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| Law 435C.001 | Personal Injury Advocacy | 2020 Term 2 |
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**WEEK 5: FEBRUARY 3, 2020 - Pecuniary damages**

* 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.
* Past wage loss and future lost earning capacity – *Athey* applied by the BCCA in *Steward v. Berezan*, 2007 BCCA 150 and *Perren v. Lalari*, 2010 BCCA 140.
* Case studies:
	+ *MacLeod v. Marshall,* Court File No. CV-13-481825 (Jury Award), aff’d [2019 ONCA 842](https://www.canlii.org/en/on/onca/doc/2019/2019onca842/2019onca842.html?autocompleteStr=2019%20ONCA%20842&autocompletePos=1) (leave to appeal to SCC is sought re: lost earning capacity)
	+ *Lampkin v. Walls,* [2016 BCSC 1003](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1003/2016bcsc1003.html?autocompleteStr=lampkin&autocompletePos=1#SCJTITLEBookMark457);
	+ *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)
* 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)
* Special damages and 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)
	+ *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.);
	+ [*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)
	1. **Pecuniary Damages**
* 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, *Thornton v. Prince George School District No. 57*, [1978] 2 S.C.R. 267 and *Arnold v. Teno*, [1978] 2 S.C.R. 287 (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) (affirmed on appeal) 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. **Past Wage Loss**
* 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, at para 107, citing *Rowe v Bobell Express Ltd.,* 2005 BCCA 141).
* “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) Justice Pearlman summarized the legal framework for analyzing past wage loss as follows at paragraphs 153-156:

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.).

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.

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.

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 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 *Lo v Vos,* 2019 BCSC 1306 at para 126).

In *MacLeod v. Marshall,* Court File No. CV-13-481825 (Jury Award), aff’d [2019 ONCA 842](https://www.canlii.org/en/on/onca/doc/2019/2019onca842/2019onca842.html?autocompleteStr=2019%20ONCA%20842&autocompletePos=1) (leave to appeal to SCC is sought re: lost earning capacity), Roderick MacLeod was abused by a Basilian priest and teacher, William Hodgson Marshall, approximately 50 times during his teen years. MacLeod testified that he failed Grade 12 because he skipped school to avoid Marshall. He eventually graduated from high school and attended university. He then served in the military with exemplary reviews, achieving the rank of Captain. He said he left the military because his commanding officer reminded him of Marshall and he wanted to get away from him. He pursued other opportunities, first as an entrepreneur, then as a financial advisor, and later a physiotherapist.

* The jury awarded damages as follows:
	+ General damages of $350,000;
	+ Aggravated damages of $75,000;
	+ Lump sum income loss of $1,588,781;
	+ Pre-judgment interest of 5%;
	+ Special damages of $56,400; and
	+ Punitive damages of $500,000.

(Total: $2,570,181)

* The jury’s verdict with regard to income loss was unanimously upheld on appeal, and the court confirmed that the real and substantial possibility test for causation applies for hypothetical lost earning capacity claims arising from historical sexual abuse, and that the threshold question is met even where there are other possible reasons for the financial loss:

[17]      In the case of a claim for economic loss following childhood sexual abuse, *both* past and future loss of income claims involve a consideration of hypothetical events because the child had not earned income prior to the assault. The jury must therefore determine not what *did* happen in the past but the chance that something *would* have happened, had the sexual abuse not happened in the past.

[18]      This requires a determination of loss of earning capacity, not the loss of actual earnings. Since the plaintiff is not required to prove hypothetical events on a balance of probabilities, the burden of proof for entitlement is that of real and substantial possibility: *Athey*, at para. [27](https://www.canlii.org/en/ca/scc/doc/1996/1996canlii183/1996canlii183.html#par27); *Janiak*, at p. 170. This is because we must now consider what kind of career the victim would have had, had he not been sexually abused: *Andrews*, at p. 251.

