

CANADA / JUDGMENT

Barron v. Wine

2021 BCSC 711

COURT

Supreme Court of British Columbia

DECIDED

16 April 2021

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2021 BCSC 711 Barron v. Wine

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barron v. Wine,

2021 BCSC 711

Date: 20210416

Docket: M179527

Registry: Vancouver

Between:

Siena Lexy Barron

Plaintiff

And

Sarah Wine

Defendant

Corrected Judgment: The text of the judgment was corrected on the front cover page and at paragraphs 117, 118, and 200 on May 27, 2021

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

September 8-11,14-18, 24,

December 14, 2020, and

January 13, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2021

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INTRODUCTION

- [1] On the morning of January 27, 2016, the plaintiff, Sienna Lexy Barron, stopped at a pedestrian crosswalk and was rear-ended by the defendant, Sarah Wine (the "Accident").
- [2] Ms. Barron seeks general and special damages, damages for past income loss, the loss of past and future income-earning capacity, and future care costs. Ms. Wine admits liability for the Accident but disputes the quantum of damages, denies all of Ms. Barron's alleged injuries were caused by the Accident, and argues that she has failed to mitigate her loss.

BEFORE THE ACCIDENT

- [3] In January 2016, Ms. Barron lived with her parents and brother in Maple Ridge. She was 24 years old, single, and had no dependants.
- [4] Ms. Barron described herself as happy, fit, and active, evidence her friend, Avery Hearsum, corroborated. Ms. Barron said she loved her work, had many friends, and an active social life. Apart from a chronic gynaecological condition which was treated effectively with medication, she was otherwise healthy. Her preferred recreational activities included hula hooping, dancing, yoga, and attending music festivals with her friends. She enjoyed hiking, was an occasional runner, and periodically attended the gym.
- [5] Ms. Barron graduated from high school in 2009. Thereafter, she took some photography courses. In 2012, she completed a special education assistant ("SEA") course. From 2012 to 2014, she worked as a SEA for the Trevor Cook Society, initially in a school setting and then in a home working with a client in his 20s with autism. She assisted him with toileting, bathing, dressing, feeding, and acquiring social skills; some of this work was physically demanding. Her position involved some driving. From 2013 to 2014, she also worked with

special needs children at a Start Smart daycare.

- [6] In November 2014, Ms. Barron pivoted away from her SEA job following a traumatic hair-pulling incident involving a client. She accepted a full-time position with Lordco as a parts delivery driver, working 40 hours a week and earning \$11.50/hour, plus vacation pay. In June 2015, she began concurrent part-time work as a server/bartender with Billy Miner Pub, working three or four shifts per week in the evenings and on week-ends, earning \$9.20/hour, plus vacation pay and tips. She managed the physical demands of this job, which included periodically changing beer kegs and carrying multiple pints of beer, without difficulty.

THE ACCIDENT

- [7] The Accident occurred on Dewdney Trunk Road in Maple Ridge. Ms. Barron was wearing her seatbelt and driving a Lordco Hyundai Accent. She saw a boy (whom she estimated to be about 9 years old) in the pedestrian crosswalk as she approached, slammed on her brakes, and was struck from behind by Ms. Wine's Ford F150 truck.
- [8] In cross-examination, Ms. Barron admitted:
- a) No air bags deployed;
 - b) No part of her body struck any part of her vehicle;
 - c) She did not hit her head or lose consciousness;
 - d) Ms. Wine's vehicle was "barely scratched"; and
 - e) No emergency medical services were called to the Accident scene.
- [9] Ms. Wine had been driving westbound on Dewdney Trunk Road before the Accident. She recalls that Ms. Barron was either stopped or in the process of stopping just before impact; she had slowed to change lanes but did not know her exact speed. In cross-examination, she estimated her speed just before the Accident to be 30 to 40 kph. She hit her brakes when Ms. Barron stopped and struck the back bumper of the Lordco car. She recalls the impact was "not hard"; her truck was not damaged. She later observed a crack on the rear bumper of the Lordco car but denied it was "hanging off", as described by Ms. Barron in her direct examination. The photographs in evidence confirm that the right rear bumper of the Lordco vehicle was cracked in the Accident.
- [10] Ms. Wine agreed that a boy was about to enter the crosswalk before the Accident; she understood that is why Ms. Barron stopped. She recalls that he had stepped onto the roadway and jumped back onto the sidewalk before the Accident. She did not see him in front of the Lordco car or with his hands either outstretched or on its hood. She estimated his age to be about 13 or 14 (the approximate age of her own son) and did not believe that he was ever at risk of being struck by Ms. Barron.

AFTER THE ACCIDENT

- [11] Ms. Wine recalls that both she and Ms. Barron got out of their cars at about the same time and spoke almost immediately after the Accident. Ms. Barron telephoned her manager as she was driving a Lordco vehicle; she recalls that she remained in her vehicle until her manager arrived at the scene but agreed the parties talked for about five minutes while they waited before filling out paper work and leaving the Accident scene. Ms. Wine thought Ms. Barron "seemed fine" but admitted their interactions were brief.

