

CANADA / JUDGMENT

Amaral v. Glasser

2020 BCSC 639

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Supreme Court of British Columbia

DECIDED

27 April 2020

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2020 BCSC 639 Amaral v. Glasser

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Amaral v. Glasser,

2020 BCSC 639

Date: 20200427

Docket: M169950

Registry: Vancouver

Between:

Nancy Lynn Amaral

Plaintiff

And:

Michael David Glasser and Anne Monique Glasser

Defendants

- and -

Docket: M176200

Registry: Vancouver

Between:

Nancy Lynn Amaral

Plaintiff

And:

Dorota Ryczko, Stanislaw Ryczko, and

Cullen Clarence Hines

Defendants

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial:

Vancouver, B.C.

January 6-10, 13-17, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 27, 2020

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1. Introduction
 - [1] The plaintiff, Nancy Amaral, was involved in two motor vehicle accidents, the first in February 2015 (Action No. M169950) and the second in October 2015 (Action No. M176200).
 - [2] Liability has been admitted by the defendants in Action No. M169950, and liability has also been admitted by the Ryczko defendants in Action No. M176200. (That action has been discontinued against the defendant Mr. Hines.)
 - [3] Ms. Amaral says that, as a result of the accidents, she sustained injuries, the most serious of which were soft tissue injuries to her neck and back and a concussion. Ms. Amaral says that, because of her injuries, she has been left with severely debilitating chronic pain and also with cognitive and psychological impairments. She says that these have affected all aspects of her life and resulted in her being unable to work. In addition to non-pecuniary damages, Ms. Amaral seeks compensation for past and future loss of earning capacity, loss of housekeeping capacity, costs of future care and special damages.
 - [4] The defendants in both actions accept that Ms. Amaral sustained injuries in the accidents, for which she is entitled to compensation. Counsel for the defendants confirmed that there is no need to apportion damages between the two accidents.
 - [5] However, the defendants dispute that the results of the injuries Ms. Amaral sustained are as severe or debilitating as Ms. Amaral claims. The defendants say further that Ms. Amaral has failed to show that she has no residual earning capacity. Moreover, the defendants say that Ms. Amaral has failed to take reasonable steps to mitigate her damages by failing to follow treatment recommendations with respect to her headache and mood symptoms, and by failing to look for employment closer to where she lives.
2. Background

- [6] Ms. Amaral was born in July 1965. She lives in Port Coquitlam with her son, Zachary, who is 20. Ms. Amaral's daughter, Emily, who is currently 22, lives in Vancouver. For convenience only, I will refer in these Reasons to Ms. Amaral's children by their first names. I intend no disrespect by doing so.
- [7] Ms. Amaral grew up in the Lower Mainland in a close-knit family. She has one sibling, a brother. Her parents live in Port Moody. Her father, Ted Slinger, was a school teacher for over 30 years before retiring. Mr. Slinger described how, as teenagers, Ms. Amaral and her brother were both very involved in competitive swimming, and the Slinger family was very involved in the swimming community in Port Moody.
- [8] Ms. Amaral has suffered from asthma since she was very young, although her condition has been well-managed with medication. Apart from that, she was healthy, active and physically fit. Mr. Slinger described his daughter before the accidents as bright, social and fun to be around.
- [9] Before she married and had children, Ms. Amaral started a degree program at Simon Fraser University ("SFU"). However, she did not complete it at that time. Instead, once her children were born, she became a full-time stay-at-home mother, and she was out of the paid workforce from 1997 to 2013. Ms. Amaral was divorced in 2005. At that time, she and her former husband shared parenting time on an equal basis. However, that arrangement changed when Emily was in Grade 9 and decided she wished to live primarily with her mother.
- [10] Ms. Amaral remained a full-time, stay-at-home mother until she returned to SFU in 2011. Ms. Amaral explained that she always intended to complete her degree, and that she wanted to set an example for her children, by finishing what she had started. In February 2013, Ms. Amaral graduated with a Bachelor of Arts in Communications and English.
- [11] Before returning to university, Ms. Amaral was very involved in many of her children's activities. She was a volunteer at their school. Emily was very interested in musical theatre and dance, and Ms. Amaral supported her by volunteering at both the dance studio Emily attended, and at the Theatris Youtheatre Society. Ms. Amaral occasionally took on roles in productions and acted as stage manager. Zachary played a number of sports, including hockey, soccer, baseball, volleyball and tennis. These often involved tournaments, especially for tennis. Ms. Amaral described herself as "always driving" in connection with her children's activities, something that was never an issue for her before the accidents. As Ms. Amaral recalled, she got to know the other parents, and, for her, there was an enjoyable social side to her children's many activities. Ms. Amaral kept everything organized for the family, and she described herself as "thriving" on multi-tasking.

- [12] In 2013, Ms. Amaral applied to the Vancouver Coastal Health Authority for a position as a "staffing clerk" at Lions Gate Hospital. She explained that she had a friend who was working as a staffing clerk, and told her that it was very good job. Ms. Amaral was hired, and began work as a "casual" staffing clerk at Lions Gate Hospital in December 2013.
- [13] A "staffing clerk" was also referred to as a "short-call clerk." This reflected the fact that the staffing clerk was dealing with hospital and department staffing needs and issues in the short term, about 72 hours out. Staffing clerks were responsible for calling in regular and casual staff for daily and short-term requirements. Among other things, the position required the ability to communicate effectively both orally and in writing, and the ability to organize and prioritize work. The work was done in a busy environment, with other clerks in close proximity. Each clerk had her own work cubicle, phone and computer. Staffing clerks worked in shifts, with the first shift starting at 5:30 a.m.
- [14] Ms. Amaral described her job as a staffing clerk as fast-paced and stressful, especially at the beginning of a shift. It required the ability to multi-task, a skill Ms. Amaral explained she had developed as a stay-at-home mother. She described the working environment as "crazy." According to Ms. Amaral, generally speaking, she enjoyed the work.
- [15] Ms. Amaral explained that the next step up from a staffing clerk was a position as a "portfolio clerk," and she wanted eventually to move into that position on a permanent basis. In contrast to the shifts worked by a staffing clerk, a portfolio clerk worked Monday to Friday, beginning at 7:30 a.m. A portfolio clerk had her own "portfolio" or group of staff for whom she was responsible. It involved addressing staffing needs over a longer period of time, and there was more on-on-one contact. If she wished to, a portfolio clerk had the ability to work overtime as a staffing clerk, including on weekends.
- [16] In the summer of 2014, Ms. Amaral moved into a temporary, full-time position as a portfolio clerk. At the end of September 2014, Ms. Amaral began a temporary, part-time portfolio clerk position, based out of Lions Gate Hospital, on a contract that ran through to August 24, 2015. Ms. Amaral explained that, for three weeks in October 2014, she worked at a hospital in Squamish, and commuted daily (driving) from Port Coquitlam to Squamish and back. According to Ms. Amaral, although this was a challenging few weeks, she enjoyed working in Squamish, and the long commute was no problem for her. She then returned to work at Lions Gate Hospital. Ms. Amaral explained that, in her role as a portfolio clerk, she spent most of her day on the phone and on her computer.
- [17] As Ms. Amaral recalled, before the first accident, she was enjoying her work and happy with her life. In terms of her career, Ms. Amaral explained that her long-term goal was to move from the Vancouver Coastal Health Authority to a hospital in the Fraser Health Authority, since hospitals in the Fraser Health Authority were closer to her home in Port Coquitlam. Her plan was to work, either as a portfolio clerk or possibly in human resources, until retirement age.

- [18] Ms. Amaral described a typical day before the first accident. On a typical workday, she would be up early to get to work at Lions Gate Hospital in North Vancouver. Then, after a long day at work, she would come home, make dinner, tidy up the house, take her children to their activities and pick them up. On a weekend, she would go to volleyball games and tournaments, run errands and go shopping. According to Ms. Amaral, before the accidents, she had no problems at all managing her work demands, and also the demands on her time and energy outside of work. That included keeping a very clean, tidy and organized household.
- [19] Both Emily and Zachary describe their mother before the accidents as active, engaged, outgoing, fun, supportive and confident. This is in sharp contrast to how they describe Ms. Amaral now.
- [20] In addition to Ms. Amaral's father and children, I also heard evidence from several of Ms. Amaral's long-time friends: Karen Robinson, Elaine Fong and Lise Birkeland. All three women have known and been close friends with Ms. Amaral for decades, going back to their teens in the case of Ms. Robinson and Ms. Fong, and even farther back in the case of Ms. Birkeland. In general, they describe Ms. Amaral before the accidents as fun, outgoing, very social, "bubbly" and happy. Each of Ms. Robinson, Ms. Fong and Ms. Birkeland described how she enjoyed spending time with Ms. Amaral, going for coffee or dinner, going to movies, and attending social gatherings. Much of that has changed since the accidents.

3. The Accidents and life after the Accidents

- [21] The first accident occurred on February 3, 2015. Ms. Amaral was a front-seat passenger in a Honda Civic being driven by one of her colleagues. They were carpooling, on their way to work. As Ms. Amaral recalled, they were waiting to get onto the Mary Hill Bypass, when their vehicle was hit from behind by a Dodge Ram truck. Ms. Amaral recalled the impact as "terrifying." She recalled that she was flung forward and then back, and that her head hit the headrest very hard. She recalled feeling scared and shaken up. As she recalled, she was afraid to move and stayed completely still. Ms. Amaral recalled that her knee began hurting and she felt her neck seizing up. She recalled that her head felt "fuzzy" and very dizzy, something she had never felt before.
- [22] As Ms. Amaral recalled, her colleague's vehicle was driveable, and they drove to Royal Columbian Hospital. She recalls that during the trip she felt very "wobbly," and almost as if she was losing consciousness. She recalled that her colleague kept nudging her to wake her up. According to Ms. Amaral, she continued to feel dizzy and light-headed at the Hospital, and that her neck and back were seizing up. She recalled feeling very emotional, scared about how she would be able to handle things, and in pain. Ms. Amaral contacted her father, who picked her up when she was discharged and took her home.
- [23] As Ms. Amaral recalled, her symptoms, particularly in her back and neck, worsened over the next few days. She was in pain and less mobile. She was unable to find a comfortable position, and her sleep was very disturbed. According to Ms. Amaral, before the first

accident, she had no problem getting a good night's sleep and always felt rested when she woke up. However, after the first accident, she was rarely able to sleep for more than two hours at a time, and, during the night, she woke up frequently with pain. As Ms. Amaral recalled, she also had headaches, and cognitive symptoms, which she described as a fuzzy or foggy feeling, and she found it hard to concentrate.

- [24] Ms. Amaral saw her long-time family doctor, Dr. Siri Ann Willoughby, on February 5, 2015. Dr. Willoughby assessed Ms. Amaral as having sustained soft tissue injuries to her neck and back, as well as a contusion on her right knee. Dr. Willoughby also noted a concussion and concerns regarding memory and concentration. Dr. Willoughby recommended that Ms. Amaral begin physiotherapy and massage therapy, and continue to use heat and ice. Because of her asthma, Ms. Amaral was unable to take anti-inflammatory medication. However, since the accident, Ms. Amaral had been taking medication in the form of Tylenol No. 3 approximately three times a day, and Dr. Willoughby recommended that she continue.
- [25] Ms. Amaral saw Dr. Willoughby for follow up on February 12, 2015. At that time, Ms. Amaral reported stiffness in her neck and upper back, headaches, dizzy spells, a foggy feeling, and that she was unable to read and concentrate for more than a brief period. She also reported feeling forgetful and having difficulty spending more than 10-15 minutes at her home computer handling financial matters. On examination, Dr. Willoughby noted decreased range of motion in Ms. Amaral's cervical spine, tenderness at the midline of her cervical and thoracic spine, and tenderness over the para-cervical and para-thoracic muscles. Ms. Amaral's knee pain was improving. Dr. Willoughby also noted Ms. Amaral's report that she was becoming irritable and angry over her lack of functionality.
- [26] Ms. Amaral started physiotherapy on February 17, 2015, and attended sessions about twice a week for the balance of 2015.
- [27] Ms. Amaral saw Dr. Willoughby twice in March 2015 for follow-up. At the beginning of the month, Dr. Willoughby helped Ms. Amaral complete a form to the effect that she could not return to work because of memory loss, headaches, and inability to focus and concentrate. Ms. Amaral's neck and upper back continued to be painful and stiff. Ms. Amaral was continuing to take Tylenol No. 3, as well as Trazadone (to help her sleep) and a muscle relaxant. She continued to report a foggy feeling mentally.
- [28] As Ms. Amaral and her children recalled, Ms. Amaral was no longer able to keep up with housework in her condominium. Before the accident, Ms. Amaral had kept everything tidy, clean and organized. According to Ms. Amaral, after the accident, she let everything slide. Her children took on more of the chores.

- [29] In her evidence at trial, Ms. Amaral spoke about cognitive issues following the first accident. Ms. Amaral explained that frequently she had problems finding words, something that was very alarming and unsettling to her. She had a constant headache. She found thinking and concentrating difficult, and she easily lost her train of thought. She described forgetting why she had gone into a room. These symptoms were very worrying to her.
- [30] In March, during Spring Break, Ms. Amaral and her children went on a planned, pre-paid trip to Disneyland. Ms. Amaral described how, before the accident, she had been looking forward to this. However, after the accident, she described herself as "terrified" about the trip. In contrast to a trip to Disneyland a couple of years before, on this trip, Ms. Amaral was unable to do much at all. She described how her children had to look after her, and how she had to push herself to pretend for her children that she was okay. As Ms. Amaral recalled, she spent most of her time sitting and taking pills for her pain symptoms.
- [31] Emotionally, Ms. Amaral was struggling, especially with anxiety and symptoms of post-traumatic stress. She described herself as feeling sad and depressed. She decided to begin counselling, which was available to her (as a Vancouver Coastal Health Authority employee) at no charge through the Employee & Family Assistance Program. At the end of March 2015, Ms. Amaral began a series of counselling sessions with Jennifer Turnbrook, a trained therapist.
- [32] Emily graduated from high school in June. She recalled that her mother complained about how long she would have to sit at the graduation. At home, as Emily recalled, her mother was sad, upset and angry.
- [33] However, by the end of August 2015, Ms. Amaral was feeling some improvement physically. With regular physiotherapy, she had more range of motion in her neck and back. Her headaches were less severe. She had benefitted from her counselling. However, Ms. Amaral was still taking medication, including Tylenol No. 3, for pain, as well other medications. Emily was about to leave home and move to Kelowna, to begin her studies at the Okanagan campus of the University of British Columbia. According to Ms. Amaral, at this time and although she had not returned to work, she was trying to be optimistic and she believed "I would get my life back."
- [34] Ms. Amaral drove Emily to Kelowna and helped her get settled into residence at the beginning of the Fall term. As Emily recalled, Ms. Amaral was "super stressed" on the drive up, whereas before the accident, she would have had no problems.
- [35] The second accident occurred on October 27, 2015. Ms. Amaral and Zachary were returning home after a volleyball game. Ms. Amaral was driving and Zachary was in the front passenger seat. As both Ms. Amaral and Zachary recalled, Ms. Amaral's vehicle was stopped at a traffic light. Ms. Amaral then saw a van and truck collide with one another in front of them, and the van then hit Ms. Amaral's vehicle. As Ms. Amaral recalled, she was covered in shattered glass. Zachary managed to free himself and get out of Ms. Amaral's vehicle, but she was trapped. As Ms. Amaral recalled, she knew she was hurt. She felt terrified, angry

and devastated. Someone called 911. Emergency personnel soon arrived and pulled Ms. Amaral from her vehicle through the rear passenger door. She was taken by ambulance to Eagle Ridge Hospital. Zachary rode in the ambulance with his mother.

