. then considered two specific questions that affect the assessment of CFC, (1) the proper manner of making the calculation so as to avoid duplication; and (2) whether there must be “medical justification” of care costs.
* On the latter issue, McLachlin J. concluded that the authorities supported the requirement that future care needs be medically justified and quoted in this regard from *Andrews* and its companion Trilogy case, *Thornton v. School District No. 57 (Prince George)* [[1978] 2 S.C.R. 267](https://www.canlii.org/en/ca/scc/doc/1978/1978canlii12/1978canlii12.html?autocompleteStr=%5B1978%5D%202%20S.C.R.%20267&autocompletePos=1):

*The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.*

***These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable.***

*This then must be the basis upon which damages for costs of future care are assessed.*

*It follows that I must reject the plaintiff's submission that damages for cost of future care should take into account the cost of amenities which serve the sole function of making the plaintiff's life more bearable or enjoyable. The award for cost of care should reflect what the evidence establishes is reasonably necessary to preserve the plaintiff's health. At the same time, it must be recognized that happiness and health are often intertwined. [At 83-4; emphasis added.]*

* The Court of Appeal in *Aberdeen* re-considered the test for cost of future care as follows:

*Counsel’s arguments raise squarely the debate encapsulated by Andrews and Milina, supra, between the medical justification of pecuniary damages and the provision of “substitute pleasures for those which have been lost”, for which non-pecuniary damages are awarded. The line between the two is often difficult to draw and as McLachlin J. noted in Milina, “happiness and health are often intertwined.” (Supra, at 84.) Again, it was for the trial judge in the first instance to draw this line. Having reviewed the reports of all the doctors, Ms. Norton, and Ms. Baptiste, and the evidence of members of Mr. Aberdeen’s family, and having reviewed in particular the items in Ms. Baptiste’s report that were allowed by the trial judge, I am not persuaded that he fell into the errors advanced by counsel for the defendants.*

* Note that if the plaintiff fails to demonstrate that a particular future care item is medically justified, the plaintiff in essence has failed to prove his damages, and therefore cannot receive compensation on that ground. **That said, the analysis of what is “medically justified” is not as narrow as what is “medically necessary**”.
* Principles to be considered when assessing cost of future care (see *Torchia v. Siegrist*, [2015 BCSC 57](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc57/2015bcsc57.html?autocompleteStr=2015%20BCSC%2057&autocompletePos=1#_Toc409009370) , starting at paragraph 141*)*:
* The award for CFC is based on what is reasonably necessary on medical evidence;
* In considering not only what is medically required, but also that which the injured person is likely to incur;
* Those services and items for future care that the injured person is unlikely to use cannot be justified as reasonably necessary;
* When considering items for future care, there should be some relationship to the severity of the injury and its need;
* The purpose of a future care award is to promote the mental and physical health of the injured person;
* The award must be fair to both parties;
* Contingencies, both negative and positive must be considered. Evidence on contingency should be presented, but if there is no such evidence, then a range of 20 percent should be considered;
* An injured person should be encouraged to do what he can do for himself or herself;
* In assessing the cost of future care, duplication must be avoided; and
* There are two methods of calculation, one taking all costs of future care, including basic living expenses and deducting from the award for lost earnings the percentage which would have been spent upon such expenses. The second way is to calculate only the additional costs that arose from the injury and allow a full award for lost earning capacity. The method used depends on the evidence and the kind of injury.
* The two approaches were summarized in *Milina, supra*:
  + - 1. The Total Lifestyle Approach may be more appropriate where the plaintiff’s entire future life has been radically changed because of his or her injury. This involves situations where a plaintiff requires a totally new environment and totally new care than would have been required had he or she not been injured. This approach suggests that the simplest and fairest approach is to award such a plaintiff all these costs and make a deduction from loss of future earnings for what would have been spent on basic necessities.
      2. The Additional Expense Approach may be more appropriate in cases where the plaintiff will continue to lead basically the same life as he or she would have led, had he or she not been injured, with the aid of additional assistance and physical facilities. This approach is more frequently applied when a plaintiff has suffered a less serious injury. In these cases, the easiest way to calculate the loss caused by the accident is by totaling the cost of the extra assistance and facilities that the plaintiff will require. (*MacEachern v. Rennie*, [2010 BCSC 625](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc625/2010bcsc625.html?autocompleteStr=2010%20BCSC%20625&autocompletePos=1), *Milina v. Bartsch*, supra)
* In *Uy v. Dhillon,* [2020 BCSC 1302](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.html?autocompleteStr=uy%20v.%20dhi&autocompletePos=3), Skolrood J. employed the Total Lifestyle Approach:

*[**59]        The parties both submit that the total lifestyle approach should be used in this case. I agree as this approach best accords with the objective of ensuring a proper and adequate future care award which is of fundamental importance in cases involving catastrophic injuries.*

*…*

*[**79]        Included in his calculations, Mr. Carson makes adjustments in keeping with the total lifestyle approach to assessing damages. Specifically, in addition to calculating the cost of 24-hour care, he includes amounts to cover the basic necessities of life. In his June 25, 2020 memo to Mr. Uy’s counsel, he describes how he has used Statistics Canada’s poverty line amount of $24,830 annually to reflect what it would cost to provide Mr. Uy with those necessities (i.e. accommodation, food, etc.). When Mr. Uy transitions to Connected Communities, Mr. Carson assumes that basic costs of accommodation, food and other household costs will be covered in the institutional cost, thus he reduces the annual cost for remaining basic necessities to $7,310. The defendants did not take issue with these calculations.*

*[**80]        Mr. Carson therefore calculates the cost of 24-hour care for Mr. Uy, while he remains in the Amuraos’ home (for 15 years), as $4,973,336, comprising $4,437,064 in care costs, $221,853 in applicable taxes and $314,419 for basic necessities.*

*[**81]        For the period when Mr. Uy transitions to institutional care (after 15 years), the total costs calculated by Mr. Carson are $2,158,629, comprising $2,066,652 for the institutional care costs and $91,977 for basic necessities.*

*[**82]        The care component for 24-hour care aide support for 15 years followed by institutional care for the balance of Mr. Uy’s life therefore totals $7,131,965.*

*[**83]        I note that in providing his present value calculations, Mr. Carson used a statistically normal life span for Mr. Uy. The defendants submit that some allowance should be made for a reduced life expectancy. They rely on Dr. Travlos’s evidence during cross-examination that Mr. Uy’s life expectancy, based solely on the general fact that his had suffered a brain injury, may be reduced by two to four years. However, Dr. Travlos was speaking in general terms and there is no direct evidence that Mr. Uy’s life expectancy should be shortened. I therefore decline to make the adjustment sought by the defendants.*

*…*

*[**117]     Keeping in mind that making an award of damages involves and assessment rather than a calculation, I find that Mr. Uy likely would have earned $30,000 for another 10 years and then would have increased his earning to $46,000, the average identified by Mr. Carson for painters/decorators. Using Mr. Carson’s multipliers results in the following: ($30,000/$1,000 x $9,854) = $295,620 + ($46,000/$1,000 x $9,720) = $447,120 for a total of $742,740. I would add 10% to this figure to reflect non-wage benefits, relying on Mr. Carson’s opinion for doing so. This results in a figure of $817,014 which I round to $820,000.*

*[**118]     From this amount, there must be deducted what Mr. Uy would have had to pay for basic necessities. As discussed above, the cost of future care award includes an amount to reflect the cost of basic necessities over and above the cost of care. In order to avoid duplication, the cost of necessities that Mr. Uy would have incurred had he continued to work must be deducted from his projected future earnings.*

* See also *MacEachern v. Rennie,* [2010 BCSC 625](https://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc625/2010bcsc625.html?autocompleteStr=2010%20BCSC%20625&autocompletePos=1), where the Total Lifestyle Approach was determined to be more appropriate in a case where the plaintiff cyclist suffered a severe brain injury when her head was struck by a passing tractor trailer. The plaintiff was, pre-accident, a drug addict living in a tent city but this did not preclude the Court from awarding $5,275,000 for CFC (at para. 708):