Injuries

- [12] According to Ms. Barron, she was scared and tense and knew she was "not okay" after the Accident. After exchanging information with Ms. Wine, she drove one block to a repair shop, to the Lordco office for first aid, and then to the hospital, where she spent a few hours before being discharged home.
- [13] Lordco first aid attendant, Christine Sheppard, recorded Ms. Barron's chief complaints as a headache and sharp pain in her mid-back, between her shoulder blades.
- [14] Ms. Barron recalls having head, neck, and upper back pain immediately after the Accident. She said her neck felt "seized" and stiff; she experienced pins and needles and "jolts" of pain when she tried to move her neck. Within about six months, her predominant complaint was right shoulder pain. The first recorded reference to right shoulder pain appears in the April 2016 records of Golden Ears Physiotherapy: a shaded diagram indicates symptoms in the right neck/trapezius area. In cross-examination, Ms. Barron admitted that her right arm symptoms rarely extend beyond the elbow, she has no problems with grip strength, and she did not injure her low back. She sustained no bumps or bruises in the Accident.
- [15] In the first six months after the Accident, Ms. Barron's neck pain impaired her ability to shoulder check. She experienced a transient shock-like sensation from the back of her neck to the top of her head if she turned her neck too quickly or a certain way; it would last from 30 seconds to the whole day, depending on what she did to relieve it. She had throbbing neck pain and the "lightening" sensation at least once a week. Her upper back, between her shoulder blades, was "tingly and hot"; she likened this sensation to "an itch" that she could not scratch. It was aggravated by heavy lifting and driving, which would trigger the jolting sensation in her neck.
- [16] Ms. Barron first noticed the onset of headaches, triggered by fluorescent lights, when she transitioned to a temporary light duty position doing paperwork at the Lordco head office after the Accident. She had headaches about three times a week while working there; they usually responded to Advil. They were also triggered by the high-pitched noise of the fly wheel at the Lordco machine shop after she relocated there in June 2016 as a machine shop helper.

- [17] Ms. Barron had her first nightmare about the Accident within a few weeks; she saw the "little boy" with his hands outstretched towards her car and woke up in a panic. This nightmare has recurred 10 to 20 times since the Accident. After the Accident, she experienced driving anxiety and was an uneasy passenger; evidence Ms. Hearsun and former boyfriend, Robert Hillenga, corroborated.

Treatment

- [18] Ms. Barron recalls that she visited her family physician, Dr. Tehmina Wasti, within a day or so of the Accident to report that her head hurt, her neck was stiff, and Ms. Barron thought something had been "missed". On February 5, 2016, Dr. Wasti recorded subjective complaints of left shoulder and interscapular pain and neck pain, stiffness, and limited range of motion. Her treatment plan included a muscle relaxant and a referral for massage therapy.
- [19] On February 18, 2016, Dr. Wasti saw Ms. Barron again and recorded complaints of severe headache pain, treated with Advil up to three times a day. She noted that Ms. Barron was then attending physiotherapy twice a week. Recorded treatment recommendations included continued physiotherapy and the symptomatic use of Advil. On February 24, 2016, Dr. Wasti noted that Ms. Barron had attended that day seeking a "referral for concussion treatment"; she wrote that "to clear her confusion" she "again discussed" with Ms. Barron that she "did not experience [a] concussion". She recorded Ms. Barron's subjective complaints of headaches, neck, left shoulder, upper and lower back pain and her treatment advice, which included physiotherapy, massage, and possible kinesiology sessions.
- [20] Dr. Wasti saw Ms. Barron again on March 3, 2016, recorded complaints of continued neck and upper shoulder pain, and noted that Ms. Barron had started a gradual return to work and was attending physiotherapy.
- [21] On March 16, 2016, gynaecologist, Dr. William Yeung, assessed Ms. Barron, in the presence of her mother, who was noted to have "many questions regarding [her daughter's] physical and mental health". In his consultation report of the same date, Dr. Yeung wrote that he encouraged Dr. Wasti "to refer [Ms. Barron] to a psychiatrist for her depression and suicidal thoughts".
- [22] On March 17, 2016, Ms. Barron again saw Dr. Wasti who recorded subjective complaints of continued headaches, neck, upper shoulder and interscapular pain and stiffness, treated with occasional Advil. Ms. Barron was noted to be attending physiotherapy and massage therapy up to twice a week and doing modified work duties. On March 31, 2016, Dr. Wasti wrote that Ms. Barron continued to struggle with neck and shoulder pain, was attending physiotherapy and massage therapy, and that kinesiology would be starting "soon".
- [23] By April 2016, Ms. Barron's most significant complaint was right shoulder pain. On April 28, 2016, she saw Dr. Wasti who recorded subjective reports of bilateral shoulder and posterior neck pain and noted that Ms. Barron was attending kinesiology sessions twice a week and

physiotherapy once a week. On May 26, 2016, Dr. Wasti wrote that Ms. Barron had lost a friend to an overdose a few days earlier and was "very stressed", was attending physiotherapy, working eight hours of light duties, had started driving outside of work, and was taking occasional pain medication. She prescribed Nortriptyline. On June 16, 2016, Dr. Wasti saw Ms. Barron again, recorded ongoing complaints of neck pain, and noted that she had started active rehabilitation therapy, significantly improved her range of motion, and was not requiring regular pain medication. On July 12, 2016, Dr. Wasti recorded Ms. Barron's complaints of harassment at work and ongoing neck, upper back, and right shoulder pain. She wrote Ms. Barron a requisition for physiotherapy with a different therapist and prescribed gabapentin.

- [24] On November 10, 2016, Dr. Wasti recorded Ms. Barron's complaints of difficulties at work due to ongoing symptoms and an inability to do her regular duties. She provided a requisition for an x-ray of the right shoulder.
- [25] On May 4, 2017, Dr. Wasti provided Ms. Barron with a prescription for Tylenol 3 and noted her plan to arrange for an ultrasound of the right shoulder. On May 23, 2017, she assessed Ms. Barron and recorded her complaints of feeling sad and depressed due to chronic pain and difficulty at work. Dr. Wasti administered a PHQ9 questionnaire and wrote that she "advised [Ms. Barron] to consider going for counselling", noting "Ms. Barron was told by the ICBC to get [a] letter for counselling". The same day, Dr. Wasti wrote a referral letter "to whom it may concern" stating that Ms. Barron "is advised to consider cognitive behavioural therapy to improve her mood symptoms". Ms. Barron did not pursue counselling.
- [26] Ms. Barron remembers having some "injections" but could not recall what was injected; this treatment provided no long term relief and she considered it to be "pointless". Based on her schedule of special damages, she last attended for physiotherapy in Maple Ridge on July 20, 2016; she resumed physiotherapy in Nelson in August 2020 after relocating there in late 2017. In September 2019, Ms. Barron began seeing two counsellors alternately at a cost of \$120/session. They provided her with strategies for managing her anxiety and she found this treatment to be helpful.