- [36] According to Ms. Amaral, in addition to the continuing effects of the injuries she had sustained in the first accident, she now also had pain in her shoulder, mid-back and low back, and ribs. She was given morphine at the Hospital. After several hours, she was discharged, and her parents drove her home. However, as Ms. Amaral recalled, she was unable to sleep. She felt dizzy, and as if she were suffering from motion sickness. As Ms. Amaral recalled, the following day, she was in considerable pain. According to Ms. Amaral, she felt she had been recovering from the effects of the first accident, and she had been looking forward to returning to work in about six months' time. The second accident was a significant blow. She felt as if her future had changed, which was very upsetting and depressing for her.
- [37] Ms. Amaral saw Dr. Willoughby on November 3, 2015. On that visit, Ms. Amaral reported headaches that had been aggravated and were severe, accompanied by pain from her left shoulder into her left collar bone and then into her head. She reported that her lumbar spine was sore, something that Dr. Willoughby noted was a new symptom. Dr. Willoughby also noted that, psychologically, Ms. Amaral was very anxious. Dr. Willoughby's assessment on this visit was that the second accident had aggravated the soft tissue injuries Ms. Amaral had sustained in the first accident, and she had sustained new injuries resulting in symptoms in her left shoulder and lower back.
- [38] Ms. Amaral saw Dr. Willoughby from time to time over the next several months in connection with the injuries she had sustained in the accidents. She continued to use medications prescribed for her, in particular Tylenol No. 3 and cyclobenzaprine. According to Ms. Amaral, Tylenol No. 3 helped with her pain symptoms, but not with her headaches, and she was also using over-the-counter Tylenol and Advil daily. At a visit on February 9, 2016, almost exactly a year after the first accident, Dr. Willoughby noted Ms. Amaral's frustration with her slow progress, her constant headaches and the severity of her headaches.
- [39] Ms. Amaral continued to attend physiotherapy regularly, through to the end of August 2016.
- [40] At a visit in early April 2016, Dr. Willoughby noted mild improvement in the range of motion in Ms. Amaral's neck, but her other symptoms, including her headaches and emotional symptoms, were essentially unchanged. Dr. Willoughby's clinical records for that visit also note Ms. Amaral's stress in relation to her application for long-term disability benefits with Great-West Life, her disability insurer, and upcoming assessments in connection with that application. Dr. Willoughby made a referral for Ms. Amaral to see a neurologist, Dr. Cory Toth, in connection with her headaches.

- [41] In late May 2016, Ms. Amaral again returned to see Ms. Turnbrook for a further series of counselling. Ms. Turnbrook's notes reflect that she started to do breath work with Ms. Amaral, to address Ms. Amaral's feelings of anxiety.
- [42] Ms. Amaral saw Dr. Willoughby on June 14, 2016, after the assessment arranged by Great-West Life had been done. At that visit, Dr. Willoughby noted Ms. Amaral's reports of difficulty driving to the assessment site in Burnaby, and that, after the morning sessions for the assessment, Ms. Amaral was in spasms and increasing pain. Dr. Willoughby also noted Ms. Amaral's report that, after the assessment, it took Ms. Amaral the whole weekend of resting, heat, ice and no activity to feel more herself.
- [43] Ms. Amaral was seen by Dr. Toth on August 2, 2016. He assessed Ms. Amaral as having post-traumatic migraine headaches following two "low grade" concussions, and said that these headaches had evolved into analgesic rebound headaches due to Ms. Amaral's overuse of "abortive" therapies. He also assessed Ms. Amaral as having soft tissue injuries to her neck muscles, periscapular muscles and diffuse paraspinal muscles. To address her headache symptoms, Dr. Toth recommended that Ms. Amaral stop her overuse of Tylenol No. 3, regular Tylenol and ibuprofen, and prescribed a trial of amitriptyline.
- [44] Unfortunately, according to Ms. Amaral, amitriptyline caused her to have an asthma attack, which Dr. Toth described as a very unusual and unexpected response to the drug. Ms. Amaral immediately stopped using the drug. She then saw Dr. Toth on August 11 for follow-up, and he prescribed a trial of Cymbalta. However, according to Ms. Amaral, Cymbalta again provoked her asthma and she stopped using that drug. She did not return to see Dr. Toth. Ms. Amaral reduced her use of Tylenol No. 3, as Dr. Toth had recommended. However, after a few weeks of reduced use of over-the-counter Tylenol and Advil, Ms. Amaral returned to using those medications daily.
- [45] In September 2016, Ms. Amaral changed counsellors to try a new treatment method. She began working with Melanie Johansson, who (unlike Ms. Turnbrook) had training in the therapeutic technique known as eye-movement desensitization and reprocessing, or EMDR. At trial, Ms. Johansson described EMDR as analogous to rapid cognitive behavioural therapy, a therapy she is also trained to provide. The focus of Ms. Johansson's work with Ms. Amaral in the fall of 2016 was to help Ms. Amaral deal with her anxiety surrounding driving and being in a vehicle. As Ms. Amaral recalled, she had nightmares about the first accident. However, with EMDR therapy, her nightmares stopped. Both Ms. Amaral and Ms. Johansson described how the EMDR therapy helped Ms. Amaral to deal with her anxiety concerning driving, and Ms. Amaral described the therapy as a "positive experience" for her. Ms. Amaral attended regular counselling with Ms. Johansson through to the end of November 2016.
- [46] In December 2016, Ms. Amaral began working with a kinesiologist and doing aqua-therapy, as part of a program provided for her by Great-West Life. I was provided with few details concerning this program, other than it lasted until June 2017. According to a note in Dr. Willoughby's clinical records, Ms. Amaral reported to Dr. Willoughby during a visit on April

21, 2017 that she was (as recorded) "not really progressing." That note was generally consistent with Ms. Amaral's evidence at trial to the effect that various treatments she had undergone did very little to improve - other than temporarily - her physical symptoms and discomfort. Engaging in almost any physical activity aggravated her pain symptoms, and she then needed time to recover. In addition, according to Ms. Amaral, even performing simple tasks on the computer (such as paying bills), for short periods of time, aggravated her headaches and worsened her cognitive symptoms.

- [47] On April 6, 2017, Ms. Amaral attended an independent medical assessment by Dr. Zeeshan Waseem, a specialist in physical medicine and rehabilitation. Dr. Waseem was qualified as an expert witness, and I will discuss his opinion evidence below.
- [48] In late August 2017, Ms. Amaral was about to begin a series of 12 sessions of occupational therapy in connection with a possible return to work.
- [49] Dr. Willoughby was asked to and completed a questionnaire in connection with that therapy. In response to a question about whether Dr. Willoughby felt Ms. Amaral would be able to return to commuting daily from Port Coquitlam to North Vancouver, Dr. Willoughby circled "no," and wrote:

PTSD s/s still present and length of journey and driving in traffic for 45-min each way will continue to trigger s/s.

- [50] In response to the question "Are there any other recommendations or interventions you feel would be beneficial to Ms. Amaral at this time?", Dr. Willoughby circled "yes," and wrote "If she could find employment closer to home." I note that Dr. Willoughby did not say that Ms. Amaral was unable to work.
- [51] As Ms. Amaral recalled, driving, and the commute from Port Coquitlam to Lions Gate Hospital, were major problems in her returning to work. They were the reasons behind trying to find work closer to her home, something she had discussed with Dr. Willoughby.
- [52] Ms. Amaral returned to counselling with Ms. Johansson in September 2017, and the treatment plan was to do more EMDR therapy. In October 2017, Ms. Amaral began chiropractic treatment with Dr. Brandon Grant.
- [53] In the fall of 2017, Ms. Amaral was also working with Kelly Chow, an accommodation advisor with the Vancouver Coastal Health Authority, concerning a possible return to work. Mr. Chow explained that, as an accommodation advisor, he works with employees who are no longer able to return to their own occupations based on medical restrictions, and under the employer's duty to accommodate. Mr. Chow explained that, before moving into the position as an accommodation advisor, he worked as a workability advisor, and he also had some brief involvement with Ms. Amaral in that capacity. Mr. Chow explained that, generally, the workability advisor's role is to assist an injured employee to return to her pre-accident job (in Ms. Amaral's case, a staffing clerk at Lions Gate Hospital). If that cannot be done, then the accommodation advisor takes over. The accommodation advisor's role is to

assist the injured employee to return to any position. Moreover, since Ms. Amaral had been away from work for more than two years, she no longer "owned" her former position as a staffing clerk. However, she was still an employee of the Vancouver Coastal Health Authority, which owed her a duty to accommodate.

- [54] Mr. Chow explained that, as Ms. Amaral's accommodation advisor, he would consider her medical limitations and restrictions (based on reports and other available information), and what other positions she was capable of doing and was qualified for. He would contact department or site managers and carry out a job-demands analysis under the duty to accommodate, with a view to locating a suitable position for Ms. Amaral, given her limitations and restrictions.
- [55] Ms. Amaral felt a great deal of anxiety about the prospect of returning to work.
- [56] For example, when Ms. Amaral resumed counselling with Ms. Johansson in September 2017, Ms. Johansson recorded Ms. Amaral's feeling that her "workability" person was "pushing her" to return to work, and she felt "very far from that reality." Ms. Amaral also reported that she felt very reluctant to return to her old position at Lions Gate Hospital because of the commute and her physical disabilities, and that she would prefer to find a job closer to her home in Port Coquitlam.
- [57] Ms. Johansson did more EMDR with Ms. Amaral at a counselling session on October 17, 2017. In Ms. Johansson's clinical records for that session, she noted Ms. Amaral's reports that [all sic]:

She has ongoing pain in her neck, shoulder and headaches all the time still. Is worried her progress is not going fast enough. Has been contacted by the hospital to have a meeting. She does not know what that will mean but she does not feel ready to work. Is hope they will accommodate her into a position closer to home.

- [58] At a session on October 30, 2017, Ms. Johansson noted that Ms. Amaral:

Says she continues to worry about having to deal with the accommodations people and whoever else wants to have a piece of her. Says it is overwhelming and creates headaches and body gets stiff and tense. I asked her if she thought she could handle going back to work and she said no! But says she feels she has no choice. I suggested she discuss this with her doctor as that is the person who has the say on her return to work. . . .

- [59] Ms. Amaral saw Dr. Willoughby on November 3, 2017. Dr. Willoughby noted Ms. Amaral's report of "lots of stress as different people are telling her she is ready for work and she has to keep telling them her story over and over." Dr. Willoughby also noted Ms. Amaral's complaints that she was unable to concentrate for longer than 30 minutes before an increase in her headache symptoms, and about her anxiety when driving. Dr. Willoughby's assessment at that time was that Ms. Amaral was not ready for a return to work or a graduated return to work, and that (among other things) Ms. Amaral needed to continue with her weekly occupational therapy, and have massage therapy twice a month for neck

stiffness.

[60] On November 10, 2017, Mr. Amaral sent an e-mail message to her new case-worker at Great-West Life. Ms. Amaral's message read in part:

Just for your information straight from me, I realize the accommodation team at VCH Workability is working on my case. There is still a long way to go in this process for my return to work. I am using my union advocate to help with my dealings with Workability. I will make sure to be in touch with you when I have more information. I am not at the place I need to be recovery wise to return to work in any capacity. At this point I would be starting to train at a whole new job (which has yet to be established), which I am not cognitively ready to do.

If you think I should move forward with my request for an extension now as opposed to waiting until negotiations with Workability have been completed then please advise. My doctor is who I would want you to contact for any clear information regarding my health and recovery at this point. I don't want to panic at the last minute as far as following the proper protocol at this instance.

[61] When asked on cross-examination about this e-mail, Ms. Amaral explained that the "new job" was a position in medical imaging.

[62] Ms. Amaral completed her occupational therapy sessions in December 2017. At this time, as she recalled, Ms. Amaral thought her return to work would be about six months away.

[63] By early 2018, Ms. Amaral was feeling more positive. Although, as she recalled, she was continuing to have pain symptoms with physical activity, she was able to do more. Her headaches were less frequent. By early March 2018, Ms. Amaral was reporting to both Ms. Johannson and Dr. Grant that she was feeling better, physically and cognitively, although she was also reporting to Ms. Johannson that she did not yet feel ready to return to work. At her last session with Ms. Johannson on April 19, 2018, Ms. Johannson notes Ms. Amaral's report that she was "doing much better." Dr. Grant had noted a similar report from Ms. Amaral at a chiropractic session the day before.

[64] On the other hand, when Ms. Amaral was asked on cross-examination about Ms. Johannson's note, she said she was sure that she told Ms. Johannson in April that she was doing much better. However, according to Ms. Amaral, her statement was in response to an inquiry from Ms. Johannson about how Ms. Amaral's drive that day was, and that was the context for her response.

[65] As Ms. Amaral recalled, she and Mr. Chow had been discussing whether a position could be found for Ms. Amaral closer to Port Coquitlam. The hospitals close to Ms. Amaral's home were not in the Vancouver Coastal Health Authority, but in the Fraser Health Authority. However, the Vancouver Coastal Health Authority, Ms. Amaral's employer, was responsible for medical imaging for the whole area, including for hospitals closer to Ms. Amaral's home. As Ms. Amaral recalled, it was her idea to look for a position as a medical imaging clerk, since she could then work at a hospital closer to home. The plan therefore was to explore

the possibility that Ms. Amaral could be hired as a booking clerk for a medical imaging department in one of the hospitals close to her home.

[66] According to Ms. Amaral, she looked at internal postings and, in July 2018, she completed and submitted separate applications for a position as a booking clerk in medical imaging at three hospitals close to Port Coquitlam. In the section "Qualifications (Education and Experience)," Ms. Amaral said (in part):

I am returning to work soon through the Duty to Accommodate department after being on LTD due to two car accidents. I am seeking a position closer to my home due to some high driving anxiety. I live in Port Coquitlam.

This position in Medical Imaging would allow me to remain at VCH yet accommodate my driving needs.

[67] Under "Qualifications (Skills & Abilities)," Ms. Amaral said:

I am a very quick learner and can pick up any new terminologies easily.

I can type over 40 wpm.

I have great people skills and communicate well with the staff, the public and medical staff as I worked directly with supervisors and managers in my past positions.

[68] As Mr. Chow recalled, he arranged for some "meet and greets" with managers of medical imaging departments and arranged for Ms. Amaral to take some training at Vancouver General Hospital. However, as Mr. Chow recalled, the feedback that he received from the "meet and greets" was that Ms. Amaral was not qualified to work in medical imaging and that she would need to complete a medical office assistant program, including the practicum requirement. Such a program was offered through Vancouver Community College, and was between eight and nine months long (including the practicum).

[69] As Mr. Chow recalled around the end of July 2018, he discussed these matters with Ms. Amaral, including that, if she wanted to work as a booking clerk in medical imaging, she would need to complete the medical office assistant program. As Mr. Chow recalled, he explained to Ms. Amaral that she was considered capable and qualified to work as a staffing clerk, and that training to keep her up-to-date was available at Vancouver General Hospital. According to Mr. Chow, Ms. Amaral's response was that she could not make the commute. However, as Mr. Chow explained, in the context of the duty to accommodate, the Vancouver Coastal Health Authority did not consider driving to be a restriction requiring accommodation, since other means of getting to and from work (for example, public transit or carpooling) were available.

[70] Since late July 2018, Mr. Chow's involvement has been "on hold."

- [71] Ms. Amaral described the effort to have her return to work as a "failed effort." According to Ms. Amaral, submitting her applications turned out to be a mistake. Ms. Amaral recalled being told by Mr. Chow during a conference call on July 31, 2018 that the managers at imaging departments refused to take her and said she was unqualified. Ms. Amaral explained that she had been under the impression that she would be shadowing someone in the job, to see whether it was something she could do, and she was unclear what qualifications were necessary to work as a booking clerk. As Ms. Amaral recalled, on August 1, 2018, she received an e-mail from Mr. Chow, and, in the end, all that was being offered to her was a two-week training session at Vancouver General Hospital, essentially to prepare her to return to work as a staffing clerk. Ms. Amaral described her situation as "all ruined." She did not attend the training. Ms. Amaral explained that she has not taken any courses or training since the accidents, and, as of trial, had no plans to do this. She explained that she has accepted that she cannot do work that requires concentration, multi-tasking and working at a computer.
- [72] Unfortunately, according to Ms. Amaral, around the time Mr. Chow communicated the outcome of the proposed plan to her, she had a significant physical set-back. On August 3, 2018, she saw both Dr. Willoughby and Dr. Grant concerning aggravation of her neck symptoms, and very severe pain in that area. Ms. Amaral described herself as being near tears from the pain.
- [73] The idea of Ms. Amaral working as a booking clerk in the medical imaging department of a hospital closer to her home was never pursued further after August 2018.
- [74] However, by December 2018, Ms. Amaral felt well enough to go on holiday. She flew to New Orleans and then went on a cruise.
- [75] According to Ms. Amaral, as of trial, her condition and functioning had improved since August 2018, but only very slightly. According to Ms. Amaral, as of trial, she continued to have neck pain and headaches, as well as back pain. She explained that she had constant baseline pain at between 2 and 3, using a 10-point scale that was given to her at massage therapy. Ms. Amaral explained that on the 10-point scale, 3 was already quite high, and anything she rated above 7 was very severe pain. According to Ms. Amaral, her headaches would occasionally go up as high as 8 or 9, at which point she was feeling like she would need an ambulance to take her to hospital. She rated her back pain at the end of the first day of testifying at between 5 and 6, and her headache pain at a 5. Physical activity often caused flare-ups of her pain symptoms. Pain often disturbed her sleep, despite medication, and she never felt properly rested. Activities requiring her to think and concentrate, such as working on her computer, provoked headache symptoms.