…

[21]      There is no dispute that MacLeod earned less than he would have, had he remained in the armed forces. However, there were several possible reasons for his leaving the armed forces and, through no fault of MacLeod’s, it is not clear which cause resulted in the financial loss.

[22]      Therefore, in order to establish entitlement to past and future economic loss, MacLeod need only prove there is a real and substantial possibility that the sexual abuse caused his economic loss.

[23]      Where a plaintiff establishes that there is a real and substantial possibility the sexual abuse caused economic loss, damages are assessed by conducting the following analysis:

1.   What economic opportunities the plaintiff might have had, had the sexual abuse not taken place;

2.   What further income the plaintiff could have earned, if any; and

3.   The chance that the plaintiff would have earned that additional amount, after taking into account the various contingencies.

[24]      In quantifying the financial loss, the trier of fact must assess the chance that what the plaintiff says would have happened, would indeed have happened. In such cases, the plaintiff is entitled to compensation, but commensurate with the percentage chance that the plaintiff would have earned that income but for the defendant’s actions. Damages are commensurate with the value of the chance of earning that income: *Janiak*, at p. 170; *Mallet*, at p. 176.

[25]      In assessing damages in this case therefore, the jury should have been instructed to:

1.   Determine what MacLeod’s life could have looked like and what economic opportunities he might have had, had the sexual abuse not taken place;

2.   Decide what the monetary value is of those possible opportunities, had the sexual abuse not taken place;

3.   Estimate the chance that MacLeod would have earned the sum(s) claimed, had the abuse not taken place; and

4.   Quantify damages commensurate with the chance that that opportunity would have materialized. Compensation is limited to the degree of probability that the defendant was responsible for the loss.

* The defendant in *MacLeod* is currently seeking leave to the Supreme Court of Canada on the Ontario Court of Appeal’s decision about the standard of proof required to prove the past loss alleged: is it the “*but for*” test, or the *“real and substantial possibility”* test?
* It is unlikely the defendant is arguing the law, but rather whether the characterization of the past loss is truly hypothetical or actual: was Mr. MacLeod’s decision to leave the military a past “hypothetical” loss or an “actual” loss?
* Contrast this claim to Rosemary Anderson’s claim currently before the B.C. Supreme Court, where she alleges that *but for* the abuse she suffered, there was a *real and substantial possibility* she would have been accepted into medical school.
	1. **Future Loss of Income Earning Capacity**
* One of the most important heads of damage in a personal injury claim – and often the largest – is the plaintiff’s future loss of income earning capacity.
* In *Pololos v Cinnamon-Lopez,* 2016 BCSC 81, Mr. Justice Voith noted at paragraph 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] S.C.J. 102 the Supreme Court of Canada made the following comments with regard to how the courts should deal with potential future for hypothetical events:

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 (CanLII)](https://www.canlii.org/en/bc/bcca/doc/2010/2010bcca140/2010bcca140.html). A concise summary of the law in *Perren*was provided by Mr. Justice Savage in *Parker v. Lemmon*, [2012 BCSC 27 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc27/2012bcsc27.html):

(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 paragraph 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)](https://www.canlii.org/en/bc/bcsc/doc/1985/1985canlii149/1985canlii149.html), 26 B.C.L.R. (3d) 353 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.
* In summary, there is a two-part test for future loss of income earning capacity:
	+ (1) For this award to be made the plaintiff must demonstrate a “substantial possibility that lost capacity will result in pecuniary loss” (note that a future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation);
	+ (2) If the plaintiff discharges the burden of proof, then he or she may prove quantification of that loss by (a) an earnings approach or (b) by a capital asset approach (these are discussed in detail below).
	+ Either way, the court must endeavor to quantify the financial harm accruing to the plaintiff over the course of their working career, taking into account relevant and realistic negative and positive contingencies (*Da Silva v Pollard,* 2019 BCSC 2249 at para 141).