Current Condition

- [27] Ms. Barron complains of ongoing neck and right shoulder pain. In cross-examination, she admitted that she has full range of motion in her neck and now experiences neck spasms only every few months. She agreed that neck stiffness does not prevent her from doing anything and that she experiences the "shock-like" sensation in her right shoulder only occasionally.
- [28] Ms. Barron complains of a "heavy feeling" when her arms are over her head or outstretched to the side. She has pain when her right arm is away from her body, when she is pushing or pulling something above her head, or when she is lifting up or engaged in a scrubbing motion. She treats her symptoms with Tylenol 3, Advil, and non-prescription marijuana.

- [29] Ms. Barron sometimes has headache pain (with no corresponding neck tension), triggered by fluorescent lighting; she agreed she has this kind of headache more frequently than those associated with neck tension. Her headaches improved after she stopped working at CIBC and was no longer exposed to fluorescent lights. By August 2019, she was having headaches only once every few months; she has had no headaches since the summer 2020.
- [30] Melatonin gummies help her sleep. She remains an anxious driver and passenger.

Post-Accident Work

- [31] Ms. Barron was advised to take a week off work after the Accident. On her return, she was uncomfortable driving and was temporarily relocated to a desk job at the Lordco head office in Maple Ridge before a helper position was created for her at the Lordco machine shop. She continued with light duties from May 2016 until November 2017, when she accepted a Lordco cashier position in Nelson, BC. She wanted a slower pace and the kind of lifestyle a small town affords.
- [32] Ms. Barron continued her part-time job at Billy Miner Pub until June 2017, transitioning from her server/bartender position to a shift supervisor role, earning the same pay but without tips and working reduced hours.
- [33] Linda Sheppard, the Lordco employee responsible for payroll and ICBC and WorkSafe BC claims, could not recall Ms. Barron making any complaints when she worked at the Lordco head office in Maple Ridge. She thought Ms. Barron seemed happy but conceded their interactions were brief.
- [34] Ron Adams was Ms. Barron's supervisor at the Lordco machine shop. He described her as a "pretty happy girl" and said she did a great job, was an asset to the company, and he was sad to see her leave. Contrary to Ms. Barron's evidence, he denied she was ever forced to drive for work when she was uncomfortable doing so.
- [35] In December 2017, Ms. Barron started work as a cashier at the Nelson Lordco location. Her duties included managing daily cash, cleaning and restocking shelves, and billing customers. She adapted to the challenges this job presented, using a dolly to carry five litre jugs or pails of oil. She left Lordco in November 2018. She was briefly employed from June to September 2018 as a security guard for the Savoy Hotel in Nelson, working the night shift. This job overlapped with her full-time work as a Lordco cashier.
- [36] In November 2018, Ms. Barron took a part-time bank teller position at CIBC in Nelson. She found the fluorescent lighting triggered headaches and that rotating from her computer screen to her printer and cash box resulted in shoulder tightness and pain at the end of her work day. She admitted in cross-examination that this pain responded quickly to Advil. She left this job in August 2020.

- [37] In March 2019, while working part-time at CIBC, Ms. Barron accepted a support worker position with Community Connections ("CC") in Nelson. She worked with one non-wheelchair bound special needs client. Her job duties included teaching him life skills, engaging with him in activities, and driving, cooking, and cleaning. She adapted to her client's unpredictable behaviour when driving by placing him in the backseat, distracting him with a snack, and raising the middle seats.
- [38] After being "let go" from her CC job, Ms. Barron accepted a casual support worker position with Kootenay Society for Community Living ("KSCL") in March 2020. She now works almost full-time hours there. She spoke about this work with enthusiasm and the four clients she assists with affection. She likes her job and manages her duties with minimal adaptations and no formal accommodations. Her only physical tasks include cooking for six people, taking some heavy dishes out of the oven, and putting dishes away. Her position includes driving. According to Ms. Barron, support worker positions outside Nelson mainly involve wheelchair-bound clients and highway driving.

MEDICAL EVIDENCE

Dr. Stephen Anderson, Psychiatrist

- [39] Dr. Stephen Anderson was qualified as an expert in psychiatry, able to give opinion evidence regarding the causation, treatment, management, and prognosis of psychiatric injuries and conditions, including chronic pain from a psychiatric perspective. He assessed Ms. Barron on March 1, 2018, approximately two and a half years before trial, and authored a report dated March 3, 2018.
- [40] Dr. Anderson understood that Ms. Barron left her support care work before the Accident, in part, because of a traumatic hair pulling incident. Thereafter, she reported occasional flashbacks related to this incident when her hair was touched. Based on the information available to him, he concluded that she had no major psychiatric disorders requiring treatment before the Accident.
- [41] Dr. Anderson opined that Ms. Barron developed physical, cognitive, and emotional difficulties as a result of the Accident. He agreed there is no evidence to suggest that any of her ongoing symptoms are due to a mild traumatic brain injury. At the time of his assessment, she reported reduced energy and ongoing headaches and pain in her neck, right shoulder, and mid/upper back. She complained of occasional tinnitus, blurred vision, and sensitivity to noise and light. Ms. Barron acknowledges that she may have suffered some hearing loss, resulting in occasional ringing in her ears, when working at the Lordco machine shop.