*“I am satisfied that in the unusual circumstances of this case, the approach advocated by the plaintiff is correct. I find as a fact, based on the plaintiff’s past history, that regardless of how long she would have taken to recover from her drug addiction and regardless of what kind of employment she might have secured in the future, one thing that can be predicted with some confidence is that she would have continued to match her lifestyle to her available income. That being the case, restitutio in integrum will be achieved by providing a cost of future care award that provides for all of her medically justifiable expenses including those of ordinary living, while giving her no award for loss of future income. This approach takes into account the two unusual features of this case: first, that as a result of her accident, the plaintiff’s future living expenses will, for medically justifiable reasons, be far different from what they otherwise would have been (she cannot receive proper medical care while living in a tent), and second, that she is someone who, but for the accident, was content to adjust her living standards to match her available income.*

**How does the plaintiff prove cost of future care expenses?**

* Medical legal experts, if asked to in the instruction letter, will make various recommendations for treatments, services, and accommodations.
* An occupation therapist is often retained in more serious cases to perform a “cost of future care assessment”, often in the plaintiff’s home, to make and price out his or her own recommendations as well as that of the other medical experts, as set out in their reports. An OT must be careful not to exceed his or her qualifications in making recommendations that only a medical doctor is qualified to make (i.e. drug costs, therapies).
  + - See the Court’s comments in *Gregory v. ICBC,* [2011 BCCA 144](https://www.canlii.org/en/bc/bcca/doc/2011/2011bcca144/2011bcca144.html?autocompleteStr=2011%20BCCA%20144&autocompletePos=1) at para. 39, wherein the Court relied upon an OT in assessing care costs:

*I do not consider it necessary, in order for a plaintiff to successfully advance a future cost of care claim, that a physician testify to the medical necessity of each and every item of care that is claimed. But there must be some evidentiary link drawn between the physician’s assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional (citing Aberdeen at paras. 43, 63)*

* The OT’s report with costing is then reviewed by an economist who calculates the “present value” cost of the plaintiff’s anticipated future out-of-pocket expenses.

**How does the defendant reduce the exposure for cost of future care?**

* Lead evidence that the plaintiff has a shortened life expectancy
* Individual care versus group care
* Nurse versus care aide
* Duplicating / overlapping therapies
* MSP coverage
* Lead evidence that the plaintiff has not used services in the past to establish that he or she will not use the same services in future.
  + I.e. in *Gignac v. ICBC,* [2012 BCCA 351](https://www.canlii.org/en/bc/bcca/doc/2012/2012bcca351/2012bcca351.html?autocompleteStr=2012%20BCCA%20351&autocompletePos=1), the Court did not allow the cost of a pool program because the plaintiff did not like to swim.
  + See also *McKenzie v Lloyd,* [2016 BCSC 1745](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1745/2016bcsc1745.html?autocompleteStr=2016%20BCSC%201745%20&autocompletePos=1) at para 241, where the Court reduced the award for future psychological services by 40% to account for the contingency that the plaintiff would not take advantage of the services, based on the plaintiff’s history of not making full use of the services.
* Are the costs claimed ordinary costs that would have been incurred in any event of the accident?
* Lead evidence that the care is not medically necessary.

**Beware the overzealous OT report:**

* See *MacDonald v. Kemp*, [2014 BCSC 1079](https://www.canlii.org/en/bc/bcsc/doc/2014/2014bcsc1079/2014bcsc1079.html?autocompleteStr=2014%20BCSC%201079&autocompletePos=1), at paras. 26-27 – are canine pedicure services reasonable and medical justified?

*[26]         In my view, a number of Ms. McDuff’s recommendations are neither medically justifiable nor reasonable. For example, in addition to recommending continued recourse to analgesic medication, massage, acupuncture, physiotherapy, and a personal trainer -- all of which I consider to be justifiable and reasonable -- Ms. McDuff’s report calls for the defendant to pay for such items as a “Symphony Side Sleeper Pillow”, a “Shark Steam Pocket Mop” and a “Vileda Bath Magic Mop”. There was little or no evidence to establish why these items were justified. The plaintiff would have been obliged to purchase mops, pillows, dusters and similar sundries absent the accident, and such evidence as was adduced concerning the difference in the value or efficacy of, say, a “Vileda Bath Magic Mop” over some other bath cleaning implement struck me as neither persuasive nor significant.*