- [76] Ms. Amaral described how, since the accidents, she finds motor vehicle travel very stressful, whether she is the driver or a passenger. Her children and Ms. Birkenhead, who have driven with her, confirmed this. Ms. Amaral described how many everyday things increase her anxiety, and she finds it hard to be calm. She explained that she uses the medication Ativan to help her, and explained that she had taken some to calm herself before she testified on the second day of trial.
- [77] When Ms. Amaral was asked to describe a typical day for her as of trial, she explained that, when she gets up in the morning, everything hurts and she feels as if she is "100 years old." She explained that she does 20 minutes of stretching and breathing exercises to get herself moving. She then makes herself coffee and sits in "her spot." She might have something to eat and watch something on television. Ms. Amaral explained that she now rarely reads for pleasure, as her headaches worsen when she has to concentrate. Often, she has appointments for some form of treatment, such as massage, physiotherapy or counselling, which she usually schedules for the middle of the day. Ms. Amaral explained that she will do "brain" games on the computer. She gave "Luminosity" as an example of a brain game, and explained that this was recommended to her in her occupational therapy. According to Ms. Amaral, some of the games are very difficult for her, and she now finds games involving multi-tasking and memory hard. She explained that she cannot be on the computer for long, as she will get a headache. She commented that she does not do much. Reflecting on her description, she observed that her typical day sounded "awful."
- [78] Ms. Amaral is currently receiving long-term disability payments, and money is another source of stress for her.
- [79] Ms. Amaral's close friends, Ms. Robinson, Ms. Fong and Ms. Birkeland, have noticed marked changes in Ms. Amaral since the accidents.
- [80] As Ms. Robinson recalled, after the accidents, Ms. Amaral was not the same person. Rather than bubbly and social, Ms. Amaral was down, and it was hard to get her out to activities. Ms. Robinson commented that all Ms. Amaral now talks about is the accidents and how her life has changed. They still go out for dinner together, but less often. Ms. Robinson noticed that when they are out, Ms. Amaral often gets up from the dinner table to stand and is always readjusting herself. Before the accidents, according to Ms. Robinson, at social events, Ms. Amaral would be the last to leave; now she is the first to go. According to Ms. Robinson, now, everything with Ms. Amaral is "doom and gloom," and she is a totally different person. Ms. Robinson said that she no longer looks forward to seeing Ms. Amaral, because it now feels like work and is no longer enjoyable.
- [81] Ms. Fong's observations were similar. She described Ms. Amaral after the accidents as "not herself." She described how, after months went by when Ms. Amaral would not leave the house to get together, she finally did a "friend intervention," where she went to Ms. Amaral's home, picked her up and took her out. However, as Ms. Fong recalled, Ms. Amaral did not stay long before Ms. Fong had to take her home. According to Ms. Fong, now all that Ms.

Amaral talks about is how she feels, her depression, how she is unable to do things, and her lack of money. When Ms. Fong and Ms. Robinson manage to convince Ms. Amaral to come out with them, Ms. Fong and Ms. Robinson always pay. According to Ms. Fong, Ms. Amaral is no longer the person she remembered from before the accidents.

- [82] Ms. Birkeland described how she has noticed that, during conversations, Ms. Amaral now has problems finding words, makes mistakes and is forgetful, something that Ms. Birkeland did not recall happening before the accidents. The conversation topics have also changed and are now, from Ms. Amaral's side, about her aches and pains. Ms. Birkeland described Ms. Amaral now as a shadow of her former self and their friendship has diminished.
- [83] Mr. Slinger described how, since the accidents, he has to work to get his daughter out to family events. According to Mr. Slinger, when Ms. Amaral does come out, her conversation is often centred around the accidents and how everything that his daughter saw in her future has been derailed. He is worried about his daughter's future.
- [84] Ms. Amaral's children also spoke of the changes they have seen in their mother since the accidents. Both of them expressed their concerns for Ms. Amaral's well-being.
- [85] In September 2017, Zachary moved to Kamloops to begin first year at Thompson Rivers University. However, in April 2018, he left school and moved back to live with his mother. He has been working since moving back to Port Coquitlam. Zachary described how Ms. Amaral now leans on him for support, and to help with chores and work around the home. According to Zachary, Ms. Amaral's pain symptoms have made her difficult to live with. Although, as of trial, he had plans to move to Victoria in September 2020 and continue his education there, he said that he is worried about his mother's ability to cope on her own.
- [86] Although she has moved back to the Lower Mainland to pursue her nursing degree, Emily is living on her own. Emily said that, before the accidents, she could tell her mother anything. However, she said that she now keeps things happening in her own life from Ms. Amaral, because she does not want to burden her mother. Now, according to Emily, she tries to protect her mother and to keep from upsetting her. As a result, she now treats her mother differently, and their relationship has become more distant.

4. The Experts

(a) The medical experts

- [87] Opinion evidence from six medical doctors was tendered at trial. In general, the areas in dispute are relatively narrow.
- [88] Ms. Amaral tendered opinion evidence from Dr. Willoughby and Dr. Toth, each of whom saw Ms. Amaral for treatment. Ms. Amaral also tendered opinion evidence from Dr. Waseem, and from Dr. Venugopal Karapareddy, a psychiatrist. Each of Dr. Waseem and Dr. Karapareddy carried out an independent medical assessment of Ms. Amaral.

[89] The defendants tendered opinion evidence from Dr. Meera Gupta, a neurologist, and Dr. Joseph Wong, a specialist in physical medicine and rehabilitation. Each of Dr. Gupta and Dr. Wong carried out an independent medical assessment of Ms. Amaral.

[90] Apart from Dr. Karapareddy and Dr. Gupta, whose reports were admitted into evidence without cross-examination, all of the medical experts testified at trial.

(i) Dr. Willoughby - Family medicine

[91] Dr. Willoughby was tendered and qualified as a medical doctor with an expertise in family medicine, qualified to provide opinion evidence as set out in her reports dated December 16, 2016 and February 6, 2019.

[92] Dr. Willoughby's December 16, 2016 report is largely a review of her clinical records for Ms. Amaral's visits up to that date. Then, at the end of the report, Dr. Willoughby says:

In summary, Ms. Amaral has experienced two motor vehicle accidents . . . causing ongoing symptoms of post traumatic stress syndrome, as well as post concussion symptoms and soft tissue injuries to the scapular complex and neck region. Despite numerous physiotherapy visits and trials of massage, acupuncture and different therapies she still has ongoing stiffness and headaches. She continues to require physiotherapy and strengthening . . . She continues to require medication and she will continue to require ongoing counselling for her anxiety and post traumatic stress syndrome. At present, I do not see her getting back to work any time soon, and I feel that her symptoms have not reached a plateau so she is still in the active treatment phase at this point. . . . [I]t is very likely she will continue to need therapies for the next few years. It is hard to say whether the patient will be partially disabled from performing her usual employment duties or household tasks until her symptoms have plateaued to a certain level.

[93] I have concluded that I cannot give this report a great deal of weight.

[94] As I read the report, Dr. Willoughby does not make a medical diagnosis of post traumatic stress disorder (or "syndrome"), and state her reasons for reaching that diagnosis in Ms. Amaral's case. Rather, that Ms. Amaral has "ongoing symptoms of post traumatic stress syndrome" caused by the accidents is simply stated as a conclusion. Dr. Willoughby does not explain the medical purpose of the therapies that Ms. Amaral will likely "continue to need . . . for the next few years." When Dr. Willoughby says that Ms. Amaral's symptoms "have not reached a plateau," it is unclear whether she is speaking only of Ms. Amaral's physical symptoms, or both her physical and psychological symptoms.

[95] In Dr. Willoughby's February 6, 2019 report, Dr. Willoughby again provides a review and summary of her clinical records for Ms. Amaral's visits, going back to February 2015. Based on what I see in the clinical records, in the period after Dr. Willoughby's first report, it was rare for Dr. Willoughby to perform any kind of physical examination of Ms. Amaral in relation to the physical injuries Ms. Amaral sustained in the accidents. Rather, and as reflected in Dr. Willoughby's February 6, 2019 report (as well as her clinical records), Ms. Amaral's visits often centred around her reports of headaches and pain, and psychological

or emotional issues, especially Ms. Amaral's strong and deep feelings of anxiety and frustration at her situation, and her anxiety about returning to work.

[96] Toward the end of her report, Dr. Willoughby set out what she described as "her [i.e., Ms. Amaral's] summary of symptoms" on Ms. Amaral's visit on January 29, 2019:

1. Headaches dull and daily. Approximately 2/10 in pain. Flare ups one time a week lasting 2-3 hours and approximately 8-9/10 for pain. She was using Tylenol and ibuprofen for these flares and these flares would start due to reading, increased cognitive activities greater than 45 minutes or physical activity.
2. Neck pain bilaterally daily. On a good day approximately 2-3/10 in pain. Aggravated with increased activity and movement including sneezing and coughing. There was still a decrease in range of motion. In the last two weeks, her neck had flared two times where each episode had lasted for a couple of days.
3. Mid back pain between the shoulder blades. It was tight daily approximately 2-3/10 on the pain scale. She would have flare ups and these would connect with neck pain in the last two weeks with one main flare up.
4. Low back felt dull and tired and tight daily.
5. Mild tightness and pain on the top of the shoulders bilaterally.
6. Sleep issues. Still had trouble falling asleep. She would be waking about five times a week in the night and she was having to take medications such as Gravol and would sometimes need Ativan or muscle relaxants to help her sleep.
7. Post traumatic stress disorder and cognitive decline. She was still having memory and concentration problems. She was not able to learn the same way as prior to the accident and she was still having anxiety around driving. She was continuing with the treatment plan of counselling, physiotherapy, home stretching and exercises and increasing her cognitive exercise time.

[97] I do not take this summary to be the equivalent of medical diagnoses made by Dr. Willoughby. Rather, this is Ms. Amaral's summary. I note that, as of January 29, 2019, Ms. Amaral was not "continuing" with any counselling; indeed, her last session with Ms. Johansson was April 18, 2018.

[98] Dr. Willoughby then summarized Ms. Amaral's circumstances as of February 6, 2019, and set out her prognosis and treatment recommendations:

In summary, Ms. Amaral sustained injuries to her neck, head and back in her initial motor vehicle accident . . . This was all aggravated again in her second motor vehicle accident . . . Over the last couple of years, she has still not regained her pre-accident function. She is not working and she is not doing the same recreational activities that she was able to. She has experienced post traumatic stress disorder and cognitive functional decline due to the concussion that she

experienced in the first motor vehicle accident. She has continued to have problems with neck and back muscle stiffness and range of motion impairment requiring ongoing therapy. It is not determined yet whether she can return to her preexisting job and alternative employment options are being explored. Ms. Amaral was a healthy woman working full time prior to the accidents and these accidents very likely have caused all these symptoms that are now summarized in the last paragraph. It is very likely that these injuries will impact the ability for Ms. Amaral to work and perform her employment duties at her own occupation in the future. These injuries may also restrict her ability to participate in some of her recreational or homemaking activities as her symptoms have plateaued over the last few years and she is making very slow progress. She will continue to need therapy such as massage and physiotherapy for any aggravations and she will continue to require cognitive exercises and her regular regime of home stretching and exercise to maintain her health.

- [99] This paragraph is not confined to what would properly be medical opinion evidence. Some of it is simply a summary of what Ms. Amaral has told Dr. Willoughby (for example, that she is not working and not doing the same recreational activities she used to). Dr. Willoughby's statement that "these accidents have very likely caused all of these symptoms" is an opinion, but it is simply conclusory. Dr. Willoughby does not explain why "all of these symptoms" make sense medically. Dr. Willoughby also does not explain why, in her opinion and from a medical perspective, Ms. Amaral has been unable to regain her pre-accident function.
- [100] Dr. Willoughby's statement that Ms. Amaral "has experienced . . . cognitive function decline due to the concussion she experienced," is an opinion. However, other than mentioning the concussion, Dr. Willoughby provides no assistance in explaining, from a medical perspective, Ms. Amaral's reports of cognitive functional decline, and Dr. Willoughby's opinion is not consistent with the opinion evidence from the neurologists, Dr. Toth and Dr. Gupta. Causation appears to be accepted by Dr. Willoughby based on some temporal co-relation. However, as of the date of this report, there was no temporal co-relation. There is no indication that Dr. Willoughby ever did any independent testing, for example, at any time, of Ms. Amaral's cognitive functioning. I do not criticize Dr. Willoughby for accepting what she was told by her patient, Ms. Amaral. However, ultimately it is up to me to decide whether Ms. Amaral has proven, on a balance of probabilities, that she has experienced cognitive functional decline. If I conclude she has not, Dr. Willoughby's opinion on causation is of no value.
- [101] On the other hand, Dr. Willoughby does not express the view that Ms. Amaral is permanently disabled from work. Rather, in her examination-in-chief, Dr. Willoughby said that, as of trial, she had not "cleared" Ms. Amaral to return to work. On cross-examination, Dr. Willoughby described the "alternative work options" being explored are Ms. Amaral working closer to home. In her report, Dr. Willoughby described Ms. Amaral's symptoms as having "plateaued," and she said that Ms. Amaral is making "slow progress." In Dr. Willoughby's opinion, Ms. Amaral's injuries "may" restrict her from being able to participate in activities. Thus, the prognosis is not entirely bleak.

(ii) The Psychiatrists

[102] Dr. Waseem and Dr. Wong were both tendered and qualified as medical doctors with a speciality in physical medicine and rehabilitation, qualified to provide opinion evidence concerning the diagnosis, causation, prognosis, effects and treatment of musculoskeletal injuries, as set out in their respective reports.

[103] Dr. Waseem carried out an independent medical examination of Ms. Amaral on April 6, 2017, about 18 months after the second accident.

[104] On Dr. Waseem's physical examination of Ms. Amaral's cervical spine he noted:

pain to palpation of the suboccipital, cervical paraspinals, upper fibers of the trapezius muscle, levator scapula, and splenius capitis/cervicis muscles bilaterally. In these areas, muscle stiffness, increased muscle tone, spasms, taut bands and trigger points were notable.

[105] He also noted reduction in the range of motion of Ms. Amaral's cervical spine, and that cervical spine movements increased her neck pain.

[106] With respect to Ms. Amaral's thoracic spine, Dr. Waseem noted no pain on palpation, and no muscle stiffness, increased tone, spasms, taut bands or trigger points. Range of motion of the thoracic spine was within normal limits, and movement did not increase Ms. Amaral's pain.

[107] On examination of Ms. Amaral's lumbar spine, Dr. Waseem noted pain to palpation of the lower lumbar paraspinals bilaterally. In these areas, he noted muscle stiffness, increased muscle tone, spasms, taut bands and trigger points. Range of motion was reduced and lumbar spine movements increased Ms. Amaral's low back pain.

[108] Otherwise, the physical examination was unremarkable.

[109] In Dr. Waseem's opinion, based on the history and his review of the medical records, Ms. Amaral sustained soft tissue injuries predominantly of the cervical and lumbar spines, and also an injury to her right knee, in the first accident. The injuries to the cervical and lumbar spines were aggravated by the second accident. In addition, in that accident, she sustained bilateral hand abrasions and soft tissue injuries to her left shoulder.

[110] In Dr. Waseem's opinion, the soft tissue injuries "resulted in chronic myofascial pain syndrome of the affected regions with associated cervicogenic headaches." Dr. Waseem explained that "cervicogenic" headaches were a specific type of headache originating in neck pain that is referred up into the head.

[111] Dr. Waseem said that the concussion that was reported and documented after the accidents was outside the scope of his expertise as a physiatrist, and he deferred to a neurologist or neuropsychologist for comment regarding this condition.

[112] In Dr. Waseem's opinion, Ms. Amaral's soft tissue injuries to her cervical and lumbar spine, and her headaches, were caused by the first accident and aggravated by the second. He explained that the onset of symptoms was reported and documented to be within a reasonable time frame of the accidents and the injuries were biologically plausible given the described mechanism of injury.

[113] One of the questions Dr. Waseem was asked to address in his report was whether he expected Ms. Amaral's condition to improve, remain the same or deteriorate over time. In his report, Dr. Waseem said:

Overall, her physical condition has failed to improve with time and appropriate treatment. Ominously, [Ms. Amaral's] complaints are worsening with time. I expect her condition to continue to deteriorate and worsen into the future.