- [42] Dr. Anderson observed that Ms. Barron ruminated anxiously about her physical symptoms. Her Pain Catastrophising Scale ("PCS") score (ranking her with other chronic pain clinic patients, including some with life-altering injuries) was in the 99th percentile. Dr. Anderson made the following diagnoses:
- a) A likely persistent somatic symptom disorder ("SSD") with predominant pain of moderate severity (i.e., symptoms that are distressing and/or result in the significant disruption of daily life);
 - b) Kinisophobia (resulting in Ms. Barron avoiding activities that she previously enjoyed due to fear of pain exacerbation); and
 - c) A likely Generalised Anxiety Disorder ("GAD") and Major Depressive Disorder ("MDD") of moderate severity.
- [43] He ruled out ongoing cognitive difficulties due to a mild concussion injury and PTSD.
- [44] In Dr. Anderson's opinion, Ms. Barron's long-term prognosis is guarded. He explained that the longer psychiatric disorders persist, the less likely they are to respond to treatment. In his view, it is difficult to predict how much her emotional function will improve until she has had a course of psychotherapy; he expects that treatment would clarify her psychiatric prognosis.
- [45] Dr. Anderson assumed Ms. Barron was truthful during his interview; he relied on her reports when forming his opinions. While he found no obvious malingering, he admitted in cross-examination that patients have fooled him before and that psychiatry is wholly subjective. He also conceded that he was unaware of the following:
- a) Ms. Barron's pre-Accident gynaecological condition, treated by her with both prescription medication and non-prescription marijuana for pain and to improve sleep (something he agreed he ought to have discussed with Ms. Barron);
 - b) Ms. Barron's debt level and the financial implications of her break-up with Mr. Hillenga (something he agreed were potentially major stressors); and
 - c) The location of Ms. Barron's current residence on a mountain (requiring her to drive a 10 km stretch of road with switchback turns regularly, something he agreed is unwise for a person with driving anxiety).
- [46] Dr. Anderson conducted no collateral interviews. He did not ask Ms. Barron about her pre-Accident academic performance. He admitted in cross-examination that she had a pre-Accident tendency to pick at her skin when anxious and that this was likely both a long-term problem and a strategy to manage stress. He was aware of the reference in a pre-Accident Lordco performance evaluation to her being somewhat emotional at work; he did not know if this indicated a tendency to be overly emotional at work or an appropriate response to being harassed in a male-dominated environment.

- [47] In cross-examination, Dr. Anderson admitted that he understood the boy Ms. Barron reported seeing just before the Accident had placed his hands on the hood of her car. Dr. Anderson agreed that detail influenced his opinion about how traumatic the Accident was for Ms. Barron; he conceded it would likely have been less traumatic for her, absent this event.
- [48] In his factual assumptions, Dr. Anderson made reference to the June 15, 2017 right shoulder ultrasound report which suggested a partial tear of the supraspinatus tendon. In cross-examination, he admitted that he assumed Ms. Barron's main complaint of right shoulder pain was supported by objective evidence of a tear; he now understands that this finding is a normal variant and unrelated to the Accident.

Dr. Lisa Caillier, Physical Medicine and Rehabilitation Specialist

- [49] Dr. Lisa Caillier is a specialist in physical medicine and rehabilitation. She was qualified to give opinion evidence about the diagnosis, treatment, and rehabilitation of physical injuries including chronic pain and functional impairment following musculoskeletal and soft tissue injury. She assessed Ms. Barron on December 5, 2019, and authored a report of the same date. She performed no functional capacity evaluation.
- [50] Ms. Barron reported neck, upper back, and bilateral shoulder pain. Dr. Caillier understood that her initial main complaint was left shoulder pain and that, over time, the right shoulder became "more of an issue". She did not find this evolution to be surprising, explaining that, as one area settles, another can become more predominant.
- [51] Dr. Caillier's examination elicited pain on palpation of the right cervical paraspinals, lateral fibres of the upper trapezius muscles, distal levator scapulae, and along the medial scapular border. She detected pain on palpation of the right teres major and infraspinatus muscles, and muscle spasm on palpation of the right lateral fibers of the upper trapezius muscle. She noted involuntary muscle contraction on palpation of the upper trapezius muscles of the right shoulder in the same areas as Ms. Barron's reports of pain. In cross-examination, she agreed that increased tone does not always correspond with pain.
- [52] Dr. Caillier confirmed that Ms. Barron has a congenital variant in her right shoulder that is unrelated to the Accident. A December 1, 2017 MRI of the right shoulder ruled out the previous suggestion on ultrasound of a partial tear of the supraspinatus tendon; Dr. Caillier agreed this incidental finding is not contributing to Ms. Barron's pain or reduced function.
- [53] In her December 5, 2019 report, Dr. Caillier makes the following diagnoses:
- a) Emotional and psychological symptoms (the treatment of which she defers to mental health professionals);
 - b) Impaired sleep (currently treated by Ms. Barron with melatonin gummies);

- c) Physical deconditioning (described as perpetuating Ms. Barron's neck, back, and shoulder girdle pain and limiting her endurance and tolerance for pre-Accident activities);
- d) Post-traumatic cervicogenic headaches (related to increased muscle tension in the neck region and triggered by fluorescent lighting); and
- e) Chronic, predominantly right-sided, neck, upper back, interscapular, and shoulder girdle pain.

[54] In cross-examination, Dr. Caillier agreed that Ms. Barron's headaches are usually managed effectively with Advil. Apart from Advil and Tylenol, she reported taking no medication for them. Given the chronicity of her post-Accident physical symptoms, Dr. Caillier opines that Ms. Barron will likely never be completely pain-free. She admitted that treatment might minimise the intensity and/or frequency of Ms. Barron's pain. She acknowledged the following improvements in Ms. Barron's condition since the Accident:

- a) Her initial reports of low back pain have resolved;
- b) Her headaches were initially reported to be constant but were occurring only twice weekly at the time of her assessment; and
- c) Her driving anxiety has improved.

[55] In cross-examination, Dr. Caillier agreed that Ms. Barron is generally capable of participating in the activities of her choice.

Jeff Padvaiskas, Occupational Therapist

[56] Jeff Padvaiskas was qualified as an expert in the area of occupational therapy, able to give opinion evidence about his functional capacity evaluation of Ms. Barron and future care costs. He conducted a work capacity evaluation of Ms. Barron on December 4, 2019, and prepared a report dated February 10, 2019. He did no on-site job evaluation and offered a "functional prognosis" rather than a medical diagnosis. He understood that Ms. Barron suffers from myofascial pain with psychological overlay. He considered whether she is capable of the safe and durable performance of duties in occupations within her area of interest.

