

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brown v. Dhariwal*,
2015 BCSC 506

Date: 20150402
Docket: M105474
Registry: Vancouver

Between:

Alexandera Maria Brown

Plaintiff

And

Surinder Kaur Dhariwal and Daljit S. Dhariwal

Defendants

Before: The Honourable Madam Justice Baker

Reasons for Judgment

Counsel for the Plaintiff:

Timothy J. Delaney
& Andrea J. Ritchie

Counsel for the Defendants:

Diane Weinrath
& Aleksandra Mihailovic

Place and Date of Trial:

Vancouver, B.C.
February 11-14, 17-21
and March 27-28, 2014

Place and Date of Judgment:

Vancouver, B.C.
April 2, 2015

[1] The plaintiff was injured on December 11, 2008 when the vehicle she was driving was struck by a vehicle owned by the defendant Daljit S. Dhariwal and driven by the defendant Surinder Kaur Dhariwal. The defendants admit that Daljit Dhariwal's negligence caused the accident. Ms. Brown is seeking damages for her injuries. The defendants dispute the nature, duration and severity of the injuries alleged by the plaintiff.

CREDIBILITY

[2] In general I found Ms. Brown to be a credible and straightforward witness. She was prepared to make concessions that were not necessarily helpful to her case. There were some differences and discrepancies in the descriptions of her medical history and symptoms that she gave to various physicians and health care providers at various times, but given the long passage of time between the accident and trial, some discrepancies are not unexpected. There were some omissions in what she told the health care providers and expert witnesses that I consider significant. I did not accept all of her testimony and have referred later in these Reasons to some of her evidence that I did not accept. With those exceptions, I have generally accepted Ms. Brown's testimony and relied on it.

BACKGROUND FACTS

[3] Alexandra Brown was born in 1975. She was 33 years old when the accident happened and 39 at time of trial. Ms. Brown grew up in North Vancouver. Her parents divorced when Ms. Brown was in her early teens. Ms. Brown's father, Richard Ego, remarried. Ms. Brown's father, mother and step-mother are all hair stylists.

[4] When Ms. Brown was 16 years old and still in high school, she enrolled in hairdressing school as part of a program offered in Grades 11 and 12. When Ms. Brown was in Grade 11, her father opened his own hair salon in Richmond and Ms. Brown worked there on Saturdays.

[5] Ms. Brown graduated from high school in 1992. She worked at a hair salon not owned by her father for a year and then returned to the salon owned by her father and step-mother in Richmond, B.C. She worked there for a year, and then worked four or five years at a salon called Focus 2 in the Kitsilano neighbourhood of Vancouver. In 2000, Ms. Brown returned to work at the Richard Ego salon in Richmond. She was still working there at time of trial. She testified, however, that she had recently accepted a position at a salon located at Fraser Street and 20th Avenue in Vancouver - a location much closer to her east side Vancouver residence - and would be starting work at that salon at the end of March.

[6] Payroll records provided by Ms. Brown's father indicate that in the three years before the motor vehicle accident - 2006, 2007 and 2008 - Ms. Brown usually worked five days a week at the salon - generally Tuesday to Saturday. The salon is closed on Sundays. There were weeks, however, in which Ms. Brown worked only three or four days in a week and she generally took several weeks of vacation annually. In 2008, Ms. Brown was away from work for more than a week in February; and more than three weeks in October.

[7] Fairly early in her career, Ms. Brown became interested in advancing her skills through short courses and competitions in hair colouring, cutting and styling. While employed at Focus 2, she went to New York City for three days for a course sponsored by "Wella". In 2000, her father switched from using "Wella" hair colouring products to "L'Oreal" products and Ms. Brown took an advanced colouring and cutting course offered by L'Oreal in 2001. She also participated in some competitions and something she called a "stage course". Eventually - around 2006 or 2007 - Ms. Brown began teaching classes for L'Oreal. At that time, L'Oreal paid for her flights, hotel and food. Ms. Brown testified that more recently she was required to pay for her own flights, but L'Oreal pays for hotel and food. Ms. Brown testified that as part of her affiliation with L'Oreal she teaches one to three-day courses in Vancouver, Victoria and other locations. Ms. Brown testified that she is paid by L'Oreal for her work as an instructor and that the pay generally ranged from \$350 for a half-day course to \$700 a day for a day-long or multi-day course. I infer

that some of Ms. Brown's one or two day absences from work in 2006, 2007 and 2008 likely related to courses, competitions or training in which Ms. Brown participated.

[8] Twice a year, L'Oreal sends 50 stylists, including Ms. Brown, to Toronto or Montreal to learn new trends and participants are then invited to teach classes in their home communities.

[9] In October 2008, Ms. Brown attended a training event in London, U.K. for five days and combined the trip with a European vacation. She paid her own expenses for the London event. Ms. Brown testified she attends courses in Europe every five years; and also travels to Germany, where she has relatives, every three years.

[10] I will discuss Ms. Brown's earnings later in these Reasons but note here that she testified that she treats some expenses incurred when teaching L'Oreal courses as deductible business expenses in her tax returns. The expenses she "writes off" include some of her telephone bills, utilities at the home she and her husband own, motor vehicle expenses, ferry tickets, and flights.

[11] Ms. Brown testified that she loves the teaching work she does; that it is her passion and that she likes to be the person who has current information about trends in the industry. She enjoys inspiring other people and making them happy. She testified that attending courses is also good for business - that clients are impressed when she tells them she is going to a distant locale for training or teaching.

[12] Ms. Brown has competed in hair colour and cutting competitions since she was in high school. At time of trial, she testified she was focusing on L'Oreal colour competitions because only one model is required, while some other competitions require the stylist to provide five to eight models, both male and female. There is a cost associated with the competitions as the stylist has to pay for a make-up artist, clothing consultant, photographer and other expenses. Ms. Brown testified that sometimes her father has paid some or all of these costs, or the entry fee, which might be \$250.

[13] Ms. Brown indicated she won a competition for stylists in British Columbia in 2007 and L’Oreal flew her and her model to Montreal. She also won a “diamond trophy” in 2009.

[14] In November 2001, Ms. Brown (whose maiden name is Ego) married Matthew Brown. At the time, Matthew Brown was a sales manager for a shoe company. Ms. Brown has an interest in music and in 2008 he quit his job and has since pursued a career in music as a DJ and music producer. Mr. Brown works as a DJ for special events in clubs and boat parties. He produces his own music and at time of trial had recently begun mixing music for other performers. No information about Mr. Brown’s income or level of earnings is in evidence.

[15] At some point, Ms. Brown and her husband purchased a large house on the east side of Vancouver and began residing there. Ms. Brown’s mother moved into a suite in the home.

[16] Ms. Brown’s mother was diagnosed with diabetes when she was 50 and her medical condition worsened over time and has proved difficult to manage. In 2008, Ms. Brown’s mother was still capable of caring for herself. She still had her eyesight and was quite mobile. In fact, she did most of the yard work around Ms. Brown’s home, including planting and maintaining flower beds, and mowing the lawn.

[17] Ms. Brown’s mother’s condition gradually deteriorated however, and around 2011 her disease progressed quite rapidly. She began losing her eyesight and by 2013 was legally blind. She developed kidney failure and began having kidney dialysis three times a week. She lost the use of her left arm. She developed mobility problems and required first the use of a walker, and then a wheelchair. She needed assistance to get out of bed, use the washroom, get in and out of cars and up and down stairs. Because of the deterioration in her eyesight she was unable to check her own blood sugar levels, or draw up her own insulin injections.

[18] In 2011 and 2012, Ms. Brown's mother was admitted to hospital several times for problems related to her diabetes, including diabetic shock. There was a hospitalization for five weeks early in 2012.

[19] Ms. Brown testified that it was following this hospital stay that her mother's care requirements became really heavy. By that time, Ms. Brown's mother's condition had been labelled Type 1 "brittle" diabetes and she required varying dosages of two different types of insulin. When Ms. Brown's mother returned home from hospital she had lost a lot of mobility and her inability to walk or exercise made her circulatory problems worse. Ms. Brown's mother's deteriorating condition meant she had a lot of medical appointments - with kidney specialists, endocrinologists and others, in addition to the requirement to go to hospital three times a week for dialysis.

[20] Ms. Brown was her mother's primary care-giver and as her mother's health deteriorated, Ms. Brown, with some assistance from Matthew Brown, assumed more and more of the responsibility and physical burden of caring for her mother. Before leaving for work on each work day, Ms. Brown cooked food for her mother's mid-day meal in addition to preparing her own lunch. She drew up her mother's insulin injections and placed the syringes where her mother could easily access them. She helped her mother test her blood sugar levels. She transported her mother to all of her medical appointments, did her shopping and looked after her other day-to-day needs. In the evenings after work, she prepared meals and did house-cleaning. She helped her mother with toileting and bathing or showering. She washed her mother's hair once a week, brushed her hair, and clipped her fingernails and toenails.

[21] Ms. Brown testified that her mother generally had dialysis from 7:30 a.m. to 11:30 a.m. on Mondays, Wednesdays, and Fridays. Ms. Brown does not work on Mondays, so was able to both drive her mother to hospital for her dialysis and pick her up afterwards. On Wednesdays, she drove her mother to hospital before going

to work and Matthew Brown did the pick-up. On Fridays, Ms. Brown drove her mother to hospital and Ms. Brown's aunt did the pick-up.

[22] One of the most difficult physical tasks Ms. Brown regularly performed was assisting her mother to get in and out of bed, chairs and vehicles. Ms. Brown testified that this was almost like lifting a "dead weight" - that her mother is only five feet one inch tall; but weighs between 140 and 145 pounds. Matthew Brown testified that Ms. Brown's mother had fallen one time and Ms. Brown had to help her up. He agreed in cross-examination that helping her mother had added to Ms. Brown's physical discomfort and that her mother's deteriorating health had been a source of anxiety for both he and Ms. Brown.

[23] In addition to the heavy physical load placed on Ms. Brown by her mother's disabilities, Ms. Brown testified that worrying about her mother's health was very stressful and that she lost sleep as a result.

[24] Sometime in the two years prior to trial Ms. Brown's mother had a "mini-stroke" and her doctor advised that she required more care than Ms. Brown could provide. In September 2013, Ms. Brown's mother moved into an adult care facility located close to Ms. Brown's home.

[25] Ms. Brown testified that since her mother moved into the care facility she has continued to be the family member who takes primary responsibility for caring for her mother. She tries to visit her mother every Sunday and generally spends most of the day with her. She tries to take her mother out in her wheelchair for a tour of the neighbourhood; or out for a drive or for lunch or coffee. This requires Ms. Brown to push her mother's wheelchair or to assist her mother in and out of her wheelchair. She continues to be the person who takes her mother to medical appointments but her mother is transported by Handi-Dart to and from her dialysis appointments.

MS. BROWN'S PRE-ACCIDENT HEALTH

[26] Before the 2008 accident, Ms. Brown generally worked five days a week at her father's salon. The salon is closed on Sundays. Ms. Brown generally worked

Tuesday to Saturday and took Sunday and Monday as her days off. She testified that Saturday was not a particularly busy day for her and that she was as busy on Tuesdays as on Saturdays. Ms. Brown generally worked from 9:00 a.m. to 5:00 p.m. on Tuesday, Wednesday, Friday and Saturday; and either noon to 8:00 p.m. or 1:00 p.m. to 9:00 p.m. on Thursday.