[114] I note that Dr. Waseem did not explain anywhere in his report the basis for his prognosis that her condition would "continue to deteriorate and worsen into the future."

[115] Later in his report, Dr. Waseem addressed a question about how much time off work and household tasks would be reasonable for Ms. Amaral. He said:

Taking into consideration the extent and nature of the accident related injuries, lack of complete recovery, worsening of her physical condition over time, and extent of physical impairment, her noted absences from usual household tasks and inability to resume work following the accidents are medically supported.

[116] In Dr. Waseem's opinion, as a result of the accident related injuries, Ms. Amaral was totally disabled from her usual employment duties and recreational activities, and partially disabled for usual household tasks. He continued:

As pain is essentially inhibitory and she is unable to sufficiently exert herself, Ms. Amaral is unable to complete all pre-accident household tasks and has relinquished recreational interests she formerly pursued. Neck pain and headaches interfere with her ability to concentrate and thereby prevent her from working. The identified disabilities in the domains of employment, household tasks, and recreation are considered permanent given her physical condition.

[117] On cross-examination, Dr. Waseem was taken to this part of his report. He explained that his opinion was based on his independent examination in April 2017, and that, if there were a change in her condition, he would have to evaluate the change, and it could alter his opinion. He explained that his opinion that Ms. Amaral was totally disabled from her usual employment duties was based in part on her self-reports, especially concerning her reduced sitting tolerance and history of headaches. Her pain and headaches were distracting, she had disturbed sleep, and he had reached a diagnosis of chronic myofascial pain syndrome. Taking all that into consideration, he concluded that she was unable to do her usual job. He also explained that by "recreational activities," he meant daily activities that had a physical component, such as going to the gym. He did not mean something such as going to a movie.

- [118] At trial, Dr. Waseem was asked about his statements that Ms. Amaral's condition and physical complaints had worsened over time. On reflection, Dr. Waseem said that what he meant and was trying to express was that Ms. Amaral's condition would worsen if she were to be re-injured. He acknowledged that it was his understanding, based on the history, that Ms. Amaral's symptoms worsened after the second accident, but then remained largely unchanged up to the point he saw her in April 2017. He acknowledged that, by the time he saw Ms. Amaral, she had been stable for some time, so her condition would not worsen unless there was some other incident.
- [119] In the light of that clarification from Dr. Waseem, I have concluded that I must be very cautious about giving much weight to his pessimistic prognoses, and his conclusions that Ms. Amaral's disabilities in relation to employment and household tasks should be considered permanent, as set out in his report. Dr. Waseem does not explain why, from a medical perspective, Ms. Amaral's pain is so disabling that she is prevented from working. In my view, such a pessimistic prognosis requires more explanation than Dr. Waseem provides.
- [120] Dr. Waseem also made a number of future treatment recommendations.
- [121] For example, he recommended that Ms. Amaral follow active rehabilitation, with a one-year gym membership and bi-weekly personal training sessions. He also recommended low-impact cardiovascular exercises for 20-30 minutes, four to five times a week, initially at a low intensity and increasing to a moderate intensity as tolerated. I have no doubt that Dr. Waseem would not have made such recommendations if he was of the opinion that Ms. Amaral was either physically incapable of activity or that her condition would worsen as a result of it.
- [122] Dr. Waseem recommended Ms. Amaral be referred to a physiatry or pain specialist for a trial of trigger point injections, and for a trial of image-guided C2-C3 medial branch block for what Dr. Waseem diagnosed as Ms. Amaral's cervicogenic headaches. I note that, based on his CV, a large component of Dr. Waseem's clinical practice involves managing pain with injection therapy. As Dr. Waseem recalled, Ms. Amaral said that she was open to the idea of injection therapy.
- [123] With respect to Ms. Amaral's reported cognitive concerns, in Dr. Waseem's opinion, undertaking a formal neuropsychological evaluation was medically reasonable to determine if there were any objective cognitive deficits.
- [124] Dr. Wong did an independent medical assessment of Ms. Amaral on September 13, 2019, almost two and a half years after Dr. Waseem's assessment.
- [125] At the assessment, Ms. Amaral complained of headache pain, which she rated at three out of 10 on a 10-point pain scale, and told Dr. Wong that, about five times a month, the pain would increase to five or six out of 10. According to Dr. Wong, Ms. Amaral reported constant pain, at three out of 10, in her neck, which sometimes increased to 7.5 out of 10.

She also reported constant pain across her upper back, rated at between two and three out of 10, although occasionally at about seven out of 10. Ms. Amaral reported that the pain was worse with prolonged sitting and repetitive arm movements, such as using a computer. Ms. Amaral reported occasional lower back pain, but only when she had performed too many activities. Ms. Amaral rated this pain at about two out of 10.

[126] On Dr. Wong's physical examination of Ms. Amaral's cervical spine, he noted that:

She complained of stiffness and tenderness on palpation along the right side muscle. She described the pain as minimal pain, rated at 1/10. . . .

[127] With respect to Dr. Wong's physical examination of Ms. Amaral's lumbar spine, Dr. Wong noted that the lumbar spine muscles were "soft and not tender," as was the gluteal muscle. He noted that Ms. Amaral "offered no pain complaints" in her lower back when Dr. Wong tested the range of motion. With respect to Ms. Amaral's thoracic spine, Dr. Wong noted that her upper back trapezius muscles and rhomboid muscles were "slightly stiff and tender," and that Ms. Amaral described the pain as a dull, aching discomfort with deep palpation.

[128] Based on his physical examination of Ms. Amaral, Dr. Wong diagnosed Ms. Amaral as having "mild myofascial strain" in the right side of her neck and upper back muscles. He continued:

These injured muscles were possibly caused by the two car accidents, but this type of tightness involving the neck and upper back muscles is frequently seen in the general public, who perform computer/desk work even if they have no car accident.

I believe the 2 car accidents may have cause[d] soft tissue injuries in the upper back and neck area, but it is now four years after the car accidents and therefore, I believe there is a good chance that the car accident related injury has already healed and she is having muscle discomfort from repetitive strain of the neck and upper back muscle from daily activities including computer work.

Ms. Amaral complains of insomnia problems and psychological problems. I would not be able to comment on psychological impairments as this is out of my area of expertise, . . .

[129] I cannot give any real weight to what is essentially speculation on Dr. Wong's part that Ms. Amaral was having muscle discomfort from "computer/desk work." One of the facts on which Dr. Wong's opinion was based was that Ms. Amaral was unemployed, so his hypothesis is not supported by facts he assumed. Moreover, there was nothing in the history that would justify a conclusion that she was doing any level of activity, including "computer/desk work," that would account for her muscle discomfort as of the date of the assessment.

- [130] In Dr. Wong's opinion, the prognosis for Ms. Amaral "from a musculoskeletal standpoint" was good. The mild tightness that he found on physical examination would, in his view, be treatable with more exercise, and trigger point injections to reduce pain could be considered if the pain was severe. In his opinion, with exercise to strengthen her upper back muscles, Ms. Amaral should be able to control the pain much better in those areas. From "a musculoskeletal standpoint," Dr. Wong's view was that Ms. Amaral should be able to return to work. He was unable to express any opinion about the effect of Ms. Amaral's headaches, difficulty with concentration and anxiety on her ability to return to work. Those factors were outside his area of expertise, and needed to be addressed by a neurologist and psychiatrist.
- [131] Dr. Wong also made a number of treatment recommendations. Like Dr. Waseem, he said that trigger point injections in Ms. Amaral's neck and upper back could help reduce the muscle tension in those areas and help her deal with the pain. He considered that another course of kinesiology treatment (about six sessions) would be reasonable to help "refresh" her on strengthening exercises for her upper back muscles. He suggested that Ms. Amaral again be seen by a neurologist in connection with her headaches, as this was one of the major reasons Ms. Amaral identified for being unable to return to work. Dr. Wong also recommended that Ms. Amaral be assessed by a psychiatrist in relation to her complaints of stress and anxiety.

(iii) Dr. Karapareddy - Psychiatrist

- [132] Dr. Karapareddy was tendered and qualified as a medical doctor with an expertise in psychiatry, qualified to give opinion evidence in that respect concerning Ms. Amaral. Dr. Karapareddy carried out an independent medical assessment of Ms. Amaral on August 8, 2019. His report is dated September 27, 2019.
- [133] In Dr. Karapareddy's opinion:
73. Ms. Amaral appears to have developed post-traumatic stress disorder symptoms following the first index accident. These symptoms improved prior to the second index accident. However, following the second index accident, she had post-traumatic stress disorder symptomatology. Her current symptom intensity is mainly indicative of other trauma and stress-related disorder, as she continues to have a degree of road-related anxiety functionally impairing her.
74. Ms. Amaral also continued to present with other specified anxiety disorder of generalized anxiety type, as she is constantly worrying excessively about her situation and/or of something bad happening to her children. These anxieties are functionally impairing her in her personal life as well as in her relationship with her children.
75. Ms. Amaral's history is indicative of chronic pain disorder mainly in the form of headaches and neck and back pain. . . .

[134] Dr. Karapareddy also noted:

81. Other findings of clinical relevance include, features of Concussion and Cognitive impairment. . . . She continues to have functional impairment with regard to multitasking, concentration, and sustained focus, which has an impact on her life.

[135] However, Dr. Karapareddy did no formal testing to confirm or independently verify Ms. Amaral's reports to him of continued cognitive "functional impairment." Although Dr. Karapareddy used several rating scales during the assessment (for example, the "GAD-7" and the "PHQ-9"), he does not connect the results from these scales or checklists with anything specific or any particular conclusion he reached concerning Ms. Amaral. I do not understand Dr. Karapareddy to have made a psychiatric diagnosis, or to state an opinion in his capacity as an expert in psychiatry, that, as a result of the accidents, Ms. Amaral has been left with any cognitive functional impairment. Apart from what properly fell within his expertise as a psychiatrist, Dr. Karapareddy was not qualified to give opinion evidence concerning concussions or their effects.

[136] With respect to causation, in Dr. Karapareddy's opinion:

- (a) the first accident caused Ms. Amaral to develop post-traumatic stress disorder symptomatology, and this was aggravated following the second accident;
- (b) her current diagnosis of "other trauma and stress-related disorder" is "more than likely" due to the accidents;
- (c) Ms. Amaral "appears to have developed" major depressive disorder after the first accident, and that was "more than likely" a result of cumulative stressors resulting from that accident. In Dr. Karapareddy's opinion, Ms. Amaral's major depressive disorder was in full remission at the time of the assessment; and
- (d) her anxiety disorder is "more than likely" the result of cumulative stressors and post-traumatic symptoms, as well as Ms. Amaral's "life situation." In Dr. Karapareddy's opinion, given the temporal relationship between the accidents and Ms. Amaral's anxiety, it is "more than likely" that the accidents were the causative factors of her anxiety.

[137] Dr. Karapareddy also says (para. 88 of his report):

In terms of chronic pain, considering the temporal relationship between the accident and the onset of her pain symptoms, it is more likely that the first and second index accidents were a causative factor for her ongoing headaches and neck and back soft tissue injuries, as documented in the other specialist's [sic] reports.

[138] Dr. Karapareddy was not qualified to give opinion evidence outside his own area of expertise (psychiatry). However, his opinion that the first and second accidents were the cause of Ms. Amaral's soft tissue injuries (and her chronic pain) is consistent with the opinion evidence from Dr. Waseem, who was sufficiently qualified to provide that opinion. On the other hand, Dr. Karapareddy's opinion regarding the cause of Ms. Amaral's "ongoing

headaches," is inconsistent with the opinion evidence from the neurologists, who (as compared with Dr. Karapareddy) are the headache and concussion experts.

[139] With respect to prognosis, in Dr. Karapareddy's opinion, given the length of time between the first accident, and Ms. Amaral's current diagnosis of other trauma and stress-related disorder, she was "less likely" to have further recovery. He expressed a similar prognosis concerning Ms. Amaral's ability to achieve her "pre-accident level of psychological stability relating to her anxiety."

[140] With respect to cognitive features, Dr. Karapareddy said:

93. In terms of cognitive features, it is less likely that she will achieve her pre-accident level of stability relating to cognition. It is likely her cognitive features are multifactorial due to issues such as anxiety and pain in the background of likely concussive symptomatology. She has made significant progress in her cognitive abilities and it is likely this has plateaued. She continues to have functional impairment with regard to multitasking, concentration, and sustained focus, which has an impact on her life.

[141] I am unable to give these views much weight, except for the possible effects of anxiety and pain, which Dr. Karapareddy mentions but does not discuss. The neurological opinion evidence (discussed below) does not support Ms. Amaral continuing to have any "concussive symptomatology" as of August 2016. Dr. Karapareddy did no independent testing to arrive at his stated conclusions. The existence of any "functional impairment" is based solely on Ms. Amaral's self-reports. On the other hand, Dr. Karapareddy's comment that it is likely Ms. Amaral's cognitive features are "multifactorial" is consistent with Dr. Gupta's evidence, for example.

[142] With respect to Ms. Amaral's functionality and disability, Dr. Karapareddy notes Ms. Amaral's anxiety surrounding driving, and her issues with focus and concentration. However, he says:

[S]he could be considered for alternate employment. She has not had any meaningful employment since the first accident. I therefore advise a vocational assessment regarding any modifiable employment opportunities.

[143] Dr. Karapareddy made a number of treatment recommendations. These included: a trial of SSRI anti-depressant medication for trauma and anxiety symptomatology; cognitive behavioural therapy (36 sessions in total), for pain, anxiety and trauma; possible "supportive counselling"; and occupational therapy, rehabilitation and other supports to help her with structure and routine, and explore job opportunities given Ms. Amaral's functional restrictions.

(iv) The Neurologists

[144] Dr. Toth was tendered and qualified as a medical doctor with an expertise in neurology, qualified to give opinion evidence in that area, including respecting headaches, mild traumatic brain injury and chronic pain conditions.

[145] Dr. Toth's expert report dated July 6, 2019 is based on a review of his chart for Ms. Amaral as a treating physician.

[146] Based on the visit on August 2, 2016, Dr. Toth diagnosed Ms. Amaral to have two low-grade concussions, one with each of the accidents. As of August 2016, he did not anticipate any ongoing brain injury. Dr. Toth explained:

[Ms. Amaral] had a post-traumatic migraine that occurred with the first MVA, [and] was exacerbated with the second MVA, but had evolved into an analgesic rebound headache due to overuse of abortive therapies at the time of my assessments. There was overuse of [three] separate pharmacological agents - she was taking tylenol #3 four times daily, tylenol regular 4 times daily, and ibuprofen 4 tablets daily, all in excess. In addition, she also had soft tissue injuries to the diffuse neck muscles, periscapular muscles and diffuse paraspinal muscles over the thoracic and lumbar regions. Of these, the first MVA led to neck muscle pain, exacerbated with the second MVA. The second MVA led to the thoracic and lumbar region pain syndrome. Finally, there were ongoing sleep issues with initial insomnia likely related to her chronic pain condition but also the ongoing anxiety and nightmares.

[147] To address the problem with analgesic rebound headache, Dr. Toth recommended a trial of the drug amitriptyline. However, Ms. Amaral had what Dr. Toth described as an "unusual provocation" of her asthma, not something that would have been anticipated as a side effect of amitriptyline. Dr. Toth then started a trial of the drug Cymbalta. August 11, 2016 was the last time Dr. Toth saw Ms. Amaral.

[148] As of Dr. Toth's assessment of Ms. Amaral in August 2016, he diagnosed her as having the following conditions:

- 1) Generalized anxiety, insomnia, and nightmares
- 2) Lumbar spinal region pain, ongoing but improved
- 3) Thoracic spinal region pain, ongoing
- 4) Cervical spinal region pain, ongoing
- 5) Chronic daily headache with migraines due to analgesic overuse.

[149] In Dr. Toth's opinion, conditions 2) to 5) were the direct result of the two accidents. He said that "other input would be needed regarding causation of diagnosis 1." That "input" has now been provided by Dr. Karapareddy.

[150] With respect to prognosis, in Dr. Toth's opinion, there was still room for improvement as of his assessment of Ms. Amaral in August 2016. Concerning his diagnosis of rebound headache, he said further that:

With stoppage of offending agents, rebound headache can improve typically in 6-9 months, especially in combination with another agent, such as amitriptyline or Cymbalta.