[57] Mr. Padvaiskas concluded that Ms. Barron demonstrated competitive levels of effort during his testing; accordingly, he considered her test results to be an accurate measure of her physical capacity. He found her self-reports to be "reasonably consistent" with clinical measures of her functional abilities and limitations. She demonstrated active functional range of movement within normal limits except for minimal limitations with lateral flexion (side bending) to the left, minimal to mild limitations on the right, and mild bilateral limitations in shoulder extension (reaching behind the body).

- [58] She demonstrated poor tolerance for reaching her right arm above her head. Her primary limitations related to right shoulder involvement in activity. Her greatest challenges were associated with pain and/or distress, including sustained reaching above the shoulder on the right.

Dr. Simon Horlick, Orthopaedic Surgeon

- [59] Dr. Simon Horlick was qualified as an expert in the area of orthopaedic surgery to give opinion evidence about the cause, diagnosis, and treatment of musculoskeletal injuries. He conducted an independent medical assessment of Ms. Barron on June 10, 2020, and authored a report of the same date. In cross-examination, Dr. Horlick confirmed he is trained to treat both surgical and non-surgical patients with musculoskeletal injuries, noting that only about one or two in ten of his patients are surgical candidates.
- [60] Dr. Horlick reviewed the medical records provided to him, obtained a history from Ms. Barron, and conducted a physical examination. She reported that her immediate post-Accident complaint was the gradual onset of headache and neck pain. At the time of his assessment, she reported improved intermittent headache pain and right paracervical, trapezial, and upper thoracic discomfort. Dr. Horlick acknowledged that the management of headache pain is outside his area of expertise.
- [61] Ms. Barron reported managing her pain with heat and occasional Tylenol 3 (consuming at most 3 tablets in 7 days) and no restrictions with shoulder checking, using her right arm above shoulder level, or awakening from sleep due to pain. He noted that she was independent in all the activities of daily living, capable of performing domestic duties, and had returned to driving (albeit on a somewhat reduced basis).
- [62] Dr. Horlick's physical examination was normal. He identified no elicitable tenderness to palpation over her posterior occiput, posterior spinous processes, or paracervical and trapezial regions, and no elicitable trigger points (i.e., "knots" or nodular areas of tightness in muscles). She demonstrated full and pain-free range of motion of both shoulders and her cervical spine. Bilateral shoulder strength (of internal and external rotation) was normal, with her arms at her sides. There was no obvious shoulder wasting and no deformity, asymmetry, or fasciculations. Tests for shoulder instability elicited no pain. Rotator cuff impairment tests were all within normal limits. Dr. Horlick identified no findings consistent with any bony, disc, or nerve-related pathology of her cervical, thoracic, or lumbar spine. He found no significant pathology of the right shoulder or upper extremity referable to the glenohumeral joint (i.e., the joint connecting the arm to the trunk) and its attendant structures.
- [63] Dr. Horlick diagnosed Ms. Barron's subjective complaints as consistent with myofascial pathology. In cross-examination, he conceded that myofascial pain is a type of soft tissue injury of non-specific origin and that patients can have pain with no objective pathology. In his opinion, Ms. Barron will have no progressive or degenerative impairment or disability.

He said that myofascial injuries recover over time with a "reconditioning musculoskeletal protocol"; in his opinion, further recovery or resolution of Ms. Barron's symptoms is probable.

- [64] While Dr. Horlick agreed it would be appropriate to refer patients with myofascial pain to a physiatrist, he makes many of the same treatment recommendations in his own practice. He conceded in cross-examination that a physiatrist would have more experience following pain patients and that he would defer to such a specialist regarding pain management.
- [65] In addition to his orthopedic surgery practice at Vancouver General Hospital, Dr. Horlick worked for 17 years with WorkSafe BC, assessing and treating patients with orthopedic injuries sustained in the work setting. In his opinion, Ms. Barron is not restricted from any of her pre-Accident recreational or avocational activities. He concluded that her myofascial diagnosis presents neither a work-related disability nor any contraindications to physical or non-physical work, despite her ongoing subjective complaints. He said patients can resolve myofascial pain by working (which does not worsen their condition or make them refractory to further recovery) and with reconditioning and improved strength and tolerance. He noted that patients generally cannot improve their tolerance without exposure to the stimulus in question.
- [66] In cross-examination, Dr. Horlick agreed:
- a) Pain is subjective and cannot be measured objectively;
 - b) Chronic pain requires management while it persists;
 - c) There is a correlation between pain, mood, and motivation and psychiatric injuries tend to intensify the experience of pain;
 - d) Pain can affect good sleep, thereby impairing function;
 - e) Work could trigger pain which might, in turn, impair function;
 - f) Pressure on trigger points can cause pain in seemingly unrelated body parts (although referral pain is distinguishable from nerve pain);
 - g) While some patients with myofascial injury experience pain indefinitely, most do not;
 - h) Patients define the shoulder area differently; and
 - i) If Ms. Barron had repeated a course of Intramuscular Stimulation ("IMS") without favourable results, that would signal a worse prognosis.

CREDIBILITY AND RELIABILITY OF EVIDENCE

- [67] Ms. Barron's claim is founded on subjective complaints which have, in turn, influenced the observations and conclusions of others. Accordingly, an assessment of the credibility and reliability of her evidence is critical. For that reason, I have addressed this issue at the outset.