[27] Ms. Brown agreed readily in cross-examination that before the accident she experienced shoulder, neck and back pain; and also had pain in her arms, wrists and feet. Ms. Brown agreed that these kinds of aches and pains are an “occupational hazard” and that hairdressing is a physically demanding job.

[28] As early as 1995, Ms. Brown consulted her long-time family doctor, Dr. Dorothy Janzen, because she was having low back pain due to bending over sinks in the hair salon. Ms. Brown was referred for physiotherapy treatment and given advice about posture modification.

[29] Ms. Brown agreed her job involves a lot of standing, and sustained periods of repetitive elevated arm movements to cut hair, colour hair, blow-dry, curl and straighten hair. Ms. Brown is right-handed, so when cutting hair generally has her scissors in her right hand and a comb in her left hand. She said that when cutting hair her left arm is elevated a lot because she uses her left hand to hold the hair while she cuts. When blow-drying hair she generally has the blow-dryer in her right hand and a comb in her left. She testified that the blow-dryer is the heaviest piece of equipment she uses. A flattening iron is not heavy, but it is hard on the wrist and arm because of constantly squeezing the hand to close the iron on the hair. Using the flat iron stresses hand, shoulder and neck, especially if the client has long hair.

[30] Ms. Brown testified that she gets pain in her fore-arm caused by a lot of brushing with a round-brush, rolling hair, and from holding the client’s head while shampooing.

[31] Ms. Brown said that the degree of discomfort she experiences because of work varies depending on the type of hair she is working with - whether the client

has long thick hair, for example. Ms. Brown testified that as a junior stylist she spent a lot of time bent over sinks washing clients' hair. She said as a result she had low back problems when she was only 16 years old. She testified that as she became more senior she tried to get junior stylists in the salon to do as much of the washing of hair as possible. Ms. Brown agreed that as far back as 2004 (she had a flare-up of symptoms in that year) she had begun wearing "sensible shoes" - flats or something other than higher heels.

[32] Beginning in 2001 and continuing up to 2008, Ms. Brown had regular massage therapy treatments from massage therapist Troy Melnick. Ms. Brown was forthright in testifying that even if the December 11, 2008 accident had not happened she would probably have continued to have regular massage therapy, although probably not as often as she has done since the accident.

[33] Ms. Brown testified, and told several of the expert witnesses who interviewed her, that before the accident the massage therapy was for "maintenance" purposes, but she agreed in cross-examination that she had massages to relieve the pain or discomfort she was experiencing in a variety of body areas, including her shoulders, caused by the repetitive motions required in her job. She agreed she had had pain in the area she thought of as her rotator cuff before the accident. She said that at times she had pain from her neck to her low back, as well as in her shoulders and shoulder joints.

[34] In February 2002, Ms. Brown was injured in a snowboarding fall. She recovered but did not ever go snowboarding again. She said she didn't want to risk falling and hurting herself, or jeopardizing her career.

[35] By 2003 and 2004, Ms. Brown was regularly having chiropractic treatments and massage therapy treatments on the same day. Ms. Brown agreed in cross-examination that in 2003 and 2004 she had 22 chiropractic treatments.

[36] In January 2004, Ms. Brown saw her family doctor, Dr. Dorothy Janzen, for complaints of neck and foot pain aggravated by standing in the salon for long

periods of time. She continued with monthly chiropractic treatments, massage therapy, and she began using orthotics in her shoes. She told Dr. Janzen she tried to wear flat shoes to ease the strain on her feet and back.

[37] There appeared to be a gap in Mr. Melnick's massage therapy records for the period March 2008 until December 2008, but Ms. Brown reported to an Insurance Corporation of British Columbia ("ICBC") adjuster on December 12, 2008 that her last massage therapy treatment had been in October 2008 and that she had been booked for a December 15 appointment before the December 11, 2008 accident happened. Ms. Brown had vacationed in Europe in November 2008, and suggested she had likely not seen Mr. Melnick that month. I am satisfied that Ms. Brown had not discontinued massage therapy in 2008 even though the cost was no longer being covered by her husband's extended medical benefits after he left his sales position.

[38] Ms. Brown was also candid in agreeing that after the motor vehicle accident in December 2008 some of the massage therapy she has had was for aches and pains unrelated to the accident injuries.

THE DECEMBER 11, 2008 ACCIDENT

[39] Ms. Brown testified that the accident happened at about 10:30 a.m. Ms. Brown and her husband live near Commercial Drive and Venables Street in Vancouver. December 11 was Thursday, and Ms. Brown was on her way to work in Richmond. On Thursdays she generally started work at noon. She was driving her husband's leased 2006 Honda Ridgeline, which she described as a mid-size truck. It was a sunny day.

[40] Ms. Brown was southbound on Knight Street. As she approached the intersection with 57th Avenue she was in the lane closest to the center line. The traffic light was green for north/south traffic. As she entered the intersection the defendant's Mercedes vehicle, which was northbound, made a left-hand turn and struck Ms. Brown's vehicle in the area above the front left wheel well and left side of

the front bumper. Ms. Brown testified that front and side air bags on the driver's side deployed. She recalled that her knees struck the steering column.

[41] The electronic door lock on the driver's side door would not allow that door to open, so Ms. Brown got out of her vehicle via the passenger side door. Ms. Brown said she felt immediate pain in her neck, left tricep, left shoulder and wrists. She spoke briefly and curtly to the defendant driver. She recalled that an emergency response vehicle, police and ambulance all came to the scene. Ms. Brown used her cellular phone to take photographs of the damaged vehicles at the scene while waiting for the ambulance to arrive. Ms. Brown said that the ambulance paramedics assessed her. Among others, they recorded a complaint of shoulder pain. The paramedics told Ms. Brown it was not necessary for her to go to hospital but she said she wanted to be seen by a doctor and her vehicle could not be driven, so the ambulance took her to hospital.

[42] While in the ambulance on route to hospital, Ms. Brown called her husband and while she remained on the line he connected them both with ICBC's Dial-a-Claim number so that Ms. Brown could report the accident. Ms. Brown agreed in cross-examination that her first thought when she got into the ambulance was to call the insurance company. Ms. Brown was taken to St. Joseph's hospital. She testified that the doctor who examined her diagnosed soft tissue injury, recommended that she take some time off work, and take over-the counter Advil, or Tylenol with codeine, to ease any discomfort. No x-rays were taken. The doctor did not prescribe any medication. Ms. Brown took a taxi to her home.

[43] Photographs of the truck Ms. Brown was driving indicate significant damage to the front left side. There was significant damage to the front of the defendants' car. The vehicle Ms. Brown had been driving was eventually "written off" by the insurer. Mr. Brown's vehicle lease was paid out and he received a cash payment.

THE AFTERMATH

[44] Ms. Brown decided to go to work the day after the accident. Her husband drove her to work on December 12 but she left after only a few hours. She had other stylists help her with shampooing and blow-drying, and she did scheduled haircuts and colours. She testified that after working on a few clients she felt quite nauseated, dizzy, sore and stiff.

[45] That same day, Ms. Brown met with an ICBC adjuster to follow up the claim she had earlier reported by telephone. A statement of information provided by Ms. Brown was prepared by the adjuster. Ms. Brown read the statement and pencilled in a few changes and additions.

[46] Ms. Brown did not go to work the next day, which was Saturday December 13. She stayed at home and tried to rest. At trial, Ms. Brown described her condition in the days immediately following the accident. She had a headache, pain in her neck, across her shoulders, in her shoulder joints, shoulder blades, and down her back to her mid-back. She was stiff on both sides of her neck and across the top of her shoulders. Her knees and wrists were also sore. Bruises appeared on her knees after a couple of days; and she had a “goose egg” on her left tricep that turned into a bruise.

[47] Ms. Brown testified she was also suffering from a really bad cold that settled in her head and neck and exacerbated some of her other symptoms.

[48] Monday December 15 was the second of Ms. Brown’s regular days off. She had an appointment scheduled with Troy Melnick, her regular massage therapist but cancelled the appointment, and went to see Dr. Janzen. She told Dr. Janzen about the accident on December 11. Dr. Janzen noted a bruise on the outside of Ms. Brown’s left knee; a “burn” on her right wrist apparently caused by friction between the air bag and the sweater Ms. Brown had been wearing; and a ten centimeter by five centimeter bruise on Ms. Brown’s left tricep (the front of her upper arm).

[49] Dr. Janzen assessed reduced range of motion in Ms. Brown's neck; and noted that muscles on the left side of Ms. Brown's neck and her left shoulder blade were tense and tender. Ms. Brown reported pain in the muscles on either side of the top four cervical vertebrae. Dr. Janzen told Ms. Brown to stay off work; apply ice to her neck; avoid loading of the spine; and try massage therapy and physiotherapy. Dr. Janzen's records indicate she prescribed Robaxisal C1/2, which she described as a combination muscle relaxant and analgesic. Ms. Brown recalled that Dr. Janzen also prescribed Tylenol with codeine, but there is no reference to that medication in Dr. Janzen's clinical record or her medical-legal report. Neither medication is listed on Ms. Brown's PharmaNet record obtained from the BC College of Pharmacists. Ms. Brown testified that she did take some of the medication, but did not use all of it because she found it was pretty potent.

[50] After working the partial day on December 12, 2008, Ms. Brown did not return to work for the rest of December. Her headaches were becoming less frequent, but she was still having some headaches. She was not sleeping well. Her neck was improving gradually but still causing her discomfort. Her head cold was complicating her recovery because it caused pain and congestion in her head and neck. Ms. Brown tried to relax and rest as much as possible.

[51] Ms. Brown next saw Dr. Janzen on December 22, 2008. Ms. Brown told Dr. Janzen that bad weather had prevented her from going for massage or physiotherapy treatments in the interim, but her neck range of motion had nevertheless improved quite significantly. She was still tender around the cervical spine but the muscles on the left side of her neck and around her shoulder blade were less tense.

[52] Ms. Brown went to see physiotherapist Charmaine To on December 23, 2008. As part of Ms. To's initial assessment of Ms. Brown, a pain diagram was completed. Ms. To's notes refer to a complaint of left shoulder pain, but on the diagram the area of pain circled is the left shoulder blade (scapula), not the shoulder joint or rotator cuff.

[53] Ms. Brown began having physiotherapy treatments approximately two times a week. The treatments focused on several problem areas - neck, upper trapezius, upper back, shoulder blades, mid back, low back and buttocks, and thumbs. On December 31, it was the right side of Ms. Brown's neck and her right shoulder that were most sore. The physiotherapy records do not indicate that the left shoulder was the focus of attention. On January 14, 2009, Ms. To concentrated on Ms. Brown's right hand and arm. At the next visit low back pain was Ms. Brown's primary complaint.

[54] Ms. Brown returned to work in the first week of January 2009, but initially limited herself to working five hour days, three days a week - Tuesday, Thursday, and Saturday. She gradually increased the length of her work day. When she saw Dr. Janzen on January 5, 2009, Ms. Brown reported that working caused pain in her neck and that clenching her teeth was causing temporomandibular pain (Ms. Brown had a pre-existing TMJ problem). Dr. Janzen recommended Ms. Brown continue with physiotherapy and hold off on returning to work.