*[27]         Ms. McDuff also provided details of a claim for the cost of future housekeeping assistance. This included the expense, until the plaintiff reaches the age of 75, of the annual cost of canine pedicure services (the plaintiff, I was told a number of times during this trial, now finds it difficult to clip her dog’s toenails), and yard work and home maintenance services. In my respectful assessment, however, the plaintiff is perfectly capable of dealing with all of her household chores. Such pain as she continues to experience may force her to spend more time on daily tasks of this sort, but the award for non-pecuniary damages has taken this loss of amenities into account. It would seem that the plaintiff’s husband is helping out more with the household chores since the accident, but not to an extent that might not legitimately have been expected of him before it. The plaintiff’s household is running satisfactorily, in other words, and there is no justifiable or reasonable basis upon which to order a subsidy or contribution from the defendant.*

* 1. **Lost homemaking and childcare capacity**

***Kim v. Lin,*** [**2016 BCSC 2405**](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc2405/2016bcsc2405.html)**; aff’d** [**2018 BCCA 77**](https://www.canlii.org/en/bc/bcca/doc/2018/2018bcca77/2018bcca77.html?autocompleteStr=kim%20v.%20lin'&autocompletePos=1)

* 27-year-old Eun Young Kim suffered permanent injuries (chronic pain disorder, depression) in a motor vehicle collision, leaving her unable to perform housekeeping and childcare tasks. Her family members took over most of the responsibility for the care of her home and her children. At trial, Sewell J. awarded her $418,000 for her “profound” lost housekeeping capacity.
* As summarized by the Court of Appeal:

*[**15]        The judge turned to assess the loss. He noted Ms. Kim’s estimate of the costs of homemaking assistance at $25 per hour, but he preferred the rate of $15 per hour endorsed in Campbell v. Banman, 2009 BCCA 484.*

*[**16]        The judge made this critical finding of fact (at para. 197):*

*I conclude that Ms. Kim requires a minimum of two to three hours per day of assistance to replace her lost housekeeping and child care capacity from the Accident.*

*[17]        As to past loss of housekeeping capacity, the judge considered that $2,000 per month was a reasonable award from the date of the accident to 1 January 2013. This included childcare expenses. For the period 1 January 2013 to the date of trial, the judge awarded $1,000 per month, reasoning (at para. 198):*

*As I have awarded damages for loss of income earning capacity, I am of the view that no award for daycare should be made in this case beyond January 1, 2013 because that would amount to double compensation, as Ms. Kim would have had to arrange paid daycare after that date to be able to work. For this reason, I reduce the monthly amount awarded for loss of housekeeping capacity to $1,000 per month effective January 1, 2013.*

*[18]        In the result, the judge awarded $168,000 by way of past loss of housekeeping capacity. He then turned to Ms. Kim’s future loss under this head. Based on the evidence, the judge calculated that Ms. Kim would have continued to use her homemaking skills to age 70, but for the accident. He calculated the present value of Ms. Kim’s loss before an adjustment for contingencies at $312,360. The judge then discounted that amount for the “substantial” possibilities that Ms. Kim’s homemaking capacity might improve and that as she and her children age, she would in any event have done less of the household chores. In the result, the judge awarded $250,000 for loss of future housekeeping capacity.*

* The trial judge’s award of “lost housekeeping capacity” as a separate head of damages was upheld by the BC Court of Appeal:

*[**33]        Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff’s circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, “it lies in the trial judge’s discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage”: at para. 26.*

*[**34]        Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.*

***Ali v. Stacey,*** [**2020 BCSC 465**](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc465/2020bcsc465.pdf) **(Gomery J.)**

**Is Ms. Nessar Ali entitled to a separate award for loss of housekeeping capacity?**

*[58]         Ms. Nessar Ali seeks an award of $12,900 for loss of housekeeping capacity.  The claim would be for an award of $15,000, but Ms. Nessar Ali also claims $2,100 in special damages for amounts paid to a house cleaner and she recognizes, correctly I think, that it would be double-counting for the amounts claimed to overlap.*