- [68] The relevant principles to be applied when assessing the credibility of interested witnesses are discussed in the frequently cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.), and Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186. I have applied those principles here.
- [69] Ms. Barron had a consistently poor recollection of material events. She struggled with dates. Her answers often reflected uncertainty. On more than one occasion, she refreshed her memory by reviewing medical records. I accept that the Accident occurred more than four years ago and that time has eroded her memory of some details. However, I found her poor general recollection to be notable. In cross-examination, she admitted to having no independent recollection of when her neck started to bother her after the Accident; at trial, she testified that she had head, neck, and bilateral shoulder pain the day of the Accident after refreshing her memory by reviewing medical records.
- [70] Ms. Barron was not a careful or consistent historian. For example, in cross-examination, she admitted that she might have told Dr. Anderson the boy she saw in the cross-walk before the Accident had placed his hands on the hood of her vehicle, despite conceding that never actually occurred. This detail was significant to Dr. Anderson and it influenced his opinion about the severity of the trauma Ms. Barron had experienced. Another example relates to the pre-Accident hair-pulling incident that occurred at her former work place. At trial, she denied having nightmares about it; in his report, Dr. Anderson noted that Ms. Barron told him she developed nightmares and occasional flashbacks following this incident.
- [71] Ms. Barron told Dr. Caillier that the bumper of her car was "only half on" after the Accident; evidence Ms. Barron repeated at trial but which is not supported by the photographic evidence. Ms. Barron advised Dr. Caillier that she "needs to be the driver" and "could not be the passenger"; those statements are inconsistent with Ms. Hearsum's evidence at trial that Ms. Barron was a comfortable passenger when driven by Ms. Hearsum's former boyfriend. Although Ms. Barron told Mr. Padvaiskas and testified at trial that she had PTSD, she has not been diagnosed with that condition. Psychiatrist, Dr. Anderson, ruled out PTSD. Notably, when discussing her driving anxiety, Ms. Barron did not tell Dr. Anderson that she lived on a mountain and regularly drove a road with multiple switchback turns. In cross-examination, Ms. Barron admitted she takes extra time when driving in the winter and when there is ongoing construction; Dr. Anderson's recorded history makes no reference to the latter qualification. After being presented with her evidence given on discovery in cross-examination, Ms. Barron admitted that she may have overstated her post-Accident weight gain at trial.
- [72] There were multiple inconsistencies between Ms. Barron's evidence on discovery, at trial, and in the histories she provided to the experts retained to assess her. She provided inconsistent information about her pre-Accident activity level: in direct examination, she said she ran laps at the local track for an hour or more before the Accident; on discovery, she said she ran on her street for a couple of blocks, maybe twice a week. In cross-examination, she admitted telling Dr. Horlick that she ran up to 5 km at a time before the

Accident, despite conceding that she did not know how far that was. Ms. Barron advised Dr. Anderson that she was having nightmares about once a month; at trial, she said she has had a total of only 10 to 20 nightmares about the Accident. Ms. Barron told Mr. Padvaiskas that she left her CC job because she did not like this organisation; at trial, she admitted that she was "let go". Her evidence about the damage sustained to the Lordco vehicle in the Accident was objectively exaggerated. Whether conscious or not, it was my general impression that Ms. Barron had a tendency to shade some of her evidence for added effect.

- [73] In her September 27, 2017 consultation report, Dr. Forsyth from Fraser Orthopedic MSK Medicine wrote: "[Ms. Barron] noticed immediate pain in the right shoulder". That history is inconsistent with the history provided by Ms. Barron in the other records in evidence regarding her immediate post-Accident complaints. In cross-examination, Ms. Barron agreed that her right shoulder only became painful over time.
- [74] Ms. Barron said she was pressured to drive when she was not comfortable doing so at the Lordco machine shop; Mr. Adams disputed that evidence. On discovery, Ms. Barron described Mr. Adams as very understanding; she told Dr. Anderson the same thing. When confronted with her discovery evidence in cross-examination, Ms. Barron suggested that she had forgotten Mr. Adams had pressured her to drive at work. I did not find that explanation to be persuasive.
- [75] Ms. Barron had a significantly elevated pain catastrophising score. I conclude that her tendency to catastrophise may have influenced her reports of pain and her perception of disability in her discussions with the experts who assessed her and her evidence at trial. Her subjective complaints were not always supported by more objective assessments of her needs and abilities. For example, while neither Mr. Padvaiskas nor Dr. Caillier identified a current need for her to receive homemaking assistance, she reported 10/10 difficulties with such tasks to Dr. Anderson. Ms. Barron quickly became emotional when giving evidence.
- [76] Ultimately, considering its inherent frailties, I am left with questions about the reliability of Ms. Barron's evidence and have approached it with some caution.
- [77] Ms. Barron met Mr. Hillenga after the Accident. Accordingly, he was unable to compare her pre and post-Accident status. They are no longer a couple; he now lives in Alberta and they see each other infrequently. Some of his evidence regarding the location of her pain was inconsistent with Ms. Barron's; he said her anxiety had become worse over time although Ms. Barron acknowledged it had improved. He offered unsolicited opinion evidence that he was not qualified to give about how Ms. Barron compensated for her right shoulder pain by using her left shoulder, how (based on the massages he provided to Ms. Barron) her muscles were "balancing" and "compensating", and how (based on his own experience in the military and with sports injuries) the human body reacts to injury. Ultimately, I conclude that his ongoing friendship with Ms. Barron may have influenced his evidence and I view it through that lens.

- [78] Ms. Hearsum and Ms. Barron have not lived in the same city since September 2017; they now see each other only once or twice a year. While Ms. Hearsum was limited in her ability to comment on Ms. Barron's current status. I found her to be a straightforward witness.
- [79] I also found Ms. Wine, Ms. Sheppard, and Mr. Adams to be candid and forthright witnesses.
- [80] While Dr. Anderson acknowledged some deficiencies in the factual foundation for his report and Dr. Caillier had a tendency to offer lengthy answers in cross-examination about what is common in her general experience rather than what was specific to Ms. Barron, I found the medical experts to be generally responsive and balanced in their views. They confined their opinions to their respective areas of expertise and made appropriate concessions as necessary. Defence counsel submitted that Dr. Caillier was both biased and an advocate for the plaintiff. I reject that suggestion as unfounded.