[55] On January 14, 2009, Ms. Brown had one massage therapy treatment at a massage clinic next door to Ms. To's clinic. Ms. Brown testified that following this treatment she developed a bad migraine headache and her TMJ problem was aggravated, so she did not return to that massage therapist. Instead she resumed regular massage therapy treatments with Troy Melnick.

[56] Ms. Brown continued with a reduced work load through January and February. Ms. Brown told Ms. To on January 22, 2009 that she had been to Toronto for a conference that week and that her neck, shoulders and lower back were sore from prolonged sitting. Photographs posted on Ms. Brown's Facebook page indicate the Toronto trip was for a L'Oreal Professional Portfolio training event.

[57] Ms. Brown saw Dr. Janzen on January 26. By this time there had been further improvement in her neck range of motion and Ms. Brown had had normal rotation bilaterally, almost normal flexion and extension, 75% of normal lateral flexion to the right and 50% of normal lateral flexion to the left. She continued to

have tenderness in her neck and mid-back. Ms. Brown told Dr. Janzen she had also begun to have pain and stiffness in her lower back. Dr. Janzen's opinion was that Ms. Brown was compensating for her neck problems with postural changes that were aggravating the lower back. She recommended that Ms. Brown continue with massage and physiotherapy.

[58] On February 12, 2009, Ms. Brown went swimming - an activity Ms. To had recommended. Ms. Brown saw Ms. To the next day - February 13 - and reported that while she was swimming she felt a sharp pain in her left shoulder. Ms. Brown testified about this incident at trial. She said that she was doing a non-energetic breast-stroke when she felt a "crunch" or "pop" sensation in her left shoulder, accompanied by pain. Ms. To thought the pain may have been the result of an impingement in Ms. Brown's left shoulder joint.

[59] For several weeks after the swimming incident Ms. Brown's left shoulder was much more painful. Ms. To referred to shoulder pain and/or shoulder impingement in subsequent entries in her clinical records. Ms. Brown testified that after a few weeks the pain in her left shoulder settled down to the same level of discomfort she had experienced right after the accident. The physiotherapy records indicate that on February 16, 2009 Ms. Brown reported that she had gone swimming again and had again felt pain in her left shoulder. Ms. To recommended exercises with pulleys to strengthen the shoulder and shoulder joint.

[60] Although there are physiotherapy records referring to complaints of pain in both shoulders in subsequent months, after the swimming incident the entries refer more frequently to left shoulder pain and sometimes to pain in the left shoulder joint.

[61] Various experts who have provided medical-legal reports in this lawsuit have provided a variety of opinions about the origin, mechanism, and causation of Ms. Brown's left shoulder complaints but with one exception, the specialists generally agree that the problem Ms. Brown experienced while swimming was causally related to the accident injuries and not an independent or "fresh" injury. I accept that the

impingement that became sharply symptomatic in mid-February was related to the injuries from the December 11, 2008 accident.

[62] Ms. Brown saw Dr. Janzen on February 23. She told Dr. Brown she was going to go back to work five days a week in March. She said her father was going on vacation and she felt obliged to fill in for him and also wanted to recover some lost income.

[63] Dr. Janzen's notes for February 23 do not refer to swimming having caused pain in Ms. Brown's left shoulder but she did note that there had been an exacerbation of neck pain and recorded:

Tried swimming but alignment incorrect because no goggles.

[64] In the first week of March, Ms. Brown worked five days - Tuesday to Saturday. The next week she worked Tuesday, Thursday, Friday and Saturday but did not work Wednesday. She worked five days in the third week of March. In the last two weeks of March Ms. Brown worked four days each week - Tuesday to Friday.

[65] At about this time, Ms. Brown decided that would not return to working five days a week as she generally had before the accident. The defendants submit that Ms. Brown voluntarily reduced her work week for reasons entirely unrelated to the accident injuries. It is true that no physician recommended that Ms. Brown limit her work to four days - Dr. Janzen simply accepted and recorded Ms. Brown's assertions that working more than four days was too difficult for her - but I am satisfied that at this stage of her recovery, Ms. Brown's decision to reduce her work week by one day was causally related to the discomfort and fatigue caused by the accident injuries.

[66] As noted earlier, the Richard Ego salon is closed on Sundays. Mr. Ego testified at time of trial that he had 12 employees. His wife, Christina Ego, is a co-owner of the business and also works in the salon. Mr. Ego prepares the payroll records with the assistance of an automated cashier system. Some of the records

are in evidence. Mr. Ego and Ms. Brown testified that if a client pays for services late in the day, the cash register record may already have been closed off and in that event the payment will show up on the record as if the client had been seen on the next day the salon is open. This led initially to some confusion during the trial about how many days Ms. Brown had worked in some weeks both before and after the accident, but I conclude that where the daily record shows that Ms. Brown had only one or two clients on a Monday, or a Saturday, it is more probable than not that those were clients she saw late on the previous day that Ms. Brown worked.

[67] Some of the stylists working in the Richard Ego salon work only four days a week. One stylist works three days. The others work five days.

[68] When Ms. Brown decided to reduce her days of work to four, she asked her father which additional day he preferred her to take off and he said Saturday. He testified that although Saturday is the salon's busiest day, he had a full complement of other stylists working on Saturday and also thought that it would be good for Ms. Brown to have three days off in a row. He said that if she had asked for Wednesday off instead he would have said no. I noted earlier that Ms. Brown testified that she was as busy on Tuesdays as on Saturdays.

[69] Ms. Brown testified that in March 2009 she continued to experience pain in her neck, back, and shoulders and was still having difficulty finding a comfortable sleeping position.

[70] Ms. Brown next saw Dr. Janzen on March 23, 2009. Ms. Brown told Dr. Janzen she had decided she was not going to work five days a week anymore. She reported that modifying her chair position at work had helped alleviate her discomfort somewhat. She reported that she was continuing with physiotherapy and massage therapy. Dr. Janzen assessed full range of motion in Ms. Brown's neck, but there was pain on the right side of the neck with lateral extension.

[71] Dr. Janzen recorded:

Has also developed pain (L) shoulder.

[72] This is the first specific reference in Dr. Janzen's clinical records to left shoulder pain, but I conclude that Ms. Brown had been experiencing shoulder pain following the accident, particularly in her left shoulder. Dr. Janzen examined Ms. Brown's shoulder and found it to be "entirely normal" with full range of motion in all directions, no "wasting" of the left shoulder muscles; and no "point tenderness" on palpation of the shoulder.

[73] Dr. Janzen noted that Ms. Brown was having some low back pain, likely due to posture, but noted:

all in all recovering steadily.

[74] Dr. Janzen counselled Ms. Brown about good posture and advised her to continue with physiotherapy.

[75] On April 11, 2009, physiotherapist Charmaine To had Ms. Brown complete several questionnaires to be used to support a request to ICBC to change the physiotherapy treatment to an active rehabilitation program. On one of the questionnaires, which included a pain scale from 1 to 10, Ms. Brown indicated that her pain intensity in the 24 hours before completing the questionnaire was 5. On a questionnaire asking her to select from sentences that people use to describe themselves when they have back pain, Ms. Brown selected only 6 out of 24 possible descriptors. She chose sentences indicating that she changed positions frequently to get comfortable, was not doing any of the jobs she usually did around the house, laid down to rest more often because of her back, found it difficult to turn over in bed, slept less well, and was more irritable and bad tempered than usual. On a neck disability index questionnaire, she indicated her pain was "moderate at the moment", that she could lift very light weights, had no headaches at all, could concentrate fully with no difficulty, could read as much as she wanted with only slight neck pain, and could look after herself normally without causing extra pain. She reported she could do most of her usual work, could drive her car as long as she wanted with slight neck pain, that her sleep was "mildly disturbed (1-2 hours sleepless) and she was able to engage in a few of her usual recreational activities.

[76] On a questionnaire asking her to circle responses describing her usual abilities over the past four weeks, she indicated she had no difficulty with 18 out of 22 activities listed, and only “some difficulty” with four activities: brushing her hair; reaching over her head to retrieve a five pound object, running errands and shopping; and household chores such as vacuuming, yard work, laundry and handyman work.

[77] On a questionnaire titled “Disabilities of the Arm, Shoulder and Hand”, Ms. Brown did not select either “severe difficulty” or “unable” in relation to any of the 21 listed activities, but indicated mild or moderate difficulty in relation to 14 of the listed items. Ms. Brown indicated on the form that during the prior week her arm, shoulder or hand problem had interfered moderately with her normal social activities and her work. She denied that the pain had interfered with her sleep in the past week. She reported that the problem caused mild difficulty with recreational activities and sports and listed golf, snowshoeing and water sports as most important to her. She reported moderate difficulty using her usual technique for work, severe difficulty in doing her work as well as she would like, and that she was unable to spend the usual amount of time doing her work.

[78] On April 15, 2009, Ms. To completed an ICBC form titled “Physiotherapy Treatment Plan” that was discussed with Ms. Brown and submitted to ICBC. The recommended treatment plan was an active rehabilitation program three days a week at Trout Lake Community Fitness Centre for six to eight weeks. The “functional goal of treatment” was stated to be:

Return to work full-time; enable patient to return to sports (golf and swimming and skiing).

[79] Evidently the request was approved and in early May 2009, Ms. Brown’s physiotherapy sessions were moved to a gymnasium at a local community centre.

[80] In the latter part of May and in June 2009, there are several entries in the physiotherapy records indicating “Not too bad today”. An entry on June 19, 2009 indicated that Ms. Brown reported that she was tired because of a busy week at

work and also sore after spending half an hour hitting golf balls at the driving range. A note on June 24, 2009 records that Ms. Brown reported gradual improvement in her neck, back and left shoulder; that the neck had recovered to about 85% of normal; the lower back to about 75% of normal after work; and 65% improvement in the left shoulder.

[81] An entry made on June 29, 2009 indicates that Ms. Brown reported she had worked seven days in a row, including the weekend, for a “shooting session” and that her lower back and shoulder were sore. I infer that a “shooting session” is a hairdressing competition or demonstration involving photography of models.

[82] The active rehabilitation program ended on July 3, 2009. Ms. To wrote a “discharge summary” on July 23, 2009 addressed to Dr. Janzen and ICBC. She reported that at the completion of the eight weeks Ms. Brown had regained functional range of motion in her neck, back, shoulders and wrists. There was some residual “hypertonicity” in the left upper trapezius muscles, and left shoulder soreness especially after work. Ms. To wrote that the left shoulder showed “an impingement syndrome” and repetitive overhead movements aggravated the shoulder. Ms. To recommended that Ms. Brown continue with “shoulder stabilization/rotator cuff and core strengthening exercises” at least three times a week for the next two to three months to maintain and improve her strength and range of motion.

[83] Ms. Brown did not return to see Dr. Janzen for issues related to the accident injuries until September 28, 2009, six months after her last visit. Ms. Brown told Dr. Janzen she was still having pain in her neck, lower back and left shoulder. Dr. Janzen found that Ms. Brown had full active range of motion in the shoulder, with no evidence of muscle wasting, but there was pain on resisted internal and external rotation. There was no tenderness on palpation. Ms. Brown told Dr. Janzen that she could not tolerate working five days a week and intended to continue working four days a week. She told Dr. Janzen she was going to try working with a personal trainer.