[151] Dr. Toth noted that, while he would anticipate improvement in Ms. Amaral's headaches and spinal pain, he would not necessarily expect resolution of these conditions. He said further that Cymbalta "is a good option for management" of headaches and spinal pain, and if that was unsuccessful, other options could be considered. In Dr. Toth's opinion, with respect to Ms. Amaral's work (which he understood to be in human resources), "limitations in attention and concentration would be present due to chronic headaches and spinal pain." In his opinion, in the period "right after" the accidents, Ms. Amaral's concussions would have had more of an effect on her ability to function in her work.

[152] Dr. Toth made a number of treatment recommendations. These included that, to help prevent chronic daily headaches, Ms. Amaral avoid "excessive" use of over-the-counter medication. He expressed the view that at times of greatest pain in Ms. Amaral's neck, shoulder, back and headache pain, she should continue to have physical and massage therapy, use Tylenol or Advil "up to twice weekly, and perform other therapies as needed." He noted that ongoing headache management might require the use of other agents, such as beta blockers, Botox or Aimovig, and potentially other therapies.

[153] Dr. Toth was not qualified to give opinion evidence concerning treatment for Ms. Amaral's psychiatric issues.

[154] Like Dr. Toth, Dr. Gupta was tendered and qualified as a medical doctor with expertise in neurology, qualified to provide opinion evidence as such, including concerning headaches, post-traumatic brain injury and chronic pain conditions.

[155] Dr. Gupta carried out an independent medical assessment of Ms. Amaral on July 7, 2019. Her expert report is dated July 12, 2019.

[156] At the assessment, and with respect to medications, Ms. Amaral reported that she was taking: two to four Tylenol tablets per day; one to three ibuprofen tablets per day; Trazadone for sleep; and Ativan occasionally for sleep.

[157] Dr. Gupta made two clinical diagnoses: (1) post-traumatic headache, whiplash subtype, and medication overuse headache; and (2) concussion.

[158] With respect to the first diagnosis, in Dr. Gupta's opinion, Ms. Amaral had post-traumatic headache as a result of the accidents, and medication overuse headache. With respect to the latter, in Dr. Gupta's opinion, if Ms. Amaral reduced her pain medication use to less than 10 to 15 days per month, her headache condition may improve. Dr. Gupta also suggested that Ms. Amaral could use acupuncture and peppermint oil to control her

headaches. She recommended that Ms. Amaral have a sleep study to rule out obstructive sleep apnea, as untreated sleep apnea can worsen headaches and cognitive complaints.

[159] With respect to the second diagnosis, in Dr. Gupta's opinion, Ms. Amaral likely suffered a concussion at the time of the first accident. At the assessment, according to Dr. Gupta, Ms. Amaral denied suffering any concussion symptoms in the second accident, although Dr. Gupta noted that it was possible Ms. Amaral had suffered a concussion at that time.

[160] Dr. Gupta explained that:

Typically a concussion is a self-limiting phenomenon with symptoms lasting up to two weeks in adults. In individuals in which the symptoms persist longer than expected, concussion experts typically agree that this is due to a myriad of other confounding and coexisting factors such as psychological issues, ongoing pain, poor coping strategies etc. . . . Any ongoing cognitive symptoms persisting longer than two weeks are most likely due to other factors. It is my opinion that Ms. Amaral's complaints of ongoing word finding difficulties and concentration issues are not due to the brain injury itself. Typically in "post-concussion syndrome" which refers to symptoms [lasting] longer than expected after a concussion, it is recommended that the individual ongoing symptoms be addressed. For instance, for symptoms of mood changes psychological strategies would be recommended. For specific pain symptoms, management of these pain problems would be recommended.

[161] In Dr. Gupta's opinion, Ms. Amaral was not disabled as a result of her headaches. In Dr. Gupta's opinion, it would have been reasonable for Ms. Amaral to have taken one to two months off work and home duties after each accident, due to the onset and then exacerbation of headaches.

[162] With respect to the concussion diagnosis, in Dr. Gupta's opinion, Ms. Amaral may have required up to two weeks off work following each accident, as a result of concussion. In Dr. Gupta's opinion, Ms. Amaral recovered from her concussions, and, as of the date of the assessment, was not disabled from a neurological point of view as a result of them.

(b) The non-medical experts

[163] Ms. Amaral tendered opinion evidence from Russell McNeil, an occupational therapist, and Christiane Clark, an economist. Both Mr. McNeil and Ms. Clark testified at trial. In response to Mr. McNeil's report, the defendants tendered opinion evidence from Sheila Branscombe, who is also an occupational therapist. Her report was admitted into evidence without cross-examination.

[164] Mr. McNeil was tendered and qualified as an occupational therapist with expertise in functional capacity evaluations and cost of care assessments. He was qualified to give opinion evidence in those areas with respect to Ms. Amaral, as set out in his report dated September 10, 2019.

- [165] Mr. McNeil carried out a functional capacity assessment of Ms. Amaral on August 13, 2019. I note that this is about one month before Ms. Amaral was assessed by Dr. Wong.
- [166] In Mr. McNeil's opinion, Ms. Amaral did not demonstrate the capacity to be competitively employable. In his opinion, she would be unable to obtain or maintain a productive work pace and would be unable to compete for work in the open market. Moreover, in Mr. McNeil's opinion, based on his assessment results, Ms. Amaral did not demonstrate the physical capacity to do work in occupations falling within sedentary physical demands, much less light or medium work.
- [167] Mr. McNeil concluded that Ms. Amaral was not capable of either part-time or full-time work as a portfolio or staffing clerk. In his opinion, based on the assessment results, Ms. Amaral did not demonstrate the physical capacity to perform that work at a competitively employable pace. Moreover, in Mr. McNeil's opinion, Ms. Amaral did not demonstrate the capacity to perform either the stamina requirements or the prolonged sitting and static positioning of that work.
- [168] On cross-examination, Mr. McNeil acknowledged that, if Ms. Amaral had had a flare-up of her pain symptoms and a higher level of pain when the assessment started, that pain might interfere with the testing. However, Mr. McNeil did not agree that, in those circumstances, the test results would not reflect Ms. Amaral's functional capacity. Mr. McNeil pointed out that, at the beginning of the assessment, he asked Ms. Amaral to rate her pain, on a scale of 0 (no pain) to 10 (individual requires emergency medical attention), based on the functional pain scale found at Appendix G to his report. According to Mr. McNeil, Ms. Amaral rated her pre-test neck, upper back and mid-to-lower back pain at 3 out of 10 ("slightly functionally disabling pain"), her headache pain at 3.5 and no pain in her mid-back. At the end of the testing, according to Mr. McNeil, Ms. Amaral rated her pain in all areas at 5 ("very disabling pain"). According to Mr. McNeil, during the assessment, Ms. Amaral reported pain at level 5, and the assessment was then stopped. Mr. McNeil described what he was doing in the assessment as measuring the quantifiable effects of Ms. Amaral's pain, and what she could do despite pain.
- [169] I have a number of concerns about Mr. McNeil's opinion evidence regarding Ms. Amaral's functional capacity.
- [170] Mr. McNeil states (Report, para. 2) that the assessment was conducted from 11:00 a.m. to 4:00 p.m. He states further: "Due to a severe increased [sic] in pain testing was shortened and stopped by this evaluator."
- [171] In Appendix B to the Report (pp. 23 to 49), titled "Measured/Observed Abilities," Mr. McNeil outlines all of the tests performed, procedures used and his interpretation of test results. In many places in Appendix B, Mr. McNeil notes that Ms. Amaral was "unable" to complete a particular test due to an increase (sometimes described as "severe") in pain.

[172] For example, in para. 163, in connection with a second trial of a test measuring 2-handed static and dynamic reaching, Mr. McNeil wrote:

Due to a severe increase in pain she was unable to complete this sub-test and she asked to stop.

[173] A neutral way to report the facts would be: Ms. Amaral reported severe pain, asked to stop and did not complete the test. Mr. McNeil does not report observing any pain behaviour on Ms. Amaral's part during the test. In my view, saying (as Mr. McNeil does) that Ms. Amaral was unable to complete the test due to a severe increase in pain is advocating a particular position on behalf of Ms. Amaral based on her self-report of her reason for stopping. This is a position Ms. Amaral is advancing in this case and wishes the court to accept. However, advocating that position on her behalf is contrary to what the court is entitled to expect from an impartial expert.

[174] In the many cases where testing was stopped when Ms. Amaral reported pain (or "severe" pain), it is unclear whether Ms. Amaral has an actual functional limitation or the problem is a lack of persistence. Ms. Amaral also suffers from an anxiety disorder, and anxiety around work (not merely driving to work) was a consistent theme in Ms. Amaral's visits to Dr. Willoughby and her counselling sessions in 2017 and 2018. Her feeling that she was being unfairly pressured to go back to work, and the associated anxiety, made her pain symptoms worse. It is unclear whether Ms. Amaral's anxiety and mood disorders affected her performance during testing. Moreover, in 2019, Ms. Amaral, based on her own evidence, was doing very little physical activity of any kind. As a matter of common sense, a lack of endurance, or discomfort, or performance anxiety, when suddenly called on to engage in physical activity in a test situation might be expected.

[175] Testing of two-handed carrying was stopped based on Ms. Amaral's report of increased neck and back pain when asked to carry a minimum load of 10 lbs. The same was true of testing of two-handed lifting, and pushing and pulling, which involved the same minimum load. However, this was not something she was required to do in her job as a staffing clerk. Rather, Ms. Amaral's job demands required the ability to handle a weight of 5 lbs. Whether she has that functional capacity was never tested.

[176] With respect to Mr. McNeil's opinion that Ms. Amaral did not demonstrate the capacity to perform either the stamina requirements or the prolonged sitting of staffing or portfolio clerk work, based on Mr. Chow's evidence, constant sitting was in fact not required in a clerk's position and would be a matter addressed in the context of work accommodation. For example, a sit/stand desk and ergonomic office equipment (recommended by Mr. McNeil as future care items) could be provided to Ms. Amaral.

[177] With respect to Ms. Amaral's reported cognitive issues, and although, strictly speaking, cognitive function was not being assessed by Mr. McNeil, there is no indication in his report that Ms. Amaral was unable to remember and follow directions, learn new tasks and sequence events appropriately.

- [178] One of my other concerns with Mr. McNeil's very pessimistic assessment of Ms. Amaral's functional capacity is that, in 2018, Ms. Amaral was ready and about to return to work, with the plan to work as a booking clerk in a medical imaging department at a hospital nearer to her home in Port Coquitlam. The only identified impediment was her anxiety related to driving. I am unable to reconcile those events with Mr. McNeil's opinion that Ms. Amaral has no functional capacity for work. In my view, Mr. McNeil's conclusions also cannot be reconciled with Dr. Wong's assessment a month later.
- [179] I turn then to Ms. Branscombe.
- [180] Ms. Branscombe was tendered and qualified as an occupational therapist, qualified to provide opinion evidence in the areas of functional capacity assessment and cost of future care, as set out in her report dated November 22, 2019.
- [181] Ms. Branscombe has an impressive background and training as an occupational therapist, a functional capacity evaluator and life planner, and she is well-qualified to provide opinion evidence in those areas. However, Ms. Branscombe never met with nor performed her own functional capacity assessment of Ms. Amaral. Instead, Ms. Branscombe was asked to review Mr. McNeil's report, together with a number of other documents. She was then asked to respond to any opinion in Mr. McNeil's report with which she disagreed. Her report is much closer to argument than it is to expert opinion evidence.
- [182] Regrettably, because of the assignment she was given, Ms. Branscombe is unable to provide me with any informed conclusions or opinions of her own concerning Ms. Amaral's functional capacity.
- [183] I will discuss Mr. McNeil's cost of future care recommendations in the section Cost of Future Care, below.
- [184] Ms. Clark was tendered and qualified as a consulting economist with expertise in labour economics, qualified to give opinion evidence concerning loss of income and non-wage benefits (including present value calculations), and present value calculations of costs of future care. Her report on these matters is dated October 4, 2019. I will refer to Ms. Clark's evidence later in these reasons.
5. Findings and conclusions regarding Ms. Amaral's injuries
- [185] Before setting out my findings and conclusions regarding Ms. Amaral's injuries, I am going to make some comments on the witnesses and the evidence.
- [186] First, I note that Mr. Slinger and Ms. Robinson were not cross-examined at all. The cross-examination of Ms. Fong and Ms. Birkeland was very brief. Emily and Zachary Amaral were both cross-examined, but their cross-examinations were relatively brief. For the most part, when these witnesses were cross-examined, it was not to challenge the evidence they had given during their examination-in-chief, but to bring out additional facts. Mr. Wilson, counsel for the defendants, did not challenge the credibility or reliability of any of these

witnesses in closing submissions. While I recognize that all of these witnesses have close ties to Ms. Amaral, I have no real concerns about their credibility or reliability, and I am satisfied that all of them testified honestly and to the best of their ability about the relevant events.

[187] I draw the same conclusions concerning the other non-party lay witnesses.

[188] I turn then to Ms. Amaral.

[189] Although the areas in dispute among the medical experts were relatively narrow, and there was a strong consensus among those close to Ms. Amaral about how different she has been after the accidents, Ms. Amaral's credibility and reliability remain important issues in this case. The opinions of the medical doctors are based, in large part, on the history provided by Ms. Amaral and on her self-reports of pain, cognitive issues and other limitations. This is especially true of Dr. Willoughby's opinion evidence. The weight that can be given to those opinions depends on the court's assessment of Ms. Amaral's credibility, and on the consistency of her evidence at trial with the information she provided to the doctors: see *Edmondson v. Payer*, 2011 BCSC 118, at para. 21.

[190] Ms. Amaral's credibility and reliability were not attacked directly in Mr. Wilson's closing submissions on behalf of the defendants. However, Ms. Amaral's credibility and reliability were often attacked indirectly.

[191] For example, Mr. McNeil concluded that Ms. Amaral's sitting tolerance was limited to 15-20 minutes, and this was one of the reasons why, in his opinion, she was not competitively employable even in the sedentary work category. However, Mr. Wilson argued that I should give no weight to this opinion based on other evidence that contradicted Mr. McNeil's conclusion. This evidence included: Ms. Amaral's acknowledgement during cross-examination that she is able to sit for an hour (although not without discomfort); Ms. Amaral's ability to sit in the witness box when testifying; Dr. Waseem's note in his report that Ms. Amaral was able to sit for 60 minutes; Dr. Wong's note that Ms. Amaral sat continuously for 35 minutes during his interview with her; and Ms. Birkeland's evidence that since the accidents, she and Ms. Amaral have gone to movies, which usually last about two hours.

[192] Mr. Wilson also referred to Ms. Amaral's evidence concerning trips she has taken since the accidents, as not supporting the conclusion her sitting tolerance is severely limited. Ms. Amaral estimated the flight to New Orleans for her cruise to be between three and a half and four hours. A vacation to the Bahamas in May 2017 involved a flight to Seattle, then Seattle to Atlanta, and finally Atlanta to the Bahamas. The return would be similar.

[193] Mr. Wilson argued that Ms. Amaral's evidence concerning driving trips was also inconsistent with her position that she had very little tolerance for sitting or for driving. Since the accidents, Ms. Amaral drove three times to Kelowna. She has also driven to Whistler.