CAUSATION

Legal Framework

- [81] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused an injury. The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the de minimus range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [82] The primary test for causation asks: but-for a defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that negligent conduct is only compensable when there is a substantial connection between the injury and the defendant's conduct: *Clements v. Clements*, 2012 SCC 32. Causation must be established on a balance of probabilities before damages are assessed: *Blackwater v. Plint*, 2005 SCC 58 at para. 78.
- [83] The most basic principle of tort law is that the plaintiff must be placed in the same position he would have been but for the defendant's negligence. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person. However, a defendant need not compensate a plaintiff for any debilitating effects of a pre-existing condition that the plaintiff would have experienced anyway: *Athey*, at paras. 32-35. A defendant is responsible for psychiatric injury that is consequential to the physical injury he caused, even if it was unforeseeable: *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 74.

Positions of the Parties

- [84] The parties agree that the Accident caused Ms. Barron's neck pain. Ms. Wine denies the Accident caused Ms. Barron any psychological difficulties, questions the delayed emergence of her right shoulder complaints, and argues her headaches are mostly related to fluorescent light exposure rather than neck strain due to the Accident.

Medical Evidence

- [85] In Dr. Anderson's opinion, Ms. Barron would not likely have developed a constellation of physical, cognitive, and emotional difficulties without the Accident. He noted the absence of any pre-Accident history of counselling or treatment with any psychotropic medications. He was aware of no evidence to suggest that she would have developed a GAD, MDD, or pain disorder if she had not been injured in the Accident.
- [86] Dr. Caillier understood reference to "interscapular" pain in the post-Accident records indicated bilateral shoulder pain. Dr. Horlick conceded that patients often use loose nomenclature to describe the shoulder, shoulder joint, shoulder cuff, shoulder blade, upper back, and trapezius areas.

Analysis and Conclusion

- [87] Dr. Anderson's opinions are subject to some limitations. They are wholly based on Ms. Barron's subjective reports which he accepted at face value. His information about Ms. Barron's pre-Accident mental health was incomplete. He did not explore the nature or severity of her pre-Accident complaints of gynaecological pain or the possible adverse side-effects associated with the medication she used to treat it. He did not interview her mother who is noted to have expressed concerns about Ms. Barron's post-Accident mental health to Dr. Yeung in March 2016. He admitted those omissions were oversights on his part.
- [88] Dr. Anderson's opinion about the traumatic nature of the Accident was influenced by inaccurate information provided by Ms. Barron; contrary to what she told him, the hands of the boy she thought she might hit were never on the hood of her car before impact. Dr. Anderson misapprehended the significance of the benign anatomical variant disclosed as a tear following an ultrasound of Ms. Barron's right shoulder. In cross-examination, he agreed this information suggested an objective cause for her otherwise wholly subjective complaints.
- [89] In cross-examination, Dr. Anderson said it was his impression that Ms. Barron had moderate depression, whether or not she met all the diagnostic criteria for a MDD at the time of his assessment. Notably, he saw her more than two years before trial and his opinions do not reflect current information. He was unaware that she regularly drives a mountain road with multiple switchback turns from her home to work.
- [90] However, there is no evidence that Ms. Barron had any mental health conditions that impaired her function or ability to work before the Accident. There was no evidence from Dr. Wasti, Dr. Yeung, or Ms. Barron's mother at trial. Dr. Yeung's March 16, 2016 consultation report is not in evidence for the truth of any opinions expressed therein. It was open to defence counsel to interview those individuals and to call them at trial. Accordingly, I am not inclined to draw an adverse inference from the plaintiff's failure to do so: *Konnert v. Buonassisi*, 2019 BCSC 1648 at paras. 119-121. It was also open to the defendant to obtain an independent psychiatric assessment of Ms. Barron.

- [91] On the best available evidence, Ms. Barron developed psychological difficulties after the Accident. Whether or not she meets the diagnostic criteria for a MDD, I am satisfied on the evidence of Dr. Anderson and others that those difficulties impair her perception and management of pain and her overall function. I find that the Accident caused symptoms of anxiety and depression. Notably, a plaintiff need not adduce expert medical evidence to prove the existence of a mental injury: *Saadati v. Moorhead*, 2017 SCC 28 at para. 38.
- [92] I appreciate there are no recorded references to Ms. Barron complaining of right shoulder pain for approximately six months after the Accident. However, she initially reported upper back pain, between the shoulder blades. Thereafter, there are recorded references in Dr. Wasti's clinical notes to "shoulder" pain. I accept Dr. Horlick's evidence that patients often use imprecise and inconsistent terminology in describing anatomy in the neck, upper back, and shoulder region. I also accept Dr. Caillier's evidence that symptoms can evolve and new complaints can emerge as acute injuries settle. I find that the Accident caused Ms. Barron's neck, upper back and bilateral shoulder pain (now confined to her right shoulder) and cervicogenic headaches (now largely resolved).

FAILURE TO MITIGATE

Legal Framework

- [93] A plaintiff in a personal injury action has a duty to take reasonable steps to mitigate her loss. The defendant bears the burden of proving: (1) that the plaintiff acted unreasonably in not doing what she asserts ought to have been done; and (2) that her loss would have been reduced or eliminated if those steps had been taken: *Chiu v. Chiu*, 2002 BCCA 618 at para. 57, citing *Janiak v. Ippolito*, [1985] 1 S.C.R. 146 [*Janiak*].
- [94] The defence may also apply when a defendant alleges that a plaintiff could have mitigated her loss by seeking employment accommodation or alternate employment: *Mullens v. Toor*, 2017 BCCA 384; *Hawkins v. Espiloy*, 2014 BCSC 1804 at paras 73-80. Courts are generally slow to find that a plaintiff has acted unreasonably in making good-faith decisions about what treatment and employment steps they will take to address an injury: *Paniccia Estate v. Toal*, 2012 ABCA 397 at para. 86.
- [95] The test is a subjective/objective one, which takes into account the knowledge possessed by the plaintiff in considering the advocated step: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 56. In determining the reasonableness of a refusal of medical treatment, the trier of fact will take into account the degree of risk to the plaintiff from the treatment, the gravity of the consequences of refusing it, and the potential benefits to be derived from it: *Janiak*, at para. 31.