[84] Dr. Janzen's notes do not indicate that Ms. Brown was using any prescription or non-prescription analgesics and except for Ms. Brown's first visit to Dr. Janzen after the motor vehicle accident, the clinical record does not indicate that Dr. Janzen prescribed any medication for symptoms related to the accident injuries. As noted earlier in these Reasons, counsel for the defendants obtained Ms. Brown's PharmaNet record from the College of Pharmacists for the period up to May 10, 2011. That record indicates Ms. Brown did not fill any prescriptions for analgesics between December 11, 2008 and May 10, 2011. Ms. Brown testified she had only taken prescription medication right after the accident. Several of the expert witnesses reported that at the time they assessed Ms. Brown she stated that she was not taking any medication. Ms. Brown told Dr. Richardson in November 2012 that she was taking any medication, not even over the counter medication. When examined for discovery on June 11, 2012, Ms. Brown testified that she had only taken over the counter Advil or Tylenol if she really needed it but probably had not taken any for the past year. When this evidence was read to Ms. Brown at trial she said her answers on discovery were truthful but that she found it difficult to believe she had not taken any medication for a whole year.

[85] Ms. Brown did not include the cost of any prescription medication in her claim for special damages. She included a small amount for an over the counter medication called Advil, which was an estimate based on receipt she had kept. She testified she had used two over the counter naturopathic products - Traumeel ointment, and Tiger Balm, but had retained only one receipt for each of these products. Ms. Brown testified she does not like to take medication, but it is fair to infer that the pain or discomfort experienced by Ms. Brown as a result of the December 11, 2008 accident was not sufficiently intense or unbearable to motivate her to seek relief through the use of prescription analgesics.

[86] In December 2009, Ms. Brown began having chiropractic treatments with a chiropractor who had treated her before the accident. She had 16 treatments between December 14, 2009 and June 12, 2010 after which she discontinued chiropractic treatment.

[87] After Ms. Brown's appointment with Dr. Janzen on September 29, 2009, she did not see Dr. Janzen again until December 17, 2009. Although Ms. Brown generally worked four day weeks in 2009, she had worked five days the week of November 16 to 21, and then went to Mexico with her husband for a vacation. She worked five days in each of the weeks of November 30 to December 5, December 7 to 12 and December 14 to 19, 2009.

[88] Ms. Brown told Dr. Janzen on December 17 that she had been working five days a week the past several weeks because of higher demand during the Christmas season, and that she was having more neck and shoulder pain as a result. Ms. Brown reported that when she returned home after work she was unable to do more than have a hot bath. I infer that there was a discussion about the use of analgesics to manage the symptoms but Ms. Brown told Dr. Janzen that the medication that had earlier been prescribed (or given to her?) by Dr. Janzen right after the accident had "knocked her out". Dr. Janzen did not prescribe any other analgesic at this visit or any subsequent visit.

[89] Dr. Janzen assessed full range of motion in Ms. Brown's neck and shoulders on December 17. Ms. Brown had tense and tender muscles in her neck, and reported pain on resisted external rotation of her shoulder.

[90] Dr. Janzen decided to send Ms. Brown for an x-ray of the cervical spine and shoulders. The radiographs were done on January 9, 2010 and Ms. Brown saw Dr. Janzen on January 14 to discuss the results. The x-ray indicated Ms. Brown's neck was essentially normal, although the radiologist noted the normal curve of the vertebral column was straightened, which Dr. Janzen opined could be caused by muscle spasm.

[91] The x-ray of the left shoulder was also normal except that it revealed a small calcium deposit in the supraspinus tendon. I shall refer to various experts' opinions about the significance of the calcium deposit later in these Reasons, but note here that it was Dr. Janzen's opinion that the calcium deposit had likely developed over time after the accident and was caused both by the "...shoulder contusion from the

air bag” and Ms. Brown’s need to repetitively use her left arm at work. It was Dr. Janzen’s opinion that it was this calcium deposit that was causing the pain on resisted external rotation.

[92] Dr. Janzen’s opinion that the air bag impact caused or contributed to the development of the calcium deposit was not supported by the testimony of the experts who also assessed Ms. Brown. The preponderance of the opinion evidence is that calcium deposits form and eventually dissolve, spontaneously. I am satisfied that the accident did not cause or contribute to the formation of the calcium deposit. I also consider it unlikely that the calcium deposit was causing the pain Ms. Brown was experiencing as she continued to have pain after the calcium deposit dissolved.

[93] Ms. Brown told Dr. Janzen she had made postural changes at work to try to reduce the need to maintain her arm in an elevated position and that she was going to continue with massage therapy and kinesiology training and remedial exercise to stabilize her shoulder and spine. She told Dr. Janzen she had been unable to golf the whole previous year because of left shoulder pain.

[94] Dr. Janzen told Ms. Brown that a steroid injection into the shoulder might be helpful and that this was a future therapeutic option. This same recommendation was subsequently made by several of the specialists to whom Ms. Brown was referred but she testified at trial that she had not pursued this option. She testified that she was concerned about side effects and that she had been told there was no guarantee the injections would resolve her symptoms.

[95] Ms. Brown saw Dr. Janzen again briefly on January 20, 2010 when Ms. Brown asked her for a note for the insurer.

[96] After January 20, 2010, Ms. Brown did not return to see Dr. Janzen for issues related to the motor vehicle accident until September 19, 2011, a gap of 18 months.

[97] Ms. Brown continued to see Troy Melnick for massage treatments once or twice a month for the balance of 2010 and into 2011. Ms. Brown candidly testified that even if the December 11, 2008 accident had not happened, she would have

continued to have regular massage therapy treatments regularly to deal with the aches and pains caused by her work, but the records indicate the frequency of her visits increased in the years after the accident in comparison to the frequency of visits before the accident.

[98] Mr. Melnick's records in relation to Ms. Brown are in evidence. They document massage therapy treatments beginning in November 2001. Mr. Melnick agreed while testifying that after the December 11, 2008 motor vehicle accident he made more detailed and expansive entries in the clinical record because he knew there could be litigation arising out of the accident. He agreed, however, that although there was some greater concentration on the left shoulder after the accident, he had treated the same complaints after the accident as he had before. The frequency of massage treatments increased after the accident from almost once to almost twice a month, on average.

[99] On April 22, 2010, Mr. Melnick recorded that Ms. Brown reported she had been doing some painting in the interior of her home the previous week and as a result was having increased symptoms in her neck, back and shoulders. His records indicate that Ms. Brown frequently complained of pain in both shoulders, as she had before the accident. The notes also indicate that sometimes Ms. Brown's right shoulder was more painful than the left. He recorded on November 4, 2010, for example, "right rotator very painful". Ms. Brown agreed in cross-examination that sometimes her right shoulder was more painful than the left. In general, however, the left shoulder symptoms were the most severe and the most persistent.

[100] Soon after beginning a second active rehabilitation program in March 2010, Ms. Brown was assessed by orthopaedic surgeon Dr. Duncan McPherson at the request of the defendants' insurer. Dr. McPherson took a medical history and examined Ms. Brown on March 22, 2010. He wrote two brief reports. The first is dated April 5, 2010. He wrote an updated report on June 4, 2012 based on his review of additional medical records.

[101] Dr. McPherson noted that it appeared that the onset of left shoulder pain occurred on February 12, 2009 when Ms. Brown was swimming. He referred to Dr. Janzen's diagnosis of "impingement" and said that suggested tendonitis, or that the impingement was possibly related to the calcium deposit revealed by the subsequent x-ray. Dr. McPherson's opinion was that the shoulder problem was not caused by the accident as the onset of shoulder pain was too distant from the accident, and that the pain was likely caused by tendonitis, bursitis, or the calcium deposit.

[102] Dr. McPherson's opinion is that Ms. Brown had made a good recovery from her accident injuries by the time he saw her in March 2010 and that there was no objective evidence at that time of a disability related to the accident. He recommended that the calcium deposit could be resolved through a local injection of steroid and anaesthetic.

[103] In his second report, Dr. McPherson elaborated on the nature of the calcium deposit. He said such deposits in the rotator cuff are a common complaint characterized by aching discomfort felt usually in about the mid-level of the upper arm. Such deposits arise spontaneously and often spontaneously resolve after they become symptomatic. His opinion was that the deposit in Ms. Brown's left shoulder area was probably present before the accident, but only became symptomatic when she tried swimming in February 2009.

[104] Dr. McPherson appears to have put no weight on Ms. Brown's assertion that she was having shoulder pain even before the swimming incident in February 2010 and the ambulance report that Ms. Brown reported shoulder pain immediately following the accident. Dr. McPherson is also in the minority in his opinion that the calcium deposit was a likely source of discomfort. A later MRI revealed the calcium deposit had dissolved, but Ms. Brown continued to have left shoulder pain.

[105] I do, however, accept Dr. McPherson's opinion that Ms. Brown had made a good recovery by the time he saw her in March 2010 and was not objectively disabled at that time.

[106] In March 2010, Ms. Brown began participating in an active rehabilitation program with kinesiologist Matthew Lloyd at Karp Rehabilitation. She was referred to this program by her insurer and the insurer paid for the program. An initial assessment was done on March 10 and a final assessment on May 10, 2010. Ms. Brown also arranged to see Mr. Lloyd for 13 personal training sessions between May 24, 2010 and February 7, 2011. Ms. Brown paid for the personal training sessions.

[107] The focus of Mr. Lloyd's work with Ms. Brown was on core strength and shoulder strength. Ms. Brown did not tell Mr. Lloyd that her goal was to return to working five days a week. She agreed in cross-examination that increasing her capacity to work more days was not her goal at that time. Her goal was to increase her stamina. She testified that if she had got back to feeling like she had before the accident she might "possibly" have gone back to working five days a week. She agreed in cross-examination that in May 2010 she was content to work a four day week and considered that to be full time.

[108] Mr. Lloyd focused on exercises designed to facilitate Ms. Brown's participation in the recreational activities she enjoyed, such as golf. There are several references to "golf swing" in his notes. On March 10, 2010, Ms. Brown told Mr. Lloyd that the physiotherapy she had had in 2009 had definitely helped; that in March 2010 the pain in her left shoulder and neck were "intermittent" and that her complaints were limited to her neck and shoulders. On April 6, 2010 and again on April 13, 2010, she told Mr. Lloyd she was feeling good and was having no problems at work. She told him she was having increased pain in her left shoulder on April 21 after she had spent the weekend painting her bedroom as a surprise for her husband.

[109] On May 10, 2010 - the date of the final assessment in relation to the rehabilitation program, Ms. Brown reported that her intermittent neck pain had entirely resolved; that her shoulder pain had decreased a lot; that she was taking no medication; that she no longer experienced difficulty with sitting, neck turning, or

neck bending, that she usually slept eight hours but woke once during each night due to pain in both shoulders; but that she had not tried to resume leisure activities such as snowshoeing or golfing due to lack of time.

[110] Ms. Brown also told Mr. Lloyd on May 10, 2010 that she was working “full-time”. She said she normally worked four eight-hour days weekly for a total of 32 hours.

[111] She said she had seen a significant reduction in her neck and bilateral shoulder pain when completing her job duties, but still experienced shoulder pain when washing and blow drying hair.

[112] On June 8, 2010 (this was a personal training session, I infer), Ms. Brown reported to Mr. Lloyd that she was having no problems with her left shoulder except for discomfort during sleep. She reported a minor flare-up of left shoulder pain due to awkward position during sleep on August 25, 2010. On January 17, 2011, Ms. Brown reported she was having no problems with her left shoulder other than occasional tightness.