- [194] Mr. Wilson argued further that Ms. Amaral's claims that, except for flare-ups, she reduced her use of Tylenol and Advil, as recommended by both Dr. Toth and Dr. Gupta to address her headache symptoms, are not credible. I have come to the same conclusion. In 2019, Ms. Amaral consistently reported using Tylenol and Advil daily, including to Dr. Willoughby. In my view, Ms. Amaral's report to Dr. Gupta concerning her over-the-counter medication use is particularly significant, given the reason for Dr. Gupta's independent assessment. Ms. Amaral would have me conclude that Dr. Gupta left out an important part of the history: that Ms. Amaral's use at the time of the assessment was atypical and the result of a flare-up. However, given the reason for the assessment, and Dr. Gupta's expertise as a neurologist, I am unable to draw that conclusion. I conclude that Dr. Gupta's record of Ms. Amaral's report is accurate, and reflected Ms. Amaral's normal pattern of use of these medications.
- [195] I have concluded that I must exercise caution in examining Ms. Amaral's evidence and assessing the weight I can give it, especially in relation to her claims that she is now totally disabled from any form of gainful employment.
- [196] On cross-examination, Ms. Amaral was defensive when notes in clinical records indicating that she was reporting improvement or feeling much better were put to her. Her response was often to the effect that the note was incomplete and needed additional context, or that it was just that day that she was feeling better. She was evasive when she was asked on cross-examination whether any doctor had told her that cognitively, she was unable to return to work, saying that her doctor, Dr. Willoughby, "understood." Ms. Amaral said she had "accepted" that she cannot do work that requires concentration and multi-tasking. However, I have concluded that Ms. Amaral's acceptance, to the extent it exists, colours her view of her situation and she is disposed to see things in the worst possible light. I have concluded that I must be very cautious before accepting that Ms. Amaral's view of her situation reflects the facts.
- [197] Ms. Amaral has identified her cognitive issues as a significant barrier to her ever returning to work, especially to the type of work she was doing as a portfolio clerk, which required concentration, focus and spending a great deal of time on a computer. Cognitive issues have also been identified in the opinion evidence of Dr. Willoughby and Dr. Karapareddy. However, although Ms. Amaral's physical functional capacity has been assessed, there has never been any real assessment of Ms. Amaral's cognitive abilities and whether they are impaired in any meaningful way. Despite Dr. Waseem's recommendation in April 2017 that Ms. Amaral undertake a formal neuropsychological evaluation in connection with her reported cognitive concerns, and that such an evaluation would be medically reasonable to determine if there were any objective cognitive deficits, such an evaluation has never been done.
- [198] Ms. Amaral has made numerous subjective reports of a variety of cognitive impairments, and she says that she has "accepted" she has them. However, in my opinion, the evidence as a whole does not support the conclusion that, as a result of the injuries she sustained in the accidents, Ms. Amaral has been left with actual, untreatable cognitive functional

impairments that prevent her from working. The opinion evidence from Dr. Toth and Dr. Gupta does not support that conclusion. Ms. Amaral's written communications, where she explains and advocates her position, are well-written, logical and clear. They do not support the conclusion that she is unable to concentrate and focus when using a computer. When giving her evidence at trial, Ms. Amaral was articulate and expressive, and able to follow and respond to questions put to her, whether in direct or cross-examination. At a certain age and stage in life, being occasionally forgetful or not being able to find the right word is not unusual even in individuals who have never been in accidents, and is not inevitably a sign of some underlying pathology.

- [199] On the other hand, I accept that Ms. Amaral's anxiety and her pain symptoms have affected and continue to affect her ability to focus and concentrate. Dr. Gupta, for example, touched on this in her report, where she mentioned that ongoing cognitive symptoms are typically due to factors other than a concussion, and can include ongoing pain and mood changes. Dr. Toth also touched on this in his report, where he mentioned that, for Ms. Amaral, limitations in attention and concentration would be present due to chronic headaches (which, in his view, were treatable) and pain. Dr. Karapareddy also touched (albeit briefly) on the effect that pain and anxiety can have on an individual's cognitive functioning.
- [200] I turn then to the expert reports.
- [201] I have set out above some of my concerns with Dr. Willoughby's opinion evidence. However, I give Dr. Willoughby's opinion evidence weight where it is consistent with and supported by other opinion evidence that I accept.
- [202] I am unable to give Dr. Waseem's very pessimistic prognosis for Ms. Amaral much weight, because it was based on a false premise (that Ms. Amaral's complaints were worsening with time) and because of the lack of an explanation. However, I accept his diagnosis of chronic myofascial pain syndrome resulting from the soft tissue injuries Ms. Amaral sustained in the accidents. When Dr. Wong assessed Ms. Amaral in September 2019, his physical findings were different than those of Dr. Waseem. Despite that, Dr. Wong did not discount Ms. Amaral's reports of pain. I have noted above why I am unable to accept Dr. Wong's hypothesis that her pain symptoms were caused by something other than the injuries she sustained in the accidents.
- [203] Both Dr. Toth and Dr. Gupta agree that Ms. Amaral's concussion symptoms would have been relatively short-lived, and she had no on-going brain injury. Dr. Karapareddy, on the other hand, opined that Ms. Amaral had ongoing concussion symptoms. I prefer the opinion evidence from Dr. Toth and Dr. Gupta, given the area of their expertise. Dr. Toth also had the advantage of examining Ms. Amaral in August 2016, on referral from Dr. Willoughby. I note as well that both Dr. Waseem and Dr. Wong deferred to a neurology opinion concerning Ms. Amaral's concussions and related symptoms.

- [204] With respect to Ms. Amaral's continuing headaches, both Dr. Toth and Dr. Gupta concurred on the diagnosis of analgesic rebound headaches (or, as Dr. Gupta described them, medication overuse headaches). Both Dr. Toth and Dr. Gupta agreed on the appropriate way to address this problem: reduce the use of over-the-counter medication, a treatment that needed to be implemented long-term. Its success or failure could not be measured by reducing the medication for only a few weeks. I note that Dr. Wong deferred to a neurologist concerning Ms. Amaral's headaches.
- [205] In 2017, Dr. Waseem made a different diagnosis for Ms. Amaral's headaches, namely, that they were cervicogenic headaches, related to her neck pain. Both Dr. Toth and Dr. Gupta were aware of the history based on which Dr. Waseem reached his diagnosis, and Dr. Toth made a diagnosis of ongoing cervical spinal region pain. Despite that, both Dr. Toth and Dr. Gupta agreed on the diagnosis of analgesic rebound headache, and Dr. Gupta's diagnosis was based on a much more recent assessment of Ms. Amaral.
- [206] I prefer the opinion evidence of Dr. Toth and Dr. Gupta, given their area of expertise. I find that, since August 2016, the cause of Ms. Amaral's headaches is medication overuse, and she has not followed the medical advice to reduce her use of the problematic medications. These medications worsen her headaches, and do not control her pain. While it is possible that Ms. Amaral's neck pain is causing her headaches, I do not think that conclusion is open until the cause identified by both Dr. Toth and Dr. Gupta has been eliminated. Because Ms. Amaral has not followed the neurologists' advice, it has not been.
- [207] I accept the psychiatric diagnoses made by Dr. Karapareddy. His diagnosis that Ms. Amaral developed post-traumatic stress disorder symptoms after both the first and second accidents is consistent with Dr. Willoughby's diagnoses, and with Ms. Amaral's evidence. It is supported as well by the evidence of Ms. Turnbrook and Ms. Johansson about their counselling sessions with Ms. Amaral. There is ample support in the evidence for Dr. Karapareddy's diagnosis of an anxiety disorder, and his diagnosis of a chronic pain disorder is consistent with Dr. Waseem's opinion evidence that I accept. I also accept his diagnosis that Ms. Amaral developed a major depressive disorder following the first accident and as a result of that accident, and that, as of August 2019, that disorder was in full remission.
- [208] As discussed above, I do not accept Dr. Karapareddy's diagnoses or opinions concerning concussions and headaches. Rather, I prefer the opinion evidence of Dr. Toth and Dr. Gupta.
- [209] My concerns about the reliability of Ms. Amaral's evidence, and about Mr. McNeil's opinion evidence, have led me to conclude that I can give very little weight to Mr. McNeil's opinions concerning Ms. Amaral's functional capacity.
- [210] I turn then to my findings and conclusions.

- [211] I find that, as a result of the first accident, Ms. Amaral sustained soft tissue injuries to her neck and back, a low-grade concussion and an injury to her right knee. The injury to Ms. Amaral's knee healed without incident. However, the soft tissue injuries and concussion resulted in stiffness and very painful symptoms in her neck and back, as well as severe headaches. In addition, Ms. Amaral developed emotional and psychiatric symptoms, including anxiety, depression and post traumatic stress disorder symptoms. As a result of the injuries she sustained in this accident, Ms. Amaral also experienced cognitive symptoms, which affected her ability to focus and concentrate, and to work on the computer. Her pain symptoms prevented restful sleep. As a result of the effects of the injuries she sustained, Ms. Amaral was unable to return to work. She was also unable to engage fully in her pre-accident leisure activities, which included spending time with friends and family and physical activities such as going to the gym and speed-walking. Ms. Amaral was more dependant on her children to manage the household, the reverse of the situation before the accident.
- [212] As recommended by Dr. Willoughby, Ms. Amaral attended physiotherapy regularly. Ms. Amaral, on her own initiative, attended counselling for help with her emotional and psychiatric symptoms.
- [213] By October 2015, Ms. Amaral's physical and emotional symptoms were improving. However, she was then involved in the second accident. This accident significantly aggravated both Ms. Amaral's physical symptoms, including her headaches, and her psychiatric symptoms.
- [214] I find that, by August 2016, when Ms. Amaral saw Dr. Toth, she had fully recovered from the concussions she sustained in the accidents. As of that date, the primary cause of Ms. Amaral's headaches was the overuse of abortive therapies, specifically Tylenol No. 3 (which had been prescribed for her since the first accident), Tylenol and Advil. For a few weeks, Ms. Amaral followed the medical advice she had been given by Dr. Toth to reduce use her of Tylenol and Advil. However, although Ms. Amaral substantially curtailed her use of Tylenol No. 3, after a few weeks she resumed frequent use of Tylenol and Advil.
- [215] Ms. Amaral returned to counselling in 2016. I find that, after EMDR therapy beginning in September, her emotional and psychological symptoms were improved.
- [216] I find that as of April 2017, when she was examined by Dr. Waseem, Ms. Amaral was continuing to experience the effects of the soft tissue injuries she sustained in the accidents. In addition to pain, she had objective findings in her cervical spine and lumbar spine. I find that, by April 2017, Ms. Amaral had developed chronic myofascial pain in her cervical spine and back as a result of the injuries she sustained in the accidents. This diagnosis by Dr. Waseem is supported by Ms. Amaral's evidence at trial, and also by the opinion evidence from Dr. Willoughby and Dr. Karapareddy. It is also consistent with Dr. Toth's and Dr. Gupta's opinion evidence concerning the cause of Ms. Amaral's described problems with concentration and attention, namely, that the problems are related to her

chronic pain.

- [217] I find that, by August 2017, Ms. Amaral was very close to sufficiently recovered from the effects of her injuries to be ready to return to work, and that steps were being taken (including a course of occupational therapy) to allow that to happen. The main barrier was Ms. Amaral's anxiety concerning driving. Physical accommodations, for example, an ergonomic work station and equipment, were available to her through her employer. I am not persuaded that, at this time, Ms. Amaral had any cognitive deficits that would have prevented her from doing the work as a portfolio clerk. Her complaints about her inability to concentrate and focus mentally for any reasonable length of time were related to her headaches, with respect to which she had not followed medical advice, and her pain symptoms. I find that, by mid-April 2018, although she was not pain-free and still coping with an anxiety disorder, Ms. Amaral was doing much better in all respects. I find that, by July 2018, when she applied for the positions in the Fraser Health Authority, Ms. Amaral was ready to return to work.
- [218] However, Ms. Amaral had a major set-back at the beginning of August 2018, when she learned from Mr. Chow that her plan to work as a booking clerk in the medical imaging department in a hospital closer to her home in Port Coquitlam was not acceptable. The reason had nothing to do with the effects of the injuries Ms. Amaral had sustained in the accidents. Rather, it was because she lacked the necessary qualifications and training, although training was available through Vancouver Community College. I find that, at this point, Ms. Amaral concluded that she was not capable of working, and gave up pursuing paid employment. However, I find that the barrier was Ms. Amaral's anxiety related to driving, and apart from managing the commute from Port Coquitlam to Lions Gate Hospital, Ms. Amaral had recovered sufficiently to return to work in an accommodated position. Unfortunately, a physical flare-up in Ms. Amaral's neck coincided with the news from Mr. Chow.
- [219] I find that, in addition to developing chronic pain as a result of the injuries sustained in the accidents, Ms. Amaral has developed significant stress and anxiety disorders. Her anxiety is entrenched and widespread. It is not confined to her anxiety about driving. I do not agree with Mr. Wilson's submission to the effect that Ms. Amaral stopped counselling because her anxiety had improved to the point that she no longer felt she needed counselling. I think a better explanation is that, especially after August 2018, Ms. Amaral was so discouraged with her situation that she lacked the motivation to pursue counselling, despite the benefits it had provided for her. I accept Dr. Karapareddy's opinion that Ms. Amaral's anxieties are functionally impairing her in her personal life and in her relationships with her children. The evidence from Ms. Amaral's children and her close friends leaves little doubt on that point. Ms. Amaral believes she is no longer capable of paid work, and, since August 2018, has made no effort to return to work.

[220] I find, however, that the medical evidence and prognoses does not support the conclusion that Ms. Amaral is totally disabled and no longer capable of work. Even Ms. Amaral's most sympathetic supporter, Dr. Willoughby, does not hold that opinion. Dr. Karapareddy expressed the opinion that she could be considered for alternate employment and recommended a vocational assessment, something that would be pointless if Ms. Amaral was no longer capable of work. Ms. Amaral's pain symptoms are now chronic, and will not be cured with treatment. However, on the evidence before me, Ms. Amaral's symptoms have not worsened since at least April 2017. Indeed, based on Dr. Wong's opinion evidence and examination findings, there had been some modest improvement since April 2017. Moreover, there are steps and treatments available to help Ms. Amaral manage her pain. Dr. Toth and Dr. Gupta have both made recommendations in relation to management of Ms. Amaral's headaches. Dr. Wong has made recommendations to improve her physical functioning and manage her pain. Dr. Karapareddy also made treatment recommendations to improve Ms. Amaral's emotional and psychiatric functioning.

[221] I find that, as a result of the injuries she sustained in the accidents, and their continuing effects, Ms. Amaral's enjoyment of life has been significantly impaired. She has chronic pain and a serious anxiety disorder. Her relationships with her children have suffered. Her daughter now feels the need to be more distant from her. Her son finds it difficult to live with her, but worries about her ability to look after herself. Her relationships with long-time close friends have suffered, to the extent that they look on spending time with her as work, rather than a pleasant experience. The pride and accomplishment, and sense of financial security, that Ms. Amaral gained from her work have been damaged. These are all significant losses.

6. Damages

(a) Non-pecuniary damages

[222] It is well-established that the purpose of non-pecuniary damages is to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The factors to be taken into account include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and the plaintiff's stoicism (a factor that should not, generally speaking, penalize the plaintiff). See *Stapley v. Hejslet*, 2006 BCCA 34, at paras. 45-46. An award of non-pecuniary damages must be fair and reasonable to both parties.

[223] It is also well established that each case must be decided on its own facts, and prior cases are useful as a guide - but only a guide - in the assessment of non-pecuniary damages.

[224] On behalf of Ms. Amaral, Mr. Spraggs submits that an award of between \$170,000 and \$200,000 for non-pecuniary damages is justified in this case.

- [225] In support of such an award, Mr. Spraggs cites: *Scoates v. Dermott*, 2012 BCSC 485; *Burdett v. Eidse*, 2010 BCSC 219; *Tan v. Mintzler*, 2016 BCSC 1183; *Mickleson v. Sodomskey*, 2019 BCSC 806; *Mayer v. Umabao*, 2016 BCSC 506; and *Dube v. Dube*, 2019 BCSC 687.
- [226] On behalf of the defendants, Mr. Wilson submits that a fair and reasonable award for non-pecuniary damages is in the range of between \$75,000 and \$100,000.
- [227] In support of such an award, Mr. Wilson cites: *Mandra v. Lu*, 2014 BCSC 2199; *Drodge v. Kozak*, 2011 BCSC 1316; and *Brown v. Bevan*, 2013 BCSC 2136.
- [228] A number of the cases cited by Mr. Spraggs involved plaintiffs who suffered mild traumatic brain injuries or concussions where the court had the benefit of neuropsychological evidence of impairment resulting from those injuries, and that provided part of the justification for the substantial awards made in those cases. I do not have such evidence here, and it makes many of Mr. Spraggs' cases distinguishable.
- [229] On the other hand, in my view, an award at the level suggested by Mr. Wilson is too low given my findings above concerning Ms. Amaral and the purpose of non-pecuniary damages.
- [230] I conclude, based on my findings set out above, and having regard to the factors described in *Stapley*, that a fair and reasonable award of non-pecuniary damages in this case is \$135,000.