**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 Justice Huddart 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…

* Case Study: *Lampkin v. Walls,* [2016 BCSC 1003](https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1003/2016bcsc1003.html?autocompleteStr=lampkin&autocompletePos=1#SCJTITLEBookMark457)
	+ Note counsel of record for the plaintiff and the defendant
	+ Randolph Lampkin was a front seat passenger in a vehicle that was rear-ended, resulting in chronic neck and back pain.
	+ Randolph was an immigrant from St. Vincent, semi-literate with no high school education. He engaged in physical occupations his entire life, masonry in St. Vincent, landscaping and a short stint in concrete work in Canada.
	+ Statistical evidence of the earnings (for concrete workers and landscapers) and collateral evidence was led from a lay witness about earning opportunities in concrete work.
	+ The plaintiff’s economist conceded in cross-examination that use of his tables and the statistical evidence, taking into account negative contingencies, indicated there was a total loss of only $10,000 - $16,000 over the course of Mr. Lampkin’s lifetime. Huge admission in favour of the defendant!
	+ But, the Court then relied upon the lay witnesses’ evidence of a concrete worker’s earnings, and employed the capital asset approach to make an award of $175,000 for future lost income earning capacity.

Madam Justice Watchuk:

[192]     The issue then becomes how best to quantify the loss. Mr. Curtis Peever, an economist, provided a report and gave oral evidence.

[193]     With respect to contingency deductions, the plaintiff submits that Mr. Peever’s “risk only” deductions should be used. In light of the evidence regarding the plaintiff’s work ethic, working often six days per week, it is submitted that it is exceedingly unlikely that Mr. Lampkin would leave the workforce by choice.

[194]     The evidence of Mr. Peever was of assistance in determining the discount for negative contingencies. Table 1 of his report relied only upon survival and discount rates premised on the trial date and the plaintiff’s age. It accounts for no negative labour market contingencies that would apply to the average worker. He agreed that if those were applied, they would have the effect of reducing the figures by 45-50%, as they do in his Tables 2 through 4.

[195]     Mr. Peever agreed that the less education the plaintiff has, the higher the contingency to be applied. Generally individuals without a high school education have a more volatile earning pattern with higher labour market contingencies. In all of the circumstances, **I would apply the higher “risk and choice” contingency deduction**.

**[****196]     The defendant submits that even if the court accepts that the plaintiff would work in concrete but for the accident, there is no loss arising from this alleged loss of opportunity. In support, he relies on the evidence of Mr. Peever and his cross-examination. The defendant says that Mr. Lampkin’s resulting total loss for his entire career life if he were to retire at age 70 is only approximately $16,000. The resulting total loss if he were to retire at age 65 is roughly $10,000.**

[197]     **However, on the evidence, I accept that Mr. Lampkin has established a real and substantial possibility of an income loss, and that that loss is appropriately quantified based on the figures and submissions provided by the plaintiff as set out below. With the evidence of specific wages in the relevant occupations and the collateral evidence regarding Mr. Lampkin’s abilities and work ethic, it is unnecessary to rely upon the statistical data provided by Mr. Peever in his report in this regard.**

[198]     The issue remains as to whether the earnings approach or capital asset approach is more useful.

[199]     Mr. Vieira confirmed that Mr. Lampkin worked for him on concrete jobs in 2008 on a casual and on-call basis earning $21 per hour. The evidence also showed that Mr. Lampkin worked in concrete in December 2008 and January 2009 earning $20 per hour.

[200]     In his current capacity as the owner of Flat Rock Concrete Ltd., **Mr. Vieira confirmed that there is a shortage of skilled workers in the concrete industry and that the going rate for a general labourer is approximately $29 per hour**. If Mr. Lampkin was healthy and able to work as he had in 2008, Mr. Vieira would have no concerns with hiring Mr. Lampkin.

[201]     In terms of career progression, Mr. Lampkin could have gone on to become a Finisher, Foreman and possibly a Superintendent, none of which require a formal education. Approximate earnings would be $35 or $34 to $38 per hour, respectively, or as a superintendent, $130,000 per year.