[113] Mr. Lloyd testified in cross-examination that he did not tell Ms. Brown she should not play golf or do other recreational activities. He said that usually he wants his clients to attempt activities so that he can address any problems they encounter.

[114] Early in 2011, Ms. Brown’s counsel sent her to Dr. Catherine Paramonoff, a specialist in physical medicine and rehabilitation, for the purposes of an independent medical legal assessment. Dr. Paramonoff wrote two reports, the first dated July 14, 2011 and a follow-up report dated August 9, 2012. At trial, the plaintiff chose not to rely on Dr. Paramonoff’s opinions, and the defendants filed her reports in the defendants’ case.

[115] Dr. Paramonoff examined Ms. Brown on March 14, 2011 and also took a medical history from her on that date. Ms. Brown told Dr. Paramonoff that she had had massage and chiropractic treatment before the December 11, 2008 accident but that it was for “maintenance purposes” for her back and arm muscles. I am satisfied

this description was inaccurate and minimized the nature and range of symptoms for which Ms. Brown had regularly had treatment before the accident.

[116] Ms. Brown told Dr. Paramonoff that before the accident she had done only “light” sporting activities as she did not want to risk injury, but had enjoyed golfing, snowshoeing, cross-country skiing and water sports such as tubing, swimming and fishing. She told Dr. Paramonoff that before the accident she golfed at least once a week during golf season but had not tried to play a game since the accident. She had tried hitting a half bucket of balls at a driving range but found her shoulder was sore the next day. She planned to return to golfing in the spring of 2011.

[117] Ms. Brown told Dr. Paramonoff the neck pain caused by the accident had resolved after she went for physiotherapy with Ms. To.

[118] Ms. Brown told Dr. Paramonoff she had aching pain at the front of her left upper arm (described by Dr. Paramonoff as the “humerus/biceps area”) and over the back of the left arm (described by Dr. Paramonoff as the “posterior deltoid”) but described the condition of her left arm as 70% of normal.

[119] Ms. Brown reported that she usually slept about 8 hours, but woke a few times to readjust her position.

[120] In her review of the medical records, Dr. Paramonoff noted, as Dr. McPherson had, that in Dr. Janzen’s clinical records there was no complaint or reference to pain in the left “shoulder joint” until the swimming incident on February 12, 2009. Dr. Paramonoff did, however, note the reference to left shoulder pain in the ambulance crew report and references to the left shoulder in the physiotherapy records and concluded from that that the left shoulder pain was present before the swimming incidents in February 2009.

[121] Dr. Paramonoff observed a slight or mild postural abnormality in Ms. Brown’s left shoulder - also described by her as a bit of “mild winging”. This symptom appears to have been transitory - some of the health professionals who treated Ms. Brown, and some of the expert witnesses who assessed her, but not all,

observed a slight difference between the appearance or movement of the left and right scapula. Other witnesses testified or reported they had not observed this.

[122] Dr. Paramonoff's opinion was that Ms. Brown's symptoms were most consistent with pain from myofascial sources, including "musculotendinous involvement of the biceps muscle", "irritation of the rotator cuff muscles" and "myofascial sources around the shoulder blade". She opined there was likely pain from inflammatory changes in the rotator cuff muscles.

[123] In terms of prognosis, Dr. Paramonoff's opinion was that Ms. Brown would have decreased tolerance of repetitive and heavier movements with her left arm. She recommended further investigations and treatment including an MR arthrogram to rule out a tear in the cartilage, an independent activity program, and a trial of injections of a freezing agent and/or steroid into the subacromial bursa to help settle down any local inflammation.

[124] On August 9, 2012, Dr. Paramonoff updated her report at the request of plaintiff's counsel following a review of more recent medical records and reports written by Dr. McPherson, Dr. Janzen, Dr. Aitken, and Dr. Stewart, and an MRI of the left shoulder that had been done.

[125] Dr. Paramonoff noted that since her report in 2011, electro-diagnostic studies had ruled out carpal tunnel syndrome; and the MRI done on September 26, 2011 had confirmed there was no cartilage tear or evidence of subacromial inflammation. Dr. Paramonoff opined that in the absence of significant structural pathology, Ms. Brown's symptoms are probably soft tissue in nature, with contribution from impingement.

[126] Dr. Paramonoff's opinion in August 2012 was that it was reasonable for Ms. Brown to increase her regular exercise program and gradually increase her work hours to full time. Dr. Paramonoff considered five days a week to be "full time".

[127] As stated earlier, Ms. Brown had not been to see Dr. Janzen for complaints or treatment related to the accident injuries between January 9, 2010 and September

18, 2011. She met with Dr. Janzen on September 19, 2011 to review Dr. Paramonoff's recommendations. Dr. Janzen made the recommended referrals for an MRI of Ms. Brown's left shoulder and for electric nerve testing to rule out carpal tunnel syndrome. Dr. Janzen noted, however, and testified, that she did not think either investigation was warranted. Her examination on September 19 indicated Ms. Brown had full range of motion in the left shoulder and no evidence of muscle wasting or rotator cuff impingement.

[128] Ms. Brown returned to see Dr. Janzen on October 17, 2011 to review the MRI results. Dr. Janzen's interpretation was that the MRI showed an intact and normal rotator cuff, including the supraspinatus muscle previously in question. There was no mention of a calcium deposit in the tendon - it appears the deposit had dissolved - and the only abnormality was a small cartilage deposit in the lower back of the shoulder joint socket. Dr. Janzen considered this to be "an incidental finding" - that the cartilage deposit was not causing or contributing to symptoms.

[129] Dr. Janzen recommended that Ms. Brown continue with exercise programs to maintain shoulder and core strength, avoid overusing the shoulder and have massage treatments to alleviate neck and shoulder tension at the same frequency as before the motor vehicle accident.

[130] Dr. Janzen had not seen Ms. Brown again before she wrote her medical-legal report on June 8, 2012 - a further gap of eight months.

[131] Ms. Brown testified that after her mother's hospitalization in early 2012, she realized she had to take on even more responsibility for caring for her mother and that that continued until September 2013 when her mother went into a care home. Ms. Brown candidly testified that while she was not planning to go back to work five days a week during this period, she could not have done so in any event because of the demands of caring for her mother.

[132] In October 2012, Ms. Brown was assessed by orthopaedic surgeon Dr. Alan Richardson at the request of Ms. Brown's counsel. Dr. Richardson examined Ms. Brown and took a medical history from her on November 6, 2012.

[133] There are some obvious problems with Dr. Richardson's report and opinions. Prior to writing his report, Dr. Richardson had not seen the records of massage therapy or chiropractic treatment for any period before the December 11, 2008 motor vehicle accident. Apparently those records were never provided to him. That was an unfortunate oversight, because the absence of those records, and a full medical history, Dr. Richardson assumed that in the several years before the motor vehicle accident, Ms. Brown had had no documented neck or shoulder symptoms other than one episode of neck pain on January 19, 2004 that he believed had resolved after a short course of treatment. The erroneous assumption based on the absence of pre-accident records was compounded by Ms. Brown's assertion to Dr. Richardson that before the accident she had had no neck, wrist, arm, or back pain. I am satisfied, and Ms. Brown admitted at trial, that she sometimes had pain or discomfort in all of those areas before the accident due to the physical stresses and strains of her work.

[134] Dr. Richardson assessed "possibly a little bit of wasting in the parascapular muscles" although Dr. Janzen consistently found no muscle wasting. Dr. Richardson observed no scapular "winging" which Dr. Paromonoff had observed. Like Dr. Janzen, Dr. Richardson found no loss of passive range of motion in the shoulder.

[135] Dr. Richardson summarized his clinical findings to include minor or mild residual tightness and tenderness in the neck muscles and mild residual findings in the left shoulder with possible rotator cuff tendonitis.

[136] Dr. Richardson's opinion was that the impact of the air bag on the back of Ms. Brown's left arm and shoulder had led to the development of weakness in the parascapular muscles and that the abnormal scapular mechanics had in turn caused a rotator cuff impingement to develop. Dr. Richardson recommended a subacromial injection to attempt to locate the origin of the left shoulder pain.

[137] He ruled out any increased risk of developing osteoarthritis in the left shoulder area, but his opinion is that will likely continue to have pain in the shoulder if she continues working as a hairdresser.

[138] Like Dr. Paramonoff, Dr. Richardson opined that there are no true limitations with regard to Ms. Brown's left shoulder or cervical spine, and any functional restriction would be based on her symptom tolerance only. He does not believe that there is any "absolute contraindication" to Ms. Brown carrying out whatever activity she desires as long as she can tolerate any symptoms generated by the activity.

[139] Dr. Richardson opined that he would consider Ms. Brown to have been totally disabled from work for a period of four to six weeks following the accident; partially disabled for a further four to six weeks, after which Ms. Brown was capable of returning to work full-time, or carrying out whatever activity she wished.

[140] Dr. Richardson recommended a long-term active therapy program including exercise and stretching two or three times a week. He said the program should be set up by a physiotherapist, but need not be supervised. Massage therapy and other passive therapies will not change the outcome, but may provide symptom relief.

[141] Ms. Brown was involved in another motor vehicle accident in May 2013. She was not injured.

[142] Ms. Brown saw Dr. Janzen only once in 2013 - that was a visit on August 19. Dr. Janzen asked Ms. Brown to come into her clinic on January 13, 2014 for a follow-up visit after Dr. Janzen had been notified that she would be required to be a witness at this trial.

[143] Two additional medical-legal reports are in evidence. Dr. Mark Adrian, a specialist in Physical Medicine and Rehabilitation, saw Ms. Brown on July 22, 2013 at the request of her counsel, and prepared a report of the same date. Dr. W.D. Regan, an orthopaedic surgeon, interviewed and examined Ms. Brown in October 2013 and wrote a report dated October 24, 2013.

[144] By the time these doctors assessed Ms. Brown, more than four and a half years had passed from the date of the accident.

[145] Dr. Adrian's opinion is that Ms. Brown suffered injuries in the accident that caused mechanical neck pain that had resolved by the time he saw her; and left shoulder rotator cuff tendinopathy, which had not completely resolved. He found no "...gross loss of integrity of the shoulder joint or rotator cuff" and it his opinion that the symptoms Ms. Brown experiences arise from an injury to the muscles around the rotator cuff.

[146] Dr. Adrian agreed in cross-examination that the MRI of the shoulder and specifically of the rotator cuff showed nothing relevant but that the absence of objective findings is not inconsistent with her subjective symptoms. He agreed that he saw no muscle wasting indicating a soft tissue tear or neurological dysfunction. He saw no scapular abnormality or "winging" when Ms. Brown's shoulder blades were at rest, but observed that the left shoulder blade did not move as smoothly as the right shoulder blade when Ms. Brown reached toward the ceiling or put her arms out. Although Dr. Adrian believes this is the most likely cause of the pain or discomfort Ms. Brown experiences when she engages in activities that stress the shoulder joint and associated muscles, he also said it is possible that the cartilage defect that showed up on the MRI of the shoulder could also be a cause of the shoulder pain symptoms. .

[147] Dr. Adrian's opinion is that the prognosis for full recovery is poor; and that Ms. Brown may not see further improvement. He does not expect, however, that her condition will deteriorate over time, although he is of the view that her shoulder and neck are probably vulnerable to future injury.