(b) Loss of earning capacity

- [231] Ms. Amaral says that, as a result of the injuries she sustained in the accidents, she has suffered both a past loss, covering the period up to trial, and a loss of future earning capacity. Ms. Amaral says that, since the first accident, she has been permanently disabled from work, and has no residual earning capacity. Ms. Amaral says that her losses should be assessed on an earnings basis, using the income she would have earned as either a staffing clerk or a portfolio clerk, to age 70.
- [232] When Ms. Amaral was injured in the first accident, she "owned" a permanent part-time position (0.8 of a full-time equivalent) as a staffing clerk at Lions Gate Hospital, and was working in a temporary part-time position as a portfolio clerk. Ms. Amaral explained that, when the first accident occurred, she was next in line for the next available full-time portfolio clerk position and, in the spring of 2015, the person below her in terms of seniority got that position. Moreover, according to Ms. Amaral, but for the accidents, once Zachary left home to go to university, she would have taken all of the overtime available and built up her seniority, something that she believed would have allowed her to transfer to a hospital in the Fraser Health Authority.
- [233] In his evidence, Mr. Chow explained that, when an employee begins a gradual return to work, he continues to be involved as accommodation advisor. He explained that, in connection with the employee's placement, an ergonomic assessment is done by an

occupational therapist, and he would then make recommendations to the site or department co-ordinator concerning the purchase of necessary equipment for the employee, based on the ergonomic assessment. The equipment will be essentially whatever the occupational therapist recommends, and can include items such as a sit-stand desk, and an ergonomic chair, mouse and keyboard. The equipment is provided free to employees. Even though one of the physical demands in a job demands analysis (such as in Exhibit 3 Tab 9) may be stated as "sitting constantly," that is not how things work in practice, and accommodations for reduced sitting tolerance (for example) can be made.

- [234] Mr. Spraggs argues that Ms. Amaral has demonstrated an entitlement to compensation for both past and future loss of earning capacity, and he says that this conclusion is well-supported in the evidence. Among other things, he notes Ms. Amaral's evidence that she is neither physically nor mentally nor cognitively able to return to work and fulfill the job demands of either a portfolio clerk or a staffing clerk. Mr. Spraggs points to Dr. Willoughby's evidence that she has not medically cleared Ms. Amaral to return to work. In Mr. Spraggs' submission, given Mr. McNeil's opinion evidence that Ms. Amaral has no functional capacity for work, it would be pointless to do a vocational assessment for Ms. Amaral. Mr. Spraggs argues further that, even if I give no weight to Mr. McNeil's opinion evidence, Ms. Amaral's emotional and psychological issues make her unemployable in her former job, and she is not capable of retraining for something else, even the lower-paying position of booking clerk in a medical imaging department. In Mr. Spraggs' submission, the proposition that Ms. Amaral had or has any residual earning capacity is simply speculation, and has not been shown to be a real and substantial possibility.
- [235] In Mr. Spraggs' submission, Ms. Amaral's loss of earning capacity to trial should be assessed assuming that, without the accidents, she would have worked as a portfolio clerk until about the end of August 2015, worked in a part-time (0.8 full-time equivalent) position as a staffing clerk to the end of February 2016 and then full-time as a portfolio clerk beginning in March 2016. The calculations are shown in Scenario 1 from Table 1 of Ms. Clark's report and result in (rounded) \$190,000 net of taxes.
- [236] In Mr. Spraggs' submission, Ms. Amaral's loss of future earning capacity should be assessed assuming that, without the accidents, Ms. Amaral would have worked full-time as a portfolio clerk to at least age 67 and with a real and substantial possibility of working to age 70. In Mr. Spraggs' submission, it is reasonable to assume the later retirement age given that Ms. Amaral "thrived" in the fast-paced work environment and some of her career goals required building up and accumulating seniority. Work also provided Ms. Amaral with a sense of purpose. The result is that an appropriate range of damages for loss of future earning capacity is (rounded) between \$414,000 (to age 65) and \$570,000 (to age 70), in Mr. Spraggs' submission.
- [237] On the other hand, in Mr. Wilson's submission, no weight can be given to the opinion evidence of Dr. Waseem or Mr. McNeil concerning Ms. Amaral's residual work capacity, and the totality of the evidence shows that Ms. Amaral has the residual capacity to work full-

time in her previous employment. Mr. Wilson points out that none of Dr. Toth, Dr. Willoughby and Dr. Karapareddy says that Ms. Amaral is unable to return to her previous employment, and Dr. Karapareddy in fact recommended a vocational assessment for Ms. Amaral. Mr. Wilson argues that Ms. Amaral's driving anxiety is not so severe as to keep her off the road entirely and she will drive when it suits her. Mr. Wilson also notes that car-pooling is available and employees of the Vancouver Coastal Health Authority are encouraged to use it.

- [238] Mr. Wilson argues further that Ms. Amaral has the capacity to earn employment income by taking retraining to qualify to work as a booking clerk in an imaging department, something that would also allow her to work in a hospital closer to her home. In Mr. Wilson's submission, Ms. Amaral cannot simply say, in effect, "I'm not interested in retraining," if she is able to pursue another line of work and earn an income despite her injuries. Implicitly, Mr. Wilson argues that Ms. Amaral has failed to show that she has no residual earning capacity, a point on which she has the burden of proof.
- [239] In Mr. Wilson's submission, the defendants accept that Ms. Amaral has established an entitlement to compensation for loss of earning capacity in the period up to trial. However, in his submission, she has not shown an entitlement to compensation for that entire period. In his submission, the longest period that could possibly be justified is from the first accident to April or May 2019, a period of about 50 months. This would have allowed Ms. Amaral to complete the training to work as a medical image booking clerk, after Mr. Chow identified that she needed those qualifications. It would translate into an award of (rounded) \$135,000, net (assuming a net past monthly wage loss of \$2,681). The shortest period would be between 24 and 27 months, to allow Ms. Amaral time to follow Dr. Toth's advice to deal with her headaches. This results in an award of between (rounded) \$64,000 and \$72,000.
- [240] In Mr. Wilson's submission, Ms. Amaral has not shown any entitlement to compensation for loss of future earning capacity. In the alternative, if I conclude she has demonstrated some entitlement, then, in Mr. Wilson's submission, Ms. Amaral's loss should be assessed using the capital asset approach, based on about two years' income as a portfolio clerk. Using the income amounts in Ms. Clark's report, this would be about (rounded) \$100,000 (based on an annual income of about \$50,000 as of 2019).
- [241] I turn then to the applicable legal principles.
- [242] There are two stages in assessing a claim for damages for loss of earning capacity. First, a plaintiff must prove that the injuries suffered in the accident and the resulting symptoms impaired her ability to earn income and that there is a real and substantial possibility that her diminished earning capacity has resulted or will result in a pecuniary loss. If the plaintiff satisfies that burden, and therefore establishes an entitlement to compensation, then the second stage requires an assessment of the loss. A plaintiff may prove the quantification of that loss either on an earnings approach or a capital asset approach. Both

are correct. The earnings approach will be more useful when the loss is more easily measurable. The capital asset approach is often more appropriate where the pecuniary loss is not easily measured. See generally *Perren v. Lalari*, 2010 BCCA 140, at paras. 21 and 32. Either way, the court must endeavour to quantify the financial harm accruing to the plaintiff over the course of her working career, taking into account relevant and realistic negative and positive contingencies.

- [243] A plaintiff's loss is assessed on the basis of the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission: see *Athey v. Leonati*, [1996] 3 S.C.R. 458, at paras. 34-35. Compensation for past loss of earning capacity is based on what the plaintiff would have - not could have - earned, but for the injuries she sustained: see *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, at para. 130. The assessment of a plaintiff's loss is an exercise of judgment, not a mathematical calculation. Ultimately, the court must base its decision on what is reasonable in all of the circumstances. Projections, calculations and formulas are only useful to the extent that they help determine what is fair and reasonable. See *Jurczak v. Mauro*, 2013 BCCA 507, at para. 36.
- [244] In addition, with respect to the issue of residual earning capacity, I note Mr. Justice Cumming's comments in *Parypa v. Wickware*, 1999 BCCA 88, at para. 67:
- [67] . . . There is a duty on the plaintiff to mitigate her damages by seeking, if at all possible, a line of work that can be pursued in spite of her injuries. If the plaintiff is unqualified for such work, then she is required, within the limits of her abilities, to pursue education or training that would qualify her for such work. If the plaintiff claims she is not able to mitigate by pursuing other lines of work or by retraining, she must prove this on a balance of probabilities. . . .
- [245] I will first address Ms. Amaral's claim for compensation for loss of earning capacity up to trial.
- [246] In my opinion, Ms. Amaral has demonstrated an impairment to her earning capacity as a result of the injuries she sustained in the accidents and that this has resulted in a pecuniary loss. Therefore, she has demonstrated an entitlement to compensation for loss of earning capacity in the period up to trial. As I understand Mr. Wilson's submissions, the defendants do not contest this. Rather, the dispute is over how Ms. Amaral's loss should be measured. Should it be on the basis that, throughout this entire period (about 59 months), Ms. Amaral had no capacity to earn income? Or should it be on the basis that, although her income-earning capacity was impaired, she had residual capacity to earn income? There is also a dispute concerning whether Scenario 1 or Scenario 2 in Ms. Clark's report should be used.
- [247] I find first that Ms. Amaral's loss should be measured on the basis that, but for the injuries she sustained in the accidents, she would have worked in her temporary position as a portfolio clerk until the end of August 2015, worked in a part-time (0.8 full-time equivalent) position as a staffing clerk to the end of February 2016 and then worked full-time as a

portfolio clerk beginning in March 2016. In my view, that Ms. Amaral would have followed this path was a real and substantial possibility in the without-accident scenario. The corresponding income is shown in Scenario 1 in Ms. Clark's report. I reject the premise underlying Scenario 2 (Mr. Wilson's favoured Scenario) that, once Ms. Amaral's temporary position as a portfolio clerk ended in August 2015, she would have returned to work as a staffing clerk and remained in that position.

[248] Next, I have not been persuaded that Ms. Amaral had no residual earning capacity, and, as I have set out above, I reject Mr. McNeil's and Dr. Waseem's conclusions to that effect.

[249] As I concluded above, in July 2018, Ms. Amaral was ready to return to work, provided that a position could be located in a hospital closer to her home in Port Coquitlam. That was the point of the plan to move into a different position, working as a booking clerk in a medical imaging department. This plan was not something imposed on Ms. Amaral against her will; it was something she was actively involved in developing. Dr. Willoughby supported that plan. Ms. Amaral in fact completed applications for job postings in three different hospitals, and described her skills.

[250] I find that, although her chronic pain and psychiatric symptoms impaired her ability to work as a portfolio clerk, given the nature of that work, Ms. Amaral nevertheless had the capacity to work as a booking clerk. That conclusion is supported by Ms. Amaral's evidence; she in fact applied for such a position in 2018. In my view, it is a reasonable inference to draw based on the evidence of Dr. Toth, Dr. Gupta, Dr. Karapareddy and Dr. Willoughby, none of whom say that Ms. Amaral is unable to work. I note as well that, if the plan for Ms. Amaral to find a position as a booking clerk in medical imaging at a hospital nearer her home had worked out as Ms. Amaral hoped, she was going to be driving. The point of the plan was to reduce her commute time, not eliminate it. When, on August 1, 2018, Mr. Chow proposed Ms. Amaral return to work as a staffing clerk at Lions Gate Hospital, after some training at Vancouver General Hospital, Ms. Amaral's refusal was based on the length of the commute and her anxiety related to driving. It was not because she had cognitive problems that made office work impossible or that she was unable generally, because of the effects of the injuries she sustained in the accidents, to work. In short, Ms. Amaral's response to Mr. Chow was not "I am unable to work," but "I am unable to drive so far to work."

[251] The problem with the plan was not that there were no booking clerk positions available, but that Ms. Amaral lacked the necessary qualifications, which she could have obtained by completing the Medical Office Assistant course. I have not been persuaded that Ms. Amaral, as a result of the injuries she sustained in the accidents, would have been unable to complete that course. Rather, in my view, Ms. Amaral was obliged to take reasonable steps to find employment at a level she could perform based on the effects of her injuries. Those steps included completing the Medical Office Assistant course. Mr. Chow's involvement as Ms. Amaral's accommodation advisor was put "on hold," not because there were no other reasonable alternatives available to Ms. Amaral, but because she refused to consider them.

- [252] The result is that, in my view, Ms. Amaral's loss should be assessed on the basis that, by May 2019, Ms. Amaral would have completed the Medical Office Assistant course and, with Mr. Chow's assistance, begun work as a booking clerk in a medical imaging department at a hospital closer to her home in Port Coquitlam.
- [253] Unfortunately, no one tendered evidence concerning a booking clerk's income. Mr. Spaggs' position was, essentially, that it was irrelevant because Ms. Amaral had and has no residual earning capacity. He did not advance any alternative arguments in the event I made findings that were different from what he argued. Mr. Wilson's position was, essentially, that Ms. Amaral had and has the capacity to earn the income paid to a staffing clerk. The extent of the evidence was that a booking clerk was paid less than a staffing clerk.
- [254] On the other hand, I do have some evidence in Ms. Clark's report of the rates of pay for each of staffing clerks and portfolio clerks. As of April 2019, the annual rate for a staffing clerk was \$2,292 (gross) less than the rate for a portfolio clerk. Although it is not much to go on, I draw the inference that the gap between the rate for a staffing clerk and the rate for a booking clerk is not more than that.
- [255] Doing the best I can with the evidence available, I assess Ms. Amaral's loss to trial at \$163,000, net. This is based on Ms. Clark's Scenario 1 net figure (in Table 1) of \$190,883, divided over 59 months to arrive at a monthly amount, and then multiplying that amount by 50. Then, a small amount (\$1,250) has been added to account for the net differential between a booking clerk and a portfolio clerk for 9 months.
- [256] I turn then to loss of future earning capacity.
- [257] In my view, Ms. Amaral has shown that she no longer has the capacity to work full-time as a portfolio clerk, with all that entails. I note in particular Ms. Amaral's chronic pain, which she will be required to manage long-term. I note also her stress and anxiety disorders which, although treatable, are well-entrenched. Management of her chronic pain and psychiatric disorders impair Ms. Amaral's ability to focus and concentrate, important features of the portfolio clerk position. I conclude that Ms. Amaral has shown an impairment to her future earning capacity and that there is a real and substantial possibility this impairment will result in a pecuniary loss. Accordingly, I find that Ms. Amaral has established an entitlement to compensation.
- [258] I have found that Ms. Amaral has residual earning capacity, and that, while she no longer has the capacity to work as a portfolio clerk, she has the capacity to work as a booking clerk. Her compensation for loss of future earning capacity must be assessed accordingly.
- [259] However, this is another area where the lack of evidence concerning earnings of a booking clerk creates a problem.
- [260] I have concluded, in that light, that Ms. Amaral's loss should be assessed on a "capital asset" basis, rather than an earnings basis.

[261] Using the capital asset approach does not mean that the assessment is unstructured or that the assessment is entirely at large without the necessity to explain the factual basis of the award: see *Villing v. Husseni*, 2016 BCCA 422, at paras. 18-19. In every case where the capital asset approach is adopted, the four questions in *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.), at para. 8, form the basis of the assessment. The questions are whether:

- (1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- (2) The plaintiff is less marketable or attractive as an employee to potential employers;
- (3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
- (4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.

[262] Of the *Brown* factors, all are applicable, although, in my view, the first, third and fourth are particularly prominent in Ms. Amaral's case.

[263] In my view, a reasonable assessment of Ms. Amaral's loss of future earning capacity is \$240,000. This is roughly equivalent to the present value of an annual loss of \$25,000 to age 67 (which, in my view, it is reasonable to assume would be Ms. Amaral's retirement age), and applying the percentage allowance for labour market contingencies shown in Ms. Clark's Table 3. In my opinion, compensating Ms. Amaral on the basis of two years' income as a portfolio clerk, as Mr. Wilson proposed in his alternative submission, creates a very real risk of undercompensating Ms. Amaral for her loss of future earning capacity. Moreover, the assessment at \$240,000 is premised on Ms. Amaral having residual earning capacity. However, that is not a certainty, and some allowance must be made for the risk that Ms. Amaral will not be able to realize that residual earning capacity in the future.

(c) Loss of housekeeping capacity

[264] On behalf of Ms. Amaral, Mr. Spraggs, citing *Kim v. Lin*, 2018 BCCA 77, at paras. 27, 33-35, submits that the evidence, both non-expert and expert, establishes that she has suffered a loss of housekeeping capacity, both in the period up to trial and in the future. In Mr. Spraggs' submission, based on the expenses she has incurred for housekeeping, and Mr. McNeil's cost of future care opinion, Ms. Amaral's loss (both past and future) should be assessed at between \$50,000 and \$70,000.

[265] Mr. Wilson, citing *Riley v. Ritsco*, 2018 BCCA 366, at paras. 101-102, submits that Ms. Amaral's injuries did not lead to a requirement that she pay for housekeeping services, nor is there evidence that homemaking services were routinely performed for her gratuitously by family members. The result, in Mr. Wilson's submission, is that there is no basis for a pecuniary award for loss of housekeeping capacity.