Positions of the Parties

- [96] The plaintiff submits that she acted reasonably in attempting to mitigate her loss following the Accident and that her ability to pursue counselling was limited by her income.
- [97] Defence counsel argues that damages should be reduced by 20% to account for Ms. Barron's failure to mitigate by not following her treating doctors' advice to pursue counselling in March 2016 and May 2017.

Medical Evidence

- [98] Ms. Barron admitted in cross-examination that she did not follow-up on Dr. Yeung's March 2016 recommendation that she seek counselling. She offered two reasons for not doing so: 1) she had not been to a therapist before and did not know if this treatment would be helpful; and 2) she had no money to pay for counselling.
- [99] On May 23, 2017, GP, Dr. Wasti, wrote in her clinical notes: "[Ms. Barron] is advised to consider CBT [cognitive behavioural therapy] to improve her mood sx [symptoms]". Pursuant to their document agreement, the parties agree Dr. Wasti recorded this statement on or about this date. The parties also agree that prescribed treatments as recorded are facts and admissible as such without further proof. Ms. Barron admitted in cross-examination that she did not follow-up on this recommendation. Ms. Barron said she had no recollection of any discussion with Dr. Wasti about going for counselling, ICBC or anyone else requesting a "letter" for counselling, or Dr. Wasti providing a letter to ICBC "for counselling", as noted in Dr. Wasti's clinical records dated May 23, 2017. Ms. Barron suggested it was defence counsel who advised her, off the record at her examination for discovery, to pursue counselling. She denied that ICBC agreed to pay for counselling. Neither party called Dr. Wasti at trial.
- [100] Ms. Barron took no steps to pursue counselling after the Accident until September 2019, when she began seeing two different counsellors at her own expense. She was given techniques to manage her anxiety that she found helpful. She said her situation changed in the fall 2019 because she then had two jobs. However, she had two jobs at the time of the Accident until June 2017, and again after she relocated to Nelson in late 2017 when she was periodically simultaneously employed with Lordco and CIBC or the Savoy Hotel, before securing her support worker position at CC in March 2019. Based on the parties' agreed statement of facts, Ms. Barron's CC position ended in September 2019. She secured her position with KSCL in November 2019.

Analysis and Conclusion

- [101] I do not find Ms. Barron's explanations for not pursuing counselling after the Accident to be persuasive. In March 2016, she was working full-time for Lordco, part-time for Billy Miner, and living with her parents in Maple Ridge. On her own evidence, she had a disposable income, admitting in cross-examination that she periodically spent \$50 to \$75 on professional nail treatments. She later amended this evidence, suggesting that one of her

friends gave her a discount on nail treatments in Nelson in exchange for posting online photos endorsing those services.

[102] On all the evidence, I conclude that Ms. Barron would reasonably have known by March 2016 that she might derive some benefit from psychological counselling. In cross-examination, Dr. Anderson admitted that the benefits of timely psychological counselling in the first six to twelve months after the Accident would have been significant. Accordingly, I conclude that Ms. Barron has failed to mitigate her damages. Ms. Barron catastrophises her pain and has developed an entrenched fear of moving which has resulted in weight gain, physical deconditioning, more limited social engagement, and low mood. I conclude that her enhanced perception of pain negatively affects her overall function.

[103] I conclude that Ms. Barron's emotional response to pain, her pain catastrophisation, and her ongoing anxiety, are her most disabling problems. Drs. Wasti and Yeung recommended that Ms. Barron pursue counselling after the Accident. On the evidence of her own psychiatrist expert, Dr. Anderson, she would likely have derived significant benefit from pursuing timely counselling following the Accident. I conclude that Ms. Barron's damages are appropriately discounted by 20% to reflect her failure to mitigate.

GENERAL DAMAGES

Legal Framework

[104] Non-pecuniary damages compensate a plaintiff for pain, suffering, and the loss of enjoyment of life and amenities. The compensation must be fair to all parties. Fairness is measured against awards in comparable cases; while helpful, these authorities serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[105] The Court of Appeal outlined the non-exhaustive factors to be considered when assessing non-pecuniary damages in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. They include a plaintiff's age, the nature of the injury, the severity and duration of pain, disability, emotional suffering, loss or impairment of life, impairment of family, marital and social relationships, physical and mental abilities, loss of lifestyle, and stoicism, a factor which generally ought not to penalise a plaintiff.

Positions of the Parties

[106] Ms. Barron argues that her age, ongoing chronic pain, and the impact of her injuries on her life ought to attract a general damages award of \$115,000. She relies on the following decisions, which she says involve plaintiffs whose age, injuries, prognosis, and impact on their function and lifestyle are comparable to her own:

- a) *Nadeau v. Toulmin*, 2020 BCSC 866--\$110,000 (awarded to a 44-year old female plaintiff for soft tissue injuries to her neck, shoulder, upper and low back, headache pain, chronic fluctuating low back pain, impaired sleep and function, weight gain, and driving anxiety);
 - b) *Dhadda v. Bradley*, 2019 BCSC 1840--\$110,000 (reduced by 25% for a failure to mitigate and awarded to a 28 year-old female plaintiff for chronic myofascial neck and shoulder pain, anxiety, and depression);
 - c) *Chong v. Nguyen*, 2017 BCSC 1564--\$110,000 (awarded to a 27 year-old female plaintiff for mild-to-moderate soft tissue injuries to her neck and back, an adjustment disorder with depressed and anxious features that aggravated her perception of her physical injuries and impaired her lifestyle and capacity to work); and
 - d) *Smith v. Hsu*, 2020 BCSC 523--\$120,000 (awarded to a 41 year-old female plaintiff for soft tissue injuries to her neck and upper back, aggravation of pre-existing migraine headaches, chronic pain, a mood disorder, and driving anxiety).
- [107] The defendant assesses general damages in the amount of \$20,000 to \$40,000, depending on which injuries are found to be related to the Accident. Defence counsel submits that Ms. Barron suffered a soft tissue injury