*[59]         The defendant maintains that compensation for loss of housekeeping capacity is ordinarily subsumed into compensation for non-pecuniary loss, and that should be the result here.*

***Legal framework***

*[60]         Each side rests its position on a recent considered decision of the Court of Appeal.  Ms. Nessar Ali relies on Kim v. Lin, 2018 BCCA 77 at paras. 27-37 [Kim] and the defendant relies upon Riley v. Ritsco, 2018 BCCA 366 at paras. 96-103 [Riley].  Riley, which is the later of the two decisions, does not reference Kim.*

*[61]         In Kim, the plaintiff was a young woman who was rendered permanently unemployable by her injuries.  The trial judge awarded damages in excess of $1.78 million.  This included an award of $418,000 for loss of housekeeping capacity in addition to substantial non-pecuniary damages.  The defendants appealed the award for loss of housekeeping capacity.  The appeal failed.*

*[62]         In Riley, the plaintiff was a man nearing retirement age.  His injuries were much less serious than those suffered by Ms. Kim.  The trial judge awarded non-pecuniary damages of $65,000 and refused Mr. Riley an award of $10,000 for loss of housekeeping capacity.  Mr. Riley appealed both points (and a third point of no present significance).  The Court of Appeal allowed Mr. Riley’s appeal of the non-pecuniary award, increasing the damages to $85,000.  It upheld the trial judge’s dismissal of the claim for loss of housekeeping capacity.*

*[63]         Ms. Kim’s $418,000 claim for loss of housekeeping capacity succeeded, and Mr. Riley’s $10,000 claim failed.  They were plainly different claims.  Ms. Kim was struggling with devastating injuries that rendered her unemployable.  Mr. Riley was not incapacitated to nearly the same degree.*

*[64]         Chief Justice Bauman gave judgment for the Court in Kim.  He described the issue – the valuation of loss of housekeeping capacity and whether it should be considered as pecuniary or non-pecuniary – as “somewhat vexing”.  At para. 31, he noted authorities emphasizing that “a loss of housekeeping capacity was just that, a loss of capacity, or the loss of an asset that should be compensated as a pecuniary loss regardless of whether the replacement services which are used to value the loss and determine the quantum of the award are actually purchased” [emphasis is that of Bauman C.J.B.C.].  He concluded:*

*[33]        Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff’s circumstances unable to perform usual and necessary household work — i.e., where the plaintiff has suffered a true loss of capacity — that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in Liu, “it lies in the trial judge’s discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage”: at para. 26.*

*[Emphasis added.]*

*[65]         Mr. Justice Groberman gave judgment for the Court in Riley.  He stated:*

*[101]     It is now well-established that where a plaintiff’s injuries lead to a requirement that they pay for housekeeping services, or where the services are routinely performed for them gratuitously by family members or friends, a pecuniary award is appropriate. Where the situation does not meet the requirements for a pecuniary award, a judge may take the incapacity into account in assessing the award for non‑pecuniary damages.*

*[Emphasis added.]*

*[66]         The defendant relies particularly on the following passage from the next paragraph in the judgment:*

*[102]    …  In my view, … segregated non-pecuniary awards should be avoided in the absence of special circumstances. There is no reason to slice up a general damages award into individual components addressed to particular aspects of a plaintiff’s lifestyle. While such an award might give an illusion of precision, or suggest that the court has been fastidious in searching out heads of damages, it serves no real purpose. An assessment of non-pecuniary damages involves a global assessment of the pain and suffering, loss of amenities, and loss of enjoyment of life suffered by a plaintiff. By its nature, it is a rough assessment and not a mathematical exercise.*

*[Emphasis added.]*

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

*a)    The first question is whether the loss should be considered as pecuniary or non-pecuniary.  This involves a discretionary assessment of the nature of the loss and how it is most fairly to be compensated; Kim at para. 33.*

*b)    If the plaintiff is paying for services provided by a housekeeper, or family members or friends are providing equivalent services gratuitously, a pecuniary award is usually more appropriate; Riley at para. 101.*