[148] Dr. Adrian agreed in cross-examination that being active - at work, or recreationally - will not cause further injury to Ms. Brown's shoulders - that there are no gross structural defects in her shoulder and that the only limitations she has are related to the discomfort she experiences. He recommended that Ms. Brown

continue with her exercise program. He said massage therapy is unlikely to change her condition, but could allow her to maintain her current functional level.

[149] Dr. Adrian suggested that an injection of a steroid medication adjacent to the rotator cuff - a procedure he performs - could possibly result in a reduction or alleviation of symptoms, although he said any relief would be temporary, and that the procedure is most likely to be beneficial if done soon after the injury.

[150] One of the shortcomings of Dr. Adrian's report is that the history he took from Ms. Brown did not include a description of the physically challenging work she did caring for her mother - particularly in the last two years that her mother was living in Ms. Brown's home. The only reference to this in Dr. Adrian's report is two lines under the heading "Social History":

Ms. Brown's mother lives in the same household. Ms. Brown's injuries affect her ability to care for her disabled mother.

[151] Dr. Adrian does not appear to have considered the possibility that the heavy lifting associated with caring for Ms. Brown's mother may have caused or contributed to the symptoms Ms. Brown was experiencing when he saw her in July 2013.

[152] Dr. Adrian said that he believes it is possible that Ms. Brown could increase the amount of work she is doing if she improved her physical condition through exercise, but would not agree that it was likely that she could do so.

[153] Dr. Regan is an orthopaedic surgeon and head of the Division of Upper Extremity Surgery at Vancouver Hospital. He testified that he specializes in treating disorders of the upper extremities and knees. He examined Ms. Brown on October 18, 2013 at the request of counsel for the defendants.

[154] Ms. Brown testified that Dr. Regan was late arriving for her appointment and that he spent only 15 minutes in total interviewing and examining her. I am satisfied that she is mistaken. Dr. Regan testified that he did not recall arriving late but that he would not have cut the assessment short in any event. He disagreed that the

appointment could have taken as little as 20 minutes. He estimated that he spent 20 to 30 minutes interviewing Ms. Brown and about the same amount of time examining her. Having looked at the history he included in his report, I accept Dr. Regan's testimony on this point.

[155] Dr. Regan included Ms. Brown's history as an appendix to his report. That history makes no reference at all to the care Ms. Brown had been providing for her mother over the past several years.

[156] Dr. Regan did not agree with Dr. Adrian's opinion that Ms. Brown's pain is caused by the muscles associated with the rotator cuff. He said there was no evidence of rotator cuff pain when he examined Ms. Brown. Dr. Regan found full range of motion in Ms. Brown's neck and shoulder, with no weakness or "crepitus" in the rotator cuff. He noted that Ms. Brown had palpable pain in the region of the long head biceps. His opinion is that she has myofascial pain associated with the left peri-scapular muscles, and the latissimus dorsi. I understand the latter to be the big muscle that goes under the shoulder. Dr. Regan's opinion is that Ms. Brown was asymptomatic before the December 11, 2008 accident.

[157] While Dr. Regan believes that the accident did aggravate musculoskeletal complaints, he did not agree that the symptoms Ms. Brown was experiencing when he saw her in the fall of 2013 are caused by the accident. Based on his belief that Ms. Brown is not working significantly less than she did before the accident, (taking into account the work she does for L'Oreal), Dr. Regan's opinion is that Ms. Brown's current complaints are caused by the nature of the work she does. He opined that the duration of temporary disability due to the accident injuries was somewhere between 12 and 18 months and that after that she had self-imposed a limitation on the number of days she worked. Like Dr. Adrian, Dr. Regan does not believe the small calcium deposit noted on the x-ray was caused by the accident trauma.

[158] Dr. Regan's opinion is that Ms. Brown could increase her hours of work with some adaptation of her work station and perhaps some reduction of the time she spends teaching in favour of more time working in the salon. In cross-examination

at trial he agreed that he could not say with certainty that Ms. Brown would be able to tolerate five days of work but he thought it was reasonably likely if she avoids heavy lifting or carrying. He does not expect that she will become 100% pain free, but does believe there would be further reduction of symptoms with an exercise program to even out the musculature.

[159] Dr. Regan recommended that Ms. Brown ice the front of her shoulder, and do Yoga or Pilates to strengthen her muscle groups. He testified that active exercise will be more helpful in decreasing her symptoms than massage therapy. He also suggested that an injection into the long biceps tendon, done with ultrasound guidance, could assist in clarifying the source of the symptoms Ms. Brown reports.

[160] Ms. Brown described her condition as largely unchanged at time of trial. She said she had stopped having physiotherapy in 2009 because the insurer stopped paying for it. She testified that she had not gone back to having massage therapy once a month even though Dr. Janzen had recommended she do so. She said she loves massages and would go once a week if she could afford it.

[161] Although she had earlier reported to various health providers that her neck and lower back symptoms had resolved to pre-accident status, she said at trial that these symptoms were still resolving. Pain in her left shoulder continued to be her main complaint at time of trial.

[162] Since March 2009, Ms. Brown has continued to work four days a week generally, with the occasional shorter or longer week. She has continued attending conferences and training sessions, and teaching for L'Oreal.

[163] Ms. Brown testified that her husband has been doing more of the heavier household tasks since the accident, and that she no longer does the vacuuming. I note, however, that until the spring of 2008 Matthew Brown was working at a regular job that also involved travel, but has been working freelance since that time, so has had more time to do his share of the housework. Matthew Brown's description of the

amount of housework he did before the accident did not accord with Ms. Brown's assertion that she had done 90% of the housework pre-accident.

[164] Ms. Brown's husband does not golf, but Ms. Brown has golfed since she was a child. She testified that she had not attempted to play 18 holes of golf in the more than five years after the accident and had only attempted an executive course once and that was two or three years prior to trial. She had played pitch and putt in the summer of 2013, but reported stopping after the 10th hole because her shoulder was fatigued. She was at a driving range in October 2009 and reported on her Facebook page that she had gone to the driving range with her brother-in-law in 2012 or 2013 for the first time in several years.

[165] Ms. Brown and her husband testified that before the accident Ms. Brown sometimes drove her husband's motor boat while he water-skied but she stopped doing this after the accident because she does not like to have to turn her head to watch the skier. Her brother-in-law normally drives the boat now. She had not tried cross-country skiing. She has gone swimming on vacation but has not attempted swimming for exercise. She has not attempted tennis. She has no difficulty walking and enjoys that activity. Matthew Brown testified that Ms. Brown does a lot of walking and some cycling. She played a bit of badminton in 2013.

[166] Observations of Ms. Brown in the witness stand indicate she is a very animated person. She frequently punctuated her testimony with large motions of her arms; and head motions that appeared smooth and pain-free.

[167] The defendants had video surveillance and observations of Ms. Brown carried out in September and October 2009; and again in December 2013. In general, the video surveillance does not depict Ms. Brown carrying out any activity that she testified she could not do, but also reveals little or no evidence that Ms. Brown is in significant pain or incapacitated by pain. She was observed riding a bicycle on October 3, 2009. Ms. Brown testified she likes bike riding and that it is one of the activities she does, including riding on trails for 30 to 45 minutes. She testified that she planned to commute by bicycle when she started working at her new salon at

the end of March 2014. On September 19, 2009, Ms. Brown was observed going on a hike at the Lower Seymour Conservation Reserve, and hitting golf balls (not energetically) at a driving range.

[168] Postings by Ms. Brown on her Facebook page included pictures and reports of a trip to Mexico in November 2013. Ms. Brown testified that she and Matthew Brown often went to Mexico at that time of year. Matthew Brown worked as a DJ while they were in Cabo San Lucas. Ms. Brown posted an entry on her Facebook page two days in a row indicating she had danced all day on the beach and that “Sand dancing is the best workout”. Ms. Brown testified she often attends parties or events where Matthew Brown is one of the DJs. She agreed in cross-examination that she often dances at these events. She reported on June 21, 2013 that she was spending every Friday at a lounge/restaurant in Vancouver where Matthew Brown was acting as DJ.

[169] Ms. Brown testified that she went to France and Germany for a three week vacation in 2013. She did not testify that the long flights associated with her travel exacerbate her symptoms.

[170] Video surveillance and observations of Ms. Brown obtained by the defendants’ insurer in October 2013 are unremarkable. A very poor video of her at work reveals that she was quite animated while conversing with her clients - using lots of arm gestures while talking, but also that she rubbed the left side of her neck at one point during the time she was under observation.

[171] Ms. Brown was also photographed and observed late at night on December 14 and in the early morning hours of December 15, 2013 at a function where her husband was one of the DJs. Ms. Brown had worked five days the week of December 9 to 14, including December 14, and she worked five days the following week also. The night-time function on December 14 was held at a downtown luxury hotel. Ms. Brown was wearing high heeled shoes. She danced energetically through most of the several hours she was under observation. After 2:00 a.m., she was observed still dancing with her left hand waving above her head and a drink in

her right hand; and later with both arms in the air. Ms. Brown stayed at the party until 3:00 a.m. when she left with her husband. Ms. Brown agreed in cross-examination that she was probably not having pain in her left shoulder at that time. Ms. Brown testified that Ms. Brown attended a similar event at the same location a week later.

[172] Ms. Brown's father, Richard Ego testified that he could not recall Ms. Brown having missed work before the accident because of neck, shoulder or back problems. He said that in the years after the accident he has not really discussed her accident injuries with her. He said he had not observed Ms. Brown having any difficulty doing her job, but had overheard her occasionally making comments to her clients (about her symptoms, I infer). He agreed that when Ms. Brown leaves his salon it will be a big loss for his business. He agreed that Ms. Browns generates as much income for the salon in four days as many other stylists do in five days. Mr. Ego said he does not know why Ms. Brown is only working four days a week - he said "It's her choice."

[173] Ms. Brown testified that at her new salon, all of the stylists work four days a week and all are involved in training.

DAMAGES

[174] Counsel provided the court with numerous authorities dealing with the calculation of damages and also comparative damage awards. Counsel referred to some of these authorities in their oral and/or written submissions. A list of the authorities referred to and considered is attached to these Reasons as an Appendix.

SPECIAL DAMAGES

[175] The plaintiff is seeking \$ about 13,000 in special damages. This figure is net of two small payments made by the insurer. The most significant item is \$9,193 for massage therapy. I understand this figure includes the cost of every massage therapy treatment post-accident. Ms. Brown was having massage therapy about once a month before the accident and testified she would have continued having

massage therapy at about that frequency even if the accident had not happened. Following the accident, she increased the frequency of treatments. The defendants are not required to pay for massage therapy treatments that Ms. Brown would probably have had even if she had not been injured. All of the medical experts agreed that massage will not “cure” Ms. Brown, but that it may assist in improving her ability to function by reducing her experience of symptoms. I award \$4,500 for massage therapy treatments.

[176] Ms. Brown’s claim to be reimbursed for the cost of vitamins is not warranted.

[177] Ms. Brown has claimed \$800 for the cost of personal training sessions with Matthew Lloyd. On the evidence, these sessions, in addition to the early physiotherapy and active rehabilitation programs proved to be very helpful in reducing symptoms.