- [266] Compensation for loss of homemaking capacity is distinct from compensation for cost of future care. An award for loss of homemaking capacity is intended to reflect the value of the work that would have been done by the plaintiff but which he or she is incapable of performing due to the injuries caused by the accident. It is not dependent upon whether replacement costs are actually incurred. However, a cautionary approach is to be taken in assessing damages for loss of homemaking capacity to ensure the award is commensurate with the loss. See, for example, *Westbroek v. Brizuela*, 2014 BCCA 48, at paras. 72-78. Where homemaking can be done, although with pain, it may be more appropriate to reflect that in the award for non-pecuniary damages, rather than make a separate award for loss of housekeeping capacity.
- [267] In my view, the facts here are very, very far removed from those that were before the court in *Kim v. Lin*, where the Court of Appeal upheld a very substantial award for loss of homemaking capacity. I note as well that there was no claim in that case for the cost of housekeeping as a cost of future care, unlike here.
- [268] In addition, for the reasons set out above, I place little weight on Mr. McNeil's opinion concerning Ms. Amaral's functional capacity, or on Dr. Waseem's opinion evidence. Dr. Karapareddy is not providing a psychiatric opinion when he comments on what Ms. Amaral might need for housekeeping.
- [269] On the other hand, based on my findings above, I conclude that Ms. Amaral has shown some loss of housekeeping capacity, and that a modest award, consistent with the cautionary approach, is justified. I award \$5,000.

(c) Cost of future care

- [270] Ms. Amaral seeks an award of \$288,164 for cost of future care (\$281,855 net of taxes). The details are set out in Table 8 of Ms. Clark's report as follows:

Item

Cost

Frequency

Present value

Contoured pillow

\$58.99

every 2 years

\$696.00

Body pillow

\$49.00

every 2 years

\$590.00

Heat pad

\$22.95

every 3 years

\$184.00

Light-weight vacuum

\$94.99

every 5 years

\$477.00

Steam mop

\$89.99

every 5 years

\$452.00

Cordless electric scrubber

\$49.99

every 5 years

\$251.00

Weekly homemaking

\$2,964.00

annual for life

\$68,449.00

Seasonal cleaning

\$456.00

annual for life

\$10,531.00

Ergonomic sit/stand desk

\$1,272.00

year 1

\$1,258.00

Height adjustable keyboard tray

\$285.00

year 1

\$282.00

Height adjustable computer monitor

\$169.00

year 1

\$167.00

Foot rest

\$34.95

year 1

\$35.00

Occupational therapy - service

\$1,344.00

year 1

\$1,329.00

Occupational therapy - travel

\$672.00

year 1

\$665.00

Pain management program

\$12,500.00

year 1

\$12,362.00

Kinesiology

\$888.00

year 1

\$878.00

Gym pass to age 65

\$450.57

annual to age 65

\$4,218.00

Gym pass age 65 to age 85

\$337.90

annual from age 65 to age 85

\$3,833.00

Gym pass age 85 on

\$225.29

annual from age 85 for life

\$538.00

Massage therapy

\$1,080.00

annual for life

\$24,941.00

Chiropractic treatment

\$840.00

annual for life

\$19,398.00

Physiotherapy

\$1,080.00

annual for life

\$24,941.00

Acetaminophen (generic)

\$58.36

annual for life

\$1,348.00

Ibuprofen (generic)

\$40.53

annual for life

\$936.00

Cyclobenzaprine (generic)

\$29.12

annual for life

\$672.00

Trazadone (generic)

\$29.20

annual for life

\$674.00

Ativan (generic)

\$6.00

annual for life

\$139.00

Botox injections

\$4,400.00

annual for life

\$101,611.00

Total:

\$281,855.00

[271] In closing submissions, Mr. Spraggs pointed to the evidence (from Exhibit 1, the Agreed Statement of Facts and Chronology) concerning the various treatments Ms. Amaral had undertaken prior to trial. These included physiotherapy, massage therapy and chiropractic treatment. He pointed to Ms. Amaral's evidence to the effect that she was willing to try any treatment that would assist in improving, managing or relieving her ongoing symptoms. In Mr. Spraggs' submission, Ms. Amaral has demonstrated this commitment by continually

trying new treatments despite her limited means.

[272] Further, in Mr. Spraggs' submission, the future care items claimed are supported by the opinion evidence from Ms. Amaral's medical experts, as well as the opinion evidence from Mr. McNeil.

[273] On behalf of the defendants, Mr. Wilson argues that no award should be made for most of the items claimed, as Ms. Amaral has failed to show that the amounts claimed are both medically justified and reasonable. In Mr. Wilson's submission, only the following items should be allowed:

Item

Amount

Contoured pillow

\$58.99

Body pillow

\$49.99

Heat pad

\$22.95

Light weight vacuum

\$534.00

Steam mop

\$506.00

Cordless electric scrubber

\$281.00

Kinesiologist (12 sessions)

\$922.00

Cyclobenzaprine

\$672.00

Trazadone

\$674.00

Ativan

\$139.00

Total:

\$3,859.93

- [274] In Mr. Wilson's submission, the frequency of replacement of the pillows and heat pad assumed in Ms. Clark's report (every two years for life), has not been demonstrated on the evidence. However, in his submission, the one-time purchase of each of these items is reasonable, at the costs shown. In Mr. Wilson's submission, the amounts for the light-weight vacuum, steam mop and cordless scrubber are reasonable only if Ms. Amaral intends to perform her own housekeeping.
- [275] The principles that apply are well settled.
- [276] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70.
- [277] A little common sense should inform claims for costs of future care, however much costs may be recommended by experts in the field: *Penner v. Insurance Corporation of British Columbia*, 2011 BCCA 135, at para. 13. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.
- [278] I will address only those items where there is disagreement.
- [279] In my opinion, and although the amounts claimed are modest, Ms. Amaral has not shown that the costs of the pillows and heat pad, for life, are medically justified or reasonable. If Ms. Amaral wishes to purchase these items for herself to make her more comfortable, they should be financed out of her award for non-pecuniary damages. A heating pad is likely to be found in many households in which the occupants have not been injured in a motor vehicle accident, as a matter of routine first-aid.
- [280] Many homes, as a matter of routine housekeeping, are equipped with light-weight vacuums and other cleaning aids. I award nothing for these items, on the basis that these fall into the category of costs Ms. Amaral would likely have incurred in any event.
- [281] Moreover, there is little in the evidence about what heavier "seasonal cleaning" Ms. Amaral did before the accidents. Often, a homeowner will pay for this to be done, rather than do it herself or himself. In my view, the cost of "seasonal cleaning" for life has neither been medically justified nor is it reasonable.

- [282] As of trial, Ms. Amaral was paying for weekly homemaking. However, in my opinion, the cost of weekly homemaking for life has also neither been medically justified nor is it reasonable. In my view, it is more reasonable to say that after a certain age, and in the without-accident scenario, Ms. Amaral would have hired help and incurred this cost in any event. Ms. Clark notes in her report that if the annual cost of weekly homemaking is terminated at Ms. Amaral's age 75, the present value would decrease by about 30%.
- [283] However, based on the medical evidence that I have accepted, some award for homemaking assistance (including heavier cleaning) can be justified, and would be reasonable. I award \$35,000 in total.
- [284] The sit/stand desk, height adjustable keyboard tray and monitor and a foot rest were identified by Mr. McNeil as assistive devices that Ms. Amaral may require if she returns to work. However, if she returns to work for the Vancouver Coastal Health Authority, for example, suitable ergonomic office equipment and furniture will be provided for her at no cost. I consider it reasonable to infer that the same would be true of the Fraser Health Authority. In my opinion, the costs of these items have not been shown to be reasonable as costs of future care. Ms. Amaral did not mention any intention to set up a home office in the future. However, if she does, and concludes she would like items such as a foot rest and adjustable monitor and tray to make work more comfortable, the costs should be financed out of her award for non-pecuniary damages. I award nothing for these items.
- [285] Ms. Amaral has had the benefit of occupational therapy services in the past, and, based on Mr. Chow's evidence, at least some of these services are available to her through Vancouver Coastal Health at no cost. On the other hand, I note Dr. Karapareddy's recommendation for occupational therapy, rehabilitation and other supports to help Ms. Amaral with structure and routine, and to explore job opportunities. In my view, some additional occupational therapy, of the kind described by Dr. Karapareddy, is medically justified and reasonable for Ms. Amaral. I award \$1,994 (including travel costs) for this item.
- [286] The recommendation that Ms. Amaral attend a pain management clinic came from Mr. McNeil. None of the medical experts, including Ms. Amaral's long-time family doctor, Dr. Willoughby, made such a recommendation. In my opinion, the cost of this item has not been shown to be either medically justified or reasonable.
- [287] The defendants accept that the costs for kinesiology are medically justified and reasonable. I award \$922 (including taxes) for this item.
- [288] Ms. Amaral attended the gym regularly prior to the first accident. In my opinion, a gym pass is an expense that Ms. Amaral likely would have incurred without the accidents. Moreover, I doubt that this is an expense Ms. Amaral would likely incur now if awarded. Rather, her preferred type of therapy has been passive, rather than active, therapy.

- [289] Neither Dr. Waseem nor Dr. Wong, the experts in physical medicine and rehabilitation, recommended ongoing physiotherapy, massage therapy or chiropractic treatment as medically justified, certainly not for life. On the other hand, Ms. Amaral has occasional flare-ups, and access to treatment during those times can be justified and is reasonable. I allow a total of \$20,000 for physiotherapy, massage therapy and chiropractic treatment.
- [290] In Ms. Clark's cost of future care table, counselling has been listed as "\$220 per session, deferred." Dr. Karapareddy recommended 36 sessions of counselling. In my view, this cost has been medically justified and is reasonable. Ms. Amaral's anxiety and psychological problems resulting from the accidents are significant barriers to her reclaiming positive aspects of her life pre-accident and returning to work. Ms. Amaral has used counselling services in the past and benefitted from them. I assume that the counselling costs will be incurred over three years, at an annual cost of \$2,640 (\$220 multiplied by 12). Using the present value multiplier in Table 6 of Ms. Clark's report, I calculate the present value of this cost to be \$7,658, and I allow that amount for this item.
- [291] In my opinion, the costs of acetaminophen and ibuprofen have not been shown to be medically justified or reasonable for Ms. Amaral. The clear recommendation from the headache specialists, Dr. Toth and Dr. Gupta, has been that she reduce her use of these non-prescription medications in order to address her headache symptoms. There is little in the evidence to suggest that the use of these medications in fact helps Ms. Amaral to control pain. Such medications would also be part of routine first-aid in most households. I award nothing for these items.
- [292] The defendants agree that the amounts claimed for Cyclobenzaprine, Trazodone and Ativan are medically justified and reasonable. They are allowed.
- [293] In my opinion, the amount claimed for Botox is neither reasonable nor has it been medically justified. In my view, based on the evidence, even a trial of Botox has not been medically justified.
- [294] Botox was mentioned by Dr. Toth as a possible treatment that might be considered for headache management. Of course, his primary recommendation was that Ms. Amaral reduce the amount and frequency of her over-the-counter medication. Dr. Gupta made the same recommendation. Ms. Amaral did not follow that recommendation.
- [295] Dr. Waseem also mentioned Botox injections as a possible treatment. However, the suggestion was in the context of Ms. Amaral first trying trigger point injections. If those were ineffective, then Botox could be considered. When Dr. Wong examined Ms. Amaral in September 2019, he did not find any trigger points.
- [296] I award nothing for Botox injections.
- [297] Accordingly, I award costs of future care as follows:

Item

Award

Contoured pillow

\$58.99

Body pillow

\$49.99

Heat pad

\$22.95

Homemaking assistance and seasonal cleaning

\$35,000.00

Occupational therapy (including travel)

\$1,994.00

Kinesiologist (12 sessions)

\$922.00

Physiotherapy, massage therapy and chiropractic treatment

\$20,000.00

Counselling (36 sessions over three years)

\$7,658.00

Cyclobenzaprine

\$672.00

Trazadone

\$674.00

Ativan

\$139.00

Total

\$67,190.93

(d) Special damages

[298] For each item of expense claimed as special damages, a plaintiff must prove, on a balance of probabilities, both the amount claimed and the fact that the expenditure is causally connected to the injuries sustained in the accident. Generally speaking, claims for special

damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care, when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness: see *Redl v. Sellin*, 2013 BCSC 581, at para. 55.

- [299] Ms. Amaral seeks compensation for special damages in the sum of \$13,906.95. The amounts are summarized in Exhibit 1 (the Agreed Statement of Facts and Chronology) at paras. 14 and following, and the details are set out in Exhibit 3 Tab 7.
- [300] The defendants do not dispute that the amounts described in Exhibit 1, and detailed in Exhibit 3 Tab 7 were incurred, and they do not dispute that most of the amounts claimed are recoverable as special damages.
- [301] However, the defendants say that five items are not recoverable.
- [302] The defendants say first that the amount claimed (\$2,999.85) for housekeeping expenses for March 3, 2015 to July 16, 2019 should not be allowed. The defendants say that housekeeping services were not recommended by any of Ms. Amaral's doctors or treatment providers, except for Mr. McNeil.
- [303] In my opinion, given the nature of the injuries sustained by Ms. Amaral, and my findings above, this expense is both causally connected to the injuries and reasonable. I allow it as claimed.
- [304] Next, the defendants say the expense of \$132.00 paid to the "The Dispensary - Hemp" should not be allowed. They also object to the amounts paid to "Pomme Natural Market" for white willow bark and milk thistle (\$40.21) and to "My Foot Reflexology" for massage therapy (\$55.65). They say that none of these treatments was recommended by any of Ms. Amaral's doctors or treatment providers, and none has been shown to be medically justified. I agree with the defendants. These amounts are disallowed.
- [305] Finally, the defendants say that the cost of a privately-done MRI, \$1,225.00, should not be allowed as there is no evidence before me to show why a private MRI was medically justified.
- [306] Again, I agree with the defendants. Based on Dr. Willoughby's clinical notes from February 5, 2015, I conclude that the initial request for an MRI came from Ms. Amaral's lawyer, not from Dr. Willoughby. There is no evidence showing any medical need for an MRI, much less a privately-funded MRI. The cost has not been shown to be reasonable.
- [307] I will leave counsel to do the revised total.

7. Mitigation issues

- [308] The defendants say that Ms. Amaral has failed to take reasonable steps to mitigate her damages by:

- (a) failing to follow treatment recommendations with respect to her headaches;
- (b) failing to pursue further counselling; and
- (c) failing to look for work closer to her home in Coquitlam.

[309] However, in closing argument, Mr. Wilson made no specific submissions concerning any percentage deduction to be made from any award under any head of damages on account of a failure to mitigate. Rather, and for example, his submissions on assessment of Ms. Amaral's loss of earning capacity were premised, in part, on what he argued was her failure to maximize her residual earning capacity; in other words, a failure to mitigate her damages in this area.

[310] In that light, I do not propose to make any separate deduction from the damages I have awarded to Ms. Amaral on ground of a failure to mitigate.

[311] I have not been persuaded there was any unreasonable failure on Ms. Amaral's part to pursue further counselling. I am satisfied she intends to do so in the future, given the strong recommendation by Dr. Karapareddy.

[312] Mr. Wilson is quite correct to point out Ms. Amaral's failure to follow the treatment recommendations from Dr. Toth and Dr. Gupta concerning her headaches. I have also discussed that above. However, although Ms. Amaral's headaches would have been better managed had she followed the medical advice, they would not have been cured, and, in addition, she has chronic pain and significant psychiatric problems. In arriving at my assessment of Ms. Amaral's non-pecuniary damages, I have taken her failure to follow the medical advice into account.

[313] Finally, in assessing Ms. Amaral's damages for loss of earning capacity (both past and future), I have taken into account that she has the burden to show that she has no residual earning capacity.

8. Summary and disposition

[314] In summary, I award damages to Ms. Amaral as follows:

- (a) non-pecuniary damages in the sum of \$135,000;
- (b) for loss of earning capacity to trial, \$163,000;
- (c) for loss of future earning capacity, \$240,000;
- (d) for loss of housekeeping capacity, \$5,000;
- (e) for cost of future care, \$67,190.93; and
- (f) for special damages, as above.

[315] There will be pre-judgment interest in accordance with the Court Order Interest Act, R.S.B.C. 1996, c. 79.

[316] Subject to any submissions that the parties may wish to make, Ms. Amaral is entitled to costs on Scale B. If the parties wish to make submissions concerning costs, they may do so in writing, provided that any submissions must be filed within 45 days of the date of these reasons. Written submissions must be no more than 10 pages double-spaced (except for quotations) using a font size no smaller than 12 point (except for quotations). I will leave counsel to agree on a suitable schedule for the exchange of submissions.

"Adair J."

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