*c)     A pecuniary award for loss of housekeeping capacity is an award for the loss of a capital asset; Kim at para. 31.  It may be entirely appropriate to value the loss holistically, and not by mathematical calculation; Kim at para. 44.*

*d)    Where the loss is considered as non-pecuniary, in the absence of special circumstances, it is compensated as a part of a general award of non-pecuniary damages; Riley at para. 102.*

*See also* ***Xu v. Balaski,* 2020 BCSC 940**

*[124]      After the accidents, her ability to care for her children, particularly I.X., was greatly diminished. It had been her intention to support and care for her children, her husband, some 20 years her senior, and her parents. She noted the special responsibility that daughters in her culture have to provide care for senior members of their family. The plaintiff now seeks support and assistance from her parents.*

*[**125]     Her mother has taken over household chores, including heavy cleaning and cooking as well as caring for I.X. The plaintiff is still able to perform some housework, albeit with increased difficulty and pain. Her family members have come to know her post-accident as irritable and at times angry. She carries considerable guilt over her inability to fulfil the cultural responsibilities which she carries as a heavy burden.*

*…*

*[**171]     There is little doubt that the plaintiff was and continues to be a capable homemaker with very high standards. Her ability to perform housecleaning is limited to a great extent as noted above. Ms. Xu has become dependent on her parents for assistance.*

*[**172]     The defendants noted that there was a pre-existing agreement between the plaintiff and Ms. Wang that provided Ms. Wang payment in exchange for services around the house. However, I note that this agreement was entered into prior to the three accidents. At the time that agreement was made, it provided some assistance for the plaintiff, and support for the parents consistent with cultural norms of this family. The three accidents created completely unforeseen circumstances well outside the contemplation of the contracting parties.*

*[**173]     In the case at bar, Ms. Boniface, the expert occupational therapist called by the plaintiff, recommended a home support worker for 1.5 hours each day. The plaintiff testified she required 2.5 hours of assistance each day at a rate of $25 per hour. In Campbell, the Court of Appeal endorsed a rate of $15 per hour. The same rate of $15 per hour was also applied in Kim, where the plaintiff sought a cost of homemaking assistance at $25 per hour.*

*[**174]     It appears that the plaintiff seeks an award of loss of childcare for the balance of her life. That sort of an award is outside “the regime of reasonableness” because there is no consideration of contingencies such as the life expectancy of I.X. (of which there is no evidence at all); when the other children will leave the family home; when and how the plaintiff may retire from her employment; whether the plaintiff’s physical condition would permit her to continue to provide care as her daughter grows and ages; or whether institutional housing would be in the best interests of I.X. I am satisfied that Ms. Xu will look after her daughter as best as she is able for as long as she is able.*

*[**175]     The plaintiff relies first on the report of Ms. Boniface at para. 398 to say the housekeeping support should be calculated until age 75 and then reduced at 20% per annum, discontinuing at age 80. Further down the same page, the plaintiff refers to multipliers for the life span of the plaintiff.*

*[**176]     The plaintiff claims $87,000 for past loss of homemaking capacity, $450,000 for future loss of homemaking capacity, and $1,200,000 for future loss of housekeeping capacity in relation to childcare.*

*[**177]     The defendants submit that the past loss of housekeeping capacity should be between $35,878.50 and $42,210 based on 1.5 hours/day of services at $15/hour, and the award for past loss of childcare should be $49,275 for the period from June 16, 2014 to September 16, 2016, together with $65,700 for the period of the last three years, for a total of $114,975.*

*[**178]     Unfortunately, the parties have not used the same nomenclature to designate individual heads of damage and the defendants have approached the calculation of damages as though the plaintiff was about to have surgery. The defendants did not make submissions on the plaintiff’s future loss of housekeeping and childcare capacity, and appeared to rely on their submission that the plaintiff failed to mitigate by not having surgery. As previously noted, I do not find that the plaintiff has failed to mitigate her damages. Similarly, the plaintiff has not made a clearly distinguished claim for past loss of childcare capacity.*