[178] Ms. Brown did not keep receipts for Traumeel ointment, Tiger Balm or Advil and has estimated her expenditures. I am satisfied Ms. Brown would have used some of these ointments or medications in any event, but award the sum of \$600.

[179] The balance of the items claimed, including parking and mileage, appear warranted on the evidence. I award the sum of \$10,700 for special damages.

PAST LOSS OF EARNINGS

[180] The calculation of past loss of earnings and loss of the capacity to earn income in future are both complicated by the lack of clear explanation for certain income and expenses claimed on Ms. Brown’s tax returns. The income she earned at her father’s salon comes from three sources - a percentage of the fees charged to clients; a percentage of sales of products; and tips. The first two of these are well documented, but neither Ms. Brown nor her employer kept a record of tips and I am satisfied that at least in some years, including some years after the accident, Ms. Brown did not declare her income from tips or gratuities on her tax returns. Neither Ms. Brown nor her employer made a record of tips or gratuities. Ms. Brown, Matthew Brown, and Richard Ego were all unable to explain several of the entries on

Ms. Brown’s tax returns. A figure titled “T4- Remaining” for example, remains a mystery. Mr. Ego said he thought that might be statutory holiday pay and vacation pay, but that seems unlikely as Ms. Brown generally took her allotted holidays or more.

[181] There was clearly a change in the way in which certain income was reported after 2008, but no adequate explanation was provided. After 2010 some income was reported as gross or net business income from L’Oreal, but this income must have been treated in some other fashion before 2010, or not reported at all. Some of the returns reported “other income” but Ms. Brown was unsure whether this was income from tips, income earned from work done for L’Oreal, and if the latter, whether it was gross or net. Ms. Brown also reported rental income on her tax return. She wasn’t able to give a clear explanation of the source of that income, although it may have been rent paid by her mother. A number of expenses were claimed that resulted in the net rental income being a negative figure. I’m satisfied that these expenses were not likely “real” expenses in the sense that they actually reduced the amount of disposable income available to Ms. Brown.

[182] Ms. Brown testified that she had done more work for L’Oreal after the accident than she had done before, but that is not clearly reflected on her tax returns.

[183] I am left to do the best I can with the evidence I have that I consider reliable, and that is the evidence of commission income paid to Ms. Brown by her employer. Looking at income from her commission at her father’s salon only, the following income picture emerges:

2005	\$60,267
2006	\$60,395
2007	\$62,225
2008	\$61,288
2009	\$53,524
2010	\$56,828
2011	\$59,398
2012	\$52,738

[184] I agree with the defendants' submission that Ms. Brown's income from L'Oreal likely increased in the years after the accident, which would offset to some degree the drop in income from her regular employment, but these figures still demonstrate a decline in Ms. Brown's main source of income in the years after the accident. Because there is no reliable evidence about income from tips, or from L'Oreal; or evidence about expenses claimed to offset L'Oreal income; or about the rental income and expenses claimed to offset the rental income, I have concluded that I should assess past loss of income by reference to commission income only. In my view, the other income and expense figures can be ignored and are likely to cancel each other out in any event.

[185] Counsel attempted to assist the court by providing opinion evidence and reports from two actuaries. Kevin Turnbull testified for the plaintiff; Douglas Hildebrand for the defendants. In my view, Mr. Turnbull's report is of no assistance, largely due to the assumptions he was asked to utilize, or chose to utilize, in preparing his report. The most flawed of these assumptions appears to have come from a misunderstanding about some information provided by Richard Ego. Based on that information, Mr. Turnbull assumed that but for the accident Ms. Brown would have been able to substantially increase her income and would have been earning about \$100,000 by 2014.

[186] In cross-examination at trial Mr. Ego conceded that level of commission income was not something that could possibly be achieved at his salon and my calculations indicate Ms. Brown would have had to have provided service to a very high (unrealistically high) number of clients to achieve anything close to that amount of commission income. Mr. Ego said possibly a top stylist working at a downtown salon where the clients were all lawyers might be able to achieve that figure. In her testimony Ms. Brown never claimed to have had the pre-accident capacity to earn that level of income. The salon to which she was moving shortly after the trial ended is not a downtown salon.

[187] In my view, the assumptions used by Mr. Turnbull have not been established by evidence that I accept, and both his calculation of past loss of income and his method of calculating future loss are unreasonable and unreliable.

[188] Mr. Hildebrand's report is more helpful. The key question is, however, did the accident injuries have a negative impact on Ms. Brown's ability to earn income prior to trial? Was she forced to reduce her average work week from five days to four as a result of the symptoms caused by the accident injuries, or did she choose to work less for other reasons?

[189] There was a period of two weeks following the accident that Ms. Brown did not work at all; and then a period of two months during which she worked only three days a week. After that, up to time of trial, she generally worked only four days a week, although in late November and in December she often worked some five day weeks and she occasionally worked five days a week at other times - before going on vacation for example.

[190] I am satisfied that for the first 18 months after the accident, pain and discomfort from the accident injuries did impair Ms. Brown's capacity to work more than four days a week on average. By the end of May 2010, however, when she completed the active rehabilitation program supervised by Matthew Lloyd, I conclude that Ms. Brown was no longer incapacitated from working five days a week. I conclude that by June 2010, Ms. Brown could have returned to working five days a week on average, had she been motivated to do so.

[191] Ms. Brown had last consulted Dr. Janzen on January 10, 2010 and did not see her again in 2010 for issues related to the accident injuries.

[192] Dr. McPherson's opinion in March 2010 was that Ms. Brown had made a good recovery by that time. He saw no objective signs of disability.

[193] Ms. Brown reported to Matthew Lloyd in May and June 2010 that her left shoulder symptoms had largely resolved. She stopped having chiropractic treatments in June 2010.

[194] I am satisfied that after Ms. Brown reduced her work week to four days from five she discovered that she that schedule and enjoyed having more time away from work to do other things. Working a reduced work week also enabled Ms. Brown to increase the amount of time spent on teaching, training and competing. She won a major competition in 2009.

[195] Ms. Brown did not earn a large income before or after the accident, but she earns a good income and according to the actuarial evidence, after the accident Ms. Brown was still earning more than twice the average income of hair stylists working in British Columbia. Although Ms. Brown's income declined when she reduced her work week, it did not decrease by 20%, possibly because of small annual increases in the rates she charged, but also because the salon records indicate Ms. Brown was able to see almost as many clients in four days as she had previously been seeing in five.

[196] Ms. Brown was able to work five day weeks during the busy Christmas season, or when she needed to fit clients in before going on vacation. Working four days a week was not unusual at her father's salon, or in the industry. Ms. Brown testified that at her new salon, all the stylists work four day weeks.

[197] In March 2010, when Ms. Brown began the active rehabilitation program with Matthew Lloyd, she did not identify increasing her hours of work as one of her goals. Ms. Brown candidly testified that it was only "possible" that she would have gone back to working five days a week if her condition improved. Matthew Lloyd understood that Ms. Brown already considered herself to be working full time.

[198] After March 2009, except for a few weeks in December each year, Ms. Brown never made a consistent effort to work more than four days a week for more than two or three weeks at a time - not long enough to judge whether she could adjust to regularly working five days each week. She never tried to gradually increase her hours - by working an extra half-day, for example. She never organizing her days off in a different way - working fewer days consecutively, for example. by separating her days off.

[199] There is no evidence that after she returned to work in January 2009 Ms. Brown ever had to cancel appointments she had accepted because of her accident injuries. When she was at work, she was able to do her work, although she did try to utilize the services of junior stylists to shampoo her clients' hair. This was a task that had caused her to have lower back pain before the accident. Richard Ego testified he had not observed Ms. Brown having difficulty doing her job.

[200] It is also significant, in my view, that Ms. Brown did not ever ask Dr. Janzen to prescribe medication that might have alleviated any symptoms she was experiencing and allowed her to work more. I conclude that if Ms. Brown really wanted to return to working five days a week, she would have asked for and taken medication to relieve her symptoms.

[201] By 2011, Ms. Brown's mother's health had started to deteriorate quite significantly and Ms. Brown began taking on increasing responsibility for her mother's care. There were several short periods of hospitalization in 2011 and then a five-week hospitalization in early 2012. Ms. Brown conceded that after her mother's health took a significant downturn, she could not have worked five days a week even if she had wanted to do so. Even after Ms. Brown's mother moved into a care facility, Ms. Brown continued to work four days. She testified she used one of her days off to rest and relax; a second to do her own errands, housework, and other activities; and devoted the remaining day - usually Sunday - to spending time with her mother. She continued to drive her mother to medical appointments.

[202] I conclude that Ms. Brown was totally incapacitated from work for a period of three weeks and partially incapacitated for a further 18 months. I conclude that after that time, Ms. Brown's symptoms had resolved to the point that she could have resumed working five days each week although I am satisfied she would have had occasional exacerbations of left-shoulder symptoms that would have caused her to occasionally be absent from work or to cancel or decline some appointments.

[203] I have concluded that but for the accident, Ms. Brown's 2008 income would likely have exceeded her 2007 income. December is a busy time of year in the

salon, so Ms. Brown lost the opportunity to income during approximately three weeks of that busy period leading up to Christmas. A calculation of income earned in the preceding 49 weeks suggests that but for the accident, Ms. Brown would probably have earned an additional \$3,500 in commissions in 2008.

[204] In each of the previous five years Ms. Brown's income had increased by about two thousand dollars a year on average. Based on my assumption that but for the accident, Ms. Brown could have earned an additional \$3,500 in 2008, her income from employment at the salon would have been about \$64,800 in 2008. Assuming an increase to \$66,800 in 2009 and \$68,800 in 2010, I conclude that Ms. Brown's lost income in 2009 was about \$13,300 and for the first six months of 2010, about \$6,000.

[205] I consider it unlikely that Ms. Brown's income from her work at her father's salon would have increased dramatically in subsequent years. Mr. Ego testified that a salon's charges are limited by what their clientele will bear. He routinely adjusted the stylists' rates upward by a small increment, but testified that at his salon he could not charge the rates that a downtown salon with business and professional clients could charge, despite the fact he considered Ms. Brown to be a top stylist.

[206] There is also the fact that Ms. Brown increased her work with L'Oreal after she started working four days a week instead of five at the salon. I am satisfied, however, that even if Ms. Brown had chosen to return to work five days a week after June 2010, she would have had occasional absences or possibly cancelled appointments due to flare-ups of shoulder symptoms. Ms. Brown had reduced income in 2012 but the decrease was not explained or attributed to the accident injuries. Ms. Brown did take a number of vacation days that year, and it appears that she had fewer appointments for a couple of weeks in January of that year, possibly because her mother was in hospital at that time.

[207] I award Ms. Brown a further \$10,000 for loss of the capacity to earn income in the period July 1, 2010 to date of trial.

[208] I award \$32,800 for past loss of income.

LOSS OF THE CAPACITY TO EARN INCOME IN FUTURE

[209] The plaintiff is seeking an award for of \$600,000 for loss of the capacity to earn income in future. As I understand the submission of plaintiff's counsel this figure assumes that but for the accident, Ms. Brown would have continued to work five days a week until retirement at age 65 and that she would have been earning about \$95,000 a year by the year 2013.

[210] The defendants' submission is that Ms. Brown's capacity to earn income is unimpaired.

[211] There is no evidence that Ms. Brown has ever considered an occupation other than her current occupation.