[202]     Using the difference between Mr. Lampkin’s potential earnings as a concrete labourer ($29/hour) and his previous earnings as a landscaper ($19/hour), Mr. Lampkin’s yearly loss assuming a 40-hour work week, 49 weeks per year is $19,600. The following table provided by the plaintiff indicates the present value of the loss claimed along with the total losses adjusted for risk alone and risk and choice contingencies:

|  |  |  |
| --- | --- | --- |
| **Present Value to Age 70** | **Total adjusted for Risk Only Contingencies (-24.1%)** | **Total adjusted for Risk and Choice Contingencies (49.6%)** |
| $364,286 | $276,493 | $183,600 |
|   |   |   |

 [204]     As a measure of Mr. Lampkin’s entitlement, the plaintiff refers to cases involving plaintiffs of a similar age who work in physically demanding professions and have suffered a loss of earning capacity as a result of similar injuries:

In *Demedeiros v. Heinrichs,* [2001 BCSC 1475 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2001/2001bcsc1475/2001bcsc1475.html), the plaintiff, a stone mason was injured in a motor vehicle accident, which resulted [in] an injury to the plaintiff’s back. The prognosis for further improvement was poor. The medical evidence confirmed that the Plaintiff would continue to experience chronic pain with occasional exacerbations. The Court found that the plaintiff’s back injury partially disabled him from his work as a stone mason. The Plaintiff was awarded $180,000 (Current value $232,866[footnote omitted])

[205]     In *Thompson v. Choi*, [2015 BCSC 1283 (CanLII)](https://www.canlii.org/en/bc/bcsc/doc/2015/2015bcsc1283/2015bcsc1283.html), the plaintiff, a 44-year-old journeyman sheet-metal worker suffered injuries to his neck, shoulders and right knee in a motor vehicle accident. The court held that the plaintiff would continue to experience problems with his work, including heavy lifting, overhead work, prolonged kneeling, crouching and assuming awkward positions. The court held the following:

There is a realistic possibility he will experience flare-ups that may require downtime, occasional days off, and physiotherapy appointments. While he is likely to experience discomfort at work, through breaks, change of position, change of task and use of anti-inflammatory medication, he generally will be able to continue and complete the work, partly because has developed some pain tolerance (at para. 192).

[206]     The court held that the plaintiff would require some accommodation from future employers and his “injuries have rendered him less valuable to himself as a person capable of earning income in a competitive market” (at para. 192)  The Plaintiff was awarded $200,000 for his loss of future earning capacity.

[207]     Based on the foregoing examples, the plaintiff submits that an appropriate award of damages for loss of earning capacity is $225,000.

**[****208]     Mr. Lampkin has suffered a loss of his capacity to earn income. He is less marketable or attractive as an employee to potential employers, and has lost the ability to take advantage of all job opportunities which might otherwise have been open to him. Although concrete labour is his preferred area of work, he does not have an established history of earnings in that employment.**

**[****209]     I therefore find that an award based on loss of a capital asset is appropriate in these circumstances. Mr. Lampkin stated:  “What I am good at is my strength”. His strength was his asset. His strength has been diminished as a result of the accident.**

**[****210]     I therefore assess damages for loss of future income earning capacity at $175,000.**

* Other 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:

[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 – “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 that 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 in which Justice Goepel 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], 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. Mr. Justice Taggart 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, 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
	+ Madame Justice Adair 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.
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 (affirmed on appeal 2006 BCCA 324) Justice Sinclair Prowse 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.**

* In most cases, the Court utilizes the capital asset approach. Even in the above case (Fox), the Court cited the factors from *Brown v. Goulay* but essentially employed the “earnings approach” to arrive at a gross loss figure, and then discounted that figure to account for both negative and positive contingencies.
1. **Key factors for proving future loss of earnings 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.