*[**179]     I accept that the cost of housekeeping services may have increased since Kim, and that a rate of $25/hour is reasonable. However, I find the figure of 1.5 hours/day provided in Ms. Boniface’s report to be a reasonable estimate of the amount of housekeeping Ms. Xu is unable to perform. Following the guidance provided by the reasons of the two courts in Kim, I have assessed the damages for past loss of homemaking capacity at $70,000.00.*

*[**180]     I assess the future loss of housekeeping capacity for housecleaning to the age of 70, a more realistic age than others submitted above. I have also considered that the plaintiff’s eventual surgery is likely to improve her symptoms and allow her to complete more housework. I therefore assess her future loss of housekeeping capacity for housecleaning at $125,000.*

*[**181]     Finally, I assess the plaintiff’s past and future loss of housekeeping capacity in relation to childcare at $375,000.*

* 1. **In trust claims**

“In Trust” claims are properly pursued as a “Special Damages” expense. In *Uy v. Dhillon,* [2020 BCSC 1302](https://www.canlii.org/en/bc/bcsc/doc/2020/2020bcsc1302/2020bcsc1302.html?autocompleteStr=2020%20BCSC%201302&autocompletePos=1), Skolrood J. awarded the highest award ever made under this head to Mr. Uy’s caregivers, his cousin and his wife:

*[**121]     In McCormick at para. 355, Chief Justice Hinkson cited the earlier decision of Bystedt v. Hay, 2001 BCSC 1735 at para. 180, where Madam Justice D. Smith, then of the Supreme Court, summarized the factors to be considered when making an in-trust award:*

*(a)   the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;*

*(b)   if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);*

*(c)   the maximum value of such services is the cost of obtaining the services outside the family;*

*(d)   where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;*

*(e)   quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,*

*(f)   the family members providing the services need not forego other income and there need not be payment for the services rendered.*

*[**122]     Mr. Uy submits that Mr. and Mrs. Amurao have provided services to Mr. Uy that go above and beyond what would be expected in a normal family relationship, keeping in mind that the Amuraos are not in a marital or parental relationship with Mr. Uy. Mr. Uy notes further that the Amuraos have foregone opportunities to earn income as a result of caring for Mr. Uy. For example, they have not taken in further home care clients and Mr. Amurao missed overtime opportunities at work, before he went on disability leave.*

*[**123]     Mr. Uy cites James v. James, 2018 BCSC 603, where the court used a daily rate approach to calculate the value of services provided by a husband to the plaintiff, who had been rendered a quadriplegic in an accident. In that case, Mr. Justice Betton referred to Brennan v. Singh, 1999 CanLII 6932 (B.C.S.C.), where the court took a similar approach. Justice Betton said:*

*[154]        The plaintiff used a daily rate of $720 in its argument and proposed a 30% reduction of market value following the example in Brennan. Since the market value is serving only as a benchmark and no monies were actually expended I am unable to accept that proposition. This is not a situation of selecting a lesser service to save money for the defendant, but rather valuing the services provided by the family member. …*

*[155]        In a general sense I agree with the approach taken by Harvey J. in Brennan. It is my conclusion that the appropriate benchmark to use is $500 per day and to adjust that by 40% to reflect the very limited opportunity cost and the reality that the defendant was not providing compensable services 24 hrs per day because some of the time he was not providing care beyond that reasonably expected of family members.*

*[**124]     Mr. Uy proposes using a similar daily rate of $500 but without the 40% discount applied in James. He submits that Mr. Uy requires closer supervision than did the plaintiff in James. Mr. Uy does acknowledge that the claim should be reduced by the $100 per day that the Amuraos received from ICBC up until August 31, 2016. Making this adjustment for that period and then applying a daily rate of $500 from September 1, 2016 results in a claim of $940,000.*

*[**127]     I agree with Mr. Uy that an approach similar to that taken in James is appropriate in this case. I disagree however that there should be no discount applied. Justice Betton’s observations in support of the discount apply with equal force here. Without in any way meaning to diminish the care and support provided to Mr. Uy by the Amuraos, it is not the equivalent to 24-hour care by a care aide. It is apparent on the evidence that the Amuraos have incorporated Mr. Uy into their daily life in that much of what Mr. Uy does is accompany Mr. Amurao on his daily errands. If there are no errands or outings planned, Mr. Uy spends much of the time on his own in his suite.*