[212] I have already discussed my conclusion that after Ms. Brown became accustomed to working four days a week, she decided she liked a reduced work week and was not motivated to resume working five day weeks.

[213] I am also not persuaded that Ms. Brown lacked the capacity to work five-day weeks after June 2010. I conclude she could have resumed regularly working five days a week had she chosen to do so.

[214] Although the medical experts who provided opinion evidence do not agree on the exact mechanism causing the left shoulder symptoms, I accept that there is a reasonable possibility that Ms. Brown will continue to have more symptoms in her left shoulder than she would have had if the accident had not happened, and that not all of these symptoms could be alleviated by the use of prescription or non-prescription analgesics.

[215] The evidence clearly establishes that the type of work Ms. Brown has chosen as her career is physically demanding, involving, as it does, a lot of standing and repetitive neck, shoulder, arm, wrist and hand movements.

[216] The expert opinion evidence I accept indicates that the accident injuries are unlikely to result in arthritic changes and unlikely to worsen over time. One expert opined that the soft tissue injuries to neck and shoulder make Ms. Brown more susceptible to future injury, but I understood that to be a reference to a risk associated with future traumatic injury.

[217] I am satisfied there is a reasonable possibility that Ms. Brown's capacity to earn income in future has been impaired by the injury to her left shoulder, but that the impairment is not nearly as significant as the plaintiff contends.

[218] I consider it unlikely that Ms. Brown would have continued to work until age 65. Given the problems with occupational aches and pains that she was already experiencing in her thirties, I consider it more probable that she would have retired at age 60.

[219] Ms. Brown has not tried using analgesic medication to alleviate her symptoms. There is no reason to believe that there is no analgesic that Ms. Brown could tolerate. The evidence does not permit me to conclude that Ms. Brown will be or would have been entirely symptom-free if she had been willing to use prescription analgesics and I have therefore not found a failure to mitigate in the strict sense, but I consider it reasonable to assess Ms. Brown's impaired capacity taking into account the likely ameliorating effect of analgesic medication.

[220] Mr. Hildebrand provided an employment income multiplier table to assist the court in arriving at a calculation for future loss of income or the capacity to earn income. I conclude that it is reasonable to anticipate that but for the accident injuries, Ms. Brown would have earned about \$4,000 a year more than she will earn because of the problems with her left shoulder, and applying a multiplier of \$12,000 - the multiplier applicable if Ms. Brown worked to age 60, with the application of some negative contingencies, I award the sum of \$48,000 for impairment of the capacity to earn income in future.

FUTURE CARE COSTS

[221] I conclude there is no realistic possibility that Ms. Brown will incur significant expenses in future related to her accident injuries. She may purchase some Advil or other over the counter analgesic medication, but her past use, when her symptoms were most acute, was very limited. I think it's likely she would have continued to purchase Advil, Traumeel Oil and Tiger Balm for sore neck and back muscles even if the accident had not happened.

[222] I am satisfied that Ms. Brown would have continued to have about 12 massage therapy treatments annually even if the accident had not happened, but may choose to have more treatment in future to manage symptoms if she has flare-ups of shoulder pain. The expert witnesses opined that massage therapy will not cure Ms. Brown's symptoms but might increase her stamina and reduce her experience of pain or discomfort.

[223] Ms. Brown worked with a physiotherapist who provided her with demonstrations and recommendations for an active fitness routine; and with a kinesiologist/personal trainer who did the same. I am satisfied she has been provided with the skills and information she needs to maintain her health and fitness in future, if she chooses to put her knowledge into effect.

[224] I award the sum of \$10,000 for the cost of future massage therapy..

LOSS OF THE CAPACITY TO DO HOUSEWORK

[225] The evidence does not establish that Ms. Brown's capacity to do household tasks has been impaired. The opinion evidence suggests that she is not disabled and that there are no activities she cannot do, although she may experience discomfort associated with some tasks that put stress on the shoulder muscles. Ms. Brown and her husband have chosen to reallocate certain household tasks between them, but that does not equate to a loss of capacity. The tasks Ms. Brown performs to assist her mother are physically much more demanding and yet she performs those tasks.

[226] The fact that Ms. Brown may experience some discomfort when performing certain household tasks - vacuuming, for example, is a matter to be taken into account in the assessment of non-pecuniary damages.

[227] I make no award for loss or impairment of the capacity to do housework.

NON-PECUNIARY DAMAGES

[228] The plaintiff seeks an award of \$80,000 for non-pecuniary damages. The defendants submit that an award of no more than \$25,000 is warranted.

[229] In my review of the facts I have discussed the impact that Ms. Brown's injuries has had on her enjoyment of some of the recreational activities she enjoyed before the accident. In addition to the left shoulder injury, Ms. Brown experienced pain in her neck, back, wrists, and knees following the accident and had headaches. Pain from her injuries interfered with her sleep and in the early weeks and months she had difficulty finding a comfortable sleeping position and woke frequently during the night. The problems with her neck and lower back persisted for some months, but eventually returned to pre-accident status.

[230] Ms. Brown has not attempted some of her pre-accident recreational activities, even though some of the specialists are of the opinion that she is not disabled from any activity, but may experience pain or discomfort if the activity puts strain on the left shoulder. Ms. Brown testified that after a difficult or particularly taxing day at work, she had little energy or stamina left to be active in the evenings.

[231] I am satisfied that Ms. Brown attempted to play golf or hit golf balls on a few occasions and found that this activity, which involves repetitive stressing of the shoulder muscles, scapula and shoulder joint, was too painful. She also testified about giving up driving her husband's boat when he water skies.

[232] Ms. Brown has increased pain when she performs some household activities, such as vacuuming, carrying heavy loads of laundry or activities involving bending over, such as cleaning the bathtub.

[233] Ms. Brown's symptoms were exacerbated by the physical load of caring for her mother as her mother's health deteriorated.

[234] Ms. Brown is likely to have episodes of shoulder pain in future caused or contributed to by the accident injuries. While she will, I am satisfied, be able to reduce the level of discomfort by the use of appropriate analgesic medication, she is entitled to be compensated for the reasonable possibility that she will not be entirely free of symptoms.

[235] Two of the cases cited by plaintiff's counsel - *Szymanski v. Morin*, 2010 BCSC 1; and *Peters v. Ortner*, 2013 BCSC 1891 provide some guidance on the assessment of non-pecuniary damages in circumstances somewhat similar to this case, but I am of the view that the impact of the injuries on the lives of those plaintiffs was greater than the impact on the plaintiff's life caused by her injuries.

[236] The award of damages must, however, take into account the particular circumstances of the plaintiff. I award \$65,000 for pain, suffering and loss of enjoyment of life.

FAILURE TO MITIGATE

[237] The defendants allege that the plaintiff has failed to mitigate her damages by failing to increase her exercise program from twice a week to five times a week, as recommended by Dr. Paramonoff in March 2011; and by declining to have steroid injections.

[238] I am not satisfied that the defendants have met the burden to prove that it was unreasonable for the plaintiff to fail to exercise five times a week, or to decline steroid injections.

[239] Ms. Brown actively engaged in efforts to improve her physical fitness and stamina. After having passive physiotherapy treatment she pursued funding from the insurer for an active rehabilitation program supervised by Ms. To and she carried through with that program. She also took advantage of the services of Karp

Rehabilitation and when the funded program ended she paid for a number of additional sessions with Matthew Lloyd.

[240] Ms. Brown’s assertion that she was too busy to exercise as often as Dr. Paramonoff recommended is reasonable. She was working virtually full-time and was increasingly called upon to provide care and support to her mother. Perfect adherence to a recommended fitness regime is not the required standard.

[241] Most of the expert witnesses suggested that steroid injections might provide some relief for Ms. Brown, but none of them opined that the treatment would have been successful, or have provided more than temporary relief. I have already noted that the experts disagree about the precise mechanism causing Ms. Brown’s pain, whether it is caused by inflammation in the muscles around the rotator cuff, or the muscles of the scapular, or the shoulder joint itself. This uncertainty about the exact source of the pain lessens the likelihood that steroid injections, unless administered to all the possible sites, would be successful.

[242] Ms. Brown testified she was concerned about potential side effects and was reluctant to start having steroid injections at her age, particularly as the results could not be assured and any relief was likely to be temporary in any event. She did not rule out the possibility she would consider injections in future.

DAMAGES SUMMARY

[243] I award the following sums:

Special damages	\$ 10,700
Past loss of income	\$ 32,800
Loss of capacity to earn	\$ 48,000
Future cost of care	\$ 10,000
Non-pecuniary damages	\$ 65,000
Total	\$166,500

COSTS

[244] Liability has been admitted and the plaintiff has succeeded in obtaining an award of damages. I am aware of no reason why the plaintiff should not have her costs, to be assessed on Scale B. If there are matters relevant to an award of costs, such as offers of settlement, the parties may file written submissions, or make arrangements to appear to make oral submissions about costs. Otherwise the order shall be that the defendants will pay the plaintiff's costs, on Scale B.

“W.G. Baker J.”

APPENDIX

1. *Chiu v. Chiu*, 2002 BCCA 618
2. *Foran v. Nguyen*, 2006 BCSC 605
3. *Garcha v. Duenas*, 2011 BCSC 365
4. *Gregory v. Insurance Corporation of British Columbia*, 2010 BCSC 352
5. *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144
6. *Larsen v. Wilson*, 2007 BCSC 943
7. *Lim v. Anderson*, 2012 BCSC 263
8. *Milliken v. Rowe*, 2011 BCSC 1458
9. *Moore v. Brown*, 2010 BCCA 419
10. *Parypa v. Wickware*, 1999 BCCA 88
11. *Peters v. Ortner*, 2013 BCSC 1861
12. *Simmvong v. Haddock*, 2012 BCSC 473
13. *Szymanski v. Morin*, 2010 BCSC 1
14. *Tabet v. Hatzis*, 2013 BCSC 1167
15. *Dennis v. Fothergill*, 2012 BCSC 1510
16. *Sandher v. Binning*, 2012 BCSC 1000
17. *Athey v. Leonati*, [1996] S.C.R. 458
18. *White v. Stonestreet*, 2006 BCSC 801
19. *Farrant v. Latkin*, 2008 BCSC 234
20. *Gabrilo v. Greater Vancouver Transportation Authority*, 2008 BCSC 1333
21. *Chandra v. Chen*, 2010 BCSC 838
22. *Janiak v. Ippolito*, [1985] 1 S.C.R. 146
23. *Middleton v. Morke*, 2007 BCSC 804
24. *Hauer v. Clendenning*, 2010 BCSC 366
25. *Price v. Kostyba* (1982), 70 B.C.L.R. 397, 1982 CarswellBC 415
26. *Filsinger v. Insurance Corporation of British Columbia*, 2009 BCSC 232
27. *Chan v. Kao*, 2009 BCSC 626
28. *Gonzales v. Voskakis*, 2013 BCSC 215
29. *Mendoza-Fores v. Haigh*, 2010 BCSC 740; also *Chandra v. Chen*, *Gabrilo*, *supra*
30. *Perren v. Lalari*, 2010 BCCA 140

31. *Holder v. MacLean*, 2001 BCSC 1474
32. *Rochon v. Mott*, 2009 BCSC 247
33. *St. Germain v. Jemott*, 2012 BCSC 1041