**In Trust Claims**

* Care services provided by family members or friends are compensable.
* See *Aberdeen v. Zanatta and Township of Langley,* [2007 BCSC 993](2020-UBC-Week-5-Pecuniary-Damages%20%281%29.docx):

[235]      In considering the in trust claim, I turn to the analysis of Harvey J. in the ***Brennan*** case (***Brennan v. Singh***, [1999 CanLII 6932 (BC SC)](https://www.canlii.org/en/bc/bcsc/doc/1999/1999canlii6932/1999canlii6932.html), [1999] B.C.J. No. 520 (S.C.) (QL)).  In ¶ 95 of that decision, Harvey J. stated as follows:

95        In my view, it is useful to review briefly the factors which are considered in the assessment of such claims.  They are:

      (a) where the services replace services necessary for the care of the plaintiff;

      (b) if the services are rendered by a family member, here the spouse, are they over and above what would be expected from the marital relationship?

      (c)  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;

      (d) it is no longer necessary that the person providing the services has foregone other income and there need not be payment for such services.

[236]      This case clearly upholds the principle of full compensation in quantifying the value of the contributions of family members.  Damages should be awarded based on the market value of services provided.  This case is however somewhat unique in that regard.  A substantial amount of personal services have been provided to Aberdeen over the course of 48 months, from the time he left GF Strong until the valuation date at trial in October 2006, by family members who reside with him and by doing so, reduce their costs.

[237]      His daughter Jenny Aberdeen lives at home with her father and does not pay any rent.  Her expenses are provided by him.  She has however dedicated much of her time to assist in the care of her father.

[238]      The plaintiff’s son Ryan Aberdeen resides at home and pays a nominal amount of rent.  He assists to some degree in the home and is completely responsible for the outside care of the home.  In addition he is a general caregiver for his father as is his sister Jenny.

[239]      Additionally, Aberdeen’s estranged wife Gail Aberdeen has provided substantial care.  She is coincidentally employed as a home care worker, earning approximately $15 an hour.  The number of hours that she has spent in providing care to Aberdeen has varied over time.  In the beginning it was as much as 10-15 hours a week, and it has gotten less since that time.  Much of Aberdeen’s success in recovering as best he can from the injuries sustained in the accident is a credit to Jenny, Ryan and Gail Aberdeen as well as the numerous close friends who have assisted Aberdeen in his recovery.  The law provides for family members to advocate an in trust claim.  I would calculate that claim as follows:

●         Jenny Aberdeen - $1,000 per month;

●         Ryan Aberdeen - $500 per month; and

●         Gail Aberdeen - $500 per month.

The total is $2,000 per month.  That calculated over 48 months totals $96,000.

 **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.
* 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, 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, Mr. Justice Sewell 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](http://www.courts.gov.bc.ca/jdb-txt/SC/11/15/2011BCSC1585cor1.htm) and *G.P. v W.B.,* 2017 BCSC 297.
	1. **Lost Housekeeping 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, Mr. Justice Sewell 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](https://www.canlii.org/en/bc/bcca/doc/2009/2009bcca484/2009bcca484.html).

 [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.

* 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 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, McLachlin J. summarized the principles relating to the assessment of damages for future care costs 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 future care costs, (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:

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.

* The trial decision from *Aberdeen v. Zanatta and Township of Langley,* [2007 BCSC 993](2020-UBC-Week-5-Pecuniary-Damages%20%281%29.docx) gives a thorough analysis of the cost of future care valuation and the contest between the two occupational therapists, starting at para. 198:

[198]      As noted earlier in the discussion around damages generally in these Reasons, I have concluded that full compensation as espoused in ***Andrews*** and ***Milina*** requires that there should be medical justification for a cost of future care expense and the expense must be reasonable.  As I noted, the inquiry is more directed to the fact-based determination of whether each individual item claimed for a cost of future care expense is medically justified, rather than approaching the question from a purely functional analysis of whether a particular item will make the plaintiff whole again.  I have rejected any suggestion that medical necessity is the test; rather it is one of medical justification.

* 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 cost of future care 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, Milina v. Bartsch, supra)

**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 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, 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 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](http://www.courts.gov.bc.ca/jdb-txt/SC/14/10/2014BCSC1079.htm), 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.