*[**128]     That said, given the cognitive issues that Mr. Uy has, he can be challenging to deal with. In the circumstances, I think a 30% discount off the $500 daily rate is reasonable. Using the figures supplied by Mr. Uy, I therefore assess the in trust claim as follows: 2,205 days x $500 = $1,102,500 x 70% = $771,750 - $80,800 (808 days at $100 per day paid to the Amuraos) = $690,950.*

*[**129]     As discussed, ICBC provided Part 7 benefits to Mr. Uy up until August 31, 2016. The total value of those benefits was $149,951.45 and the parties agree this amount should be included in the special damages claim.*

*[**130]     Mr. Uy also claims for incidental expenses totaling $1,472.35, including prescriptions, disability forms, parking, and other miscellaneous expenses. The defendants agreed to pay for all of these except parking expenses incurred by Mr. Amurao when he visited Mr. Uy in the hospital on the basis of his concern for Mr. Uy. In other words, the defendants did not accept as a reasonable expense Mr. Amurao’s parking before he was granted committeeship of Mr. Uy on March 7, 2014. I accept the defendants’ position in this regard and I accept that the remaining costs were reasonably incurred in the amount of $1,339.36. The defendants also agreed that an additional amount, to be determined, for Risperidone and Cipralex prescriptions was reasonable.*

*[**131]     The total award for special damages and the in trust claim is therefore $842,240.81*.

* 1. **Pecuniary Damages under the ICBC Enhanced Care Model**
* As discussed in previous lectures, as of May 1, 2021, BC has moved from a full tort jurisdiction to a no-fault jurisdiction by virtue of [s. 115 of the *Insurance (Vehicle) Act,* RSBC 1996, c.231](https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96231_01#section115) coming into force and effect.
* Under the “Enhanced Care” model, the BC Government has substituted the traditional model of compensating the plaintiff with a lump sum for their pecuniary loss with a model that is based upon a permanent payment relationship with ICBC.
* Under the new model, in lieu of an individualized award for loss of earning capacity, insured drivers will be entitled to 90% of their net income in wage loss benefits up to $100,000.00 in gross income. **There is an option to purchase additional coverage for up to a maximum of $200,000.00 per year, at an additional premium cost of approximately $450 annually**. This care will be accessible until age 65, when retirement benefits will then be accessible. To read more on the new model and how it affects income loss, you can [read this press release](https://news.gov.bc.ca/releases/2021PSSG0035-000781) from the BC Government detailing the care model. More information can be found on [the “Enhanced Care” website](https://enhancedcare.icbc.com/care-and-coverages#improvements) as well.
* Additionally, treatments and items that were previously accounted for under the special and CFC heads of damages are now subject to the “Enhanced Care” model. There is no longer the limit of $300,000.00 on medical care and rehabilitation expenses that were in place under the old system under what was then governed by Part 7 of the *Insurance (Vehicle) Act,* RSBC 1996, c.231. This section of the *Act* has been entirely changed under the new version. For further details of the treatments and coverage now available please see [the “Enhanced Care” website](https://enhancedcare.icbc.com/care-and-coverages#benefits).

**For discussion – Is the new “Enhanced Care” really providing British Columbians the care that it promises? Does this present a better long term alternative than what existed under the old system to care for and compensate British Columbians who are involved in MVAs?**

* [***Crash victim says ICBC’s new Enhanced Care model is falling short***](https://www.capitaldaily.ca/news/icbc-enhanced-care-no-fault-insurance)**- The Capital Daily, November 15, 2021**
* [***B.C. couple injured in serious crash feel left behind by ICBC's new insurance model***](https://www.cbc.ca/news/canada/british-columbia/icbc-enhanced-care-complaints-1.6106439)**– CBC News, July 19, 2021**
* [***B.C. man struck by car says no-fault insurance system ‘just doesn’t make sense’***](https://globalnews.ca/news/8093538/bc-man-struck-car-no-fault-insurance-system/)**– Global News, August 6, 2021**

**Next Class - February 13 2022: Week 6/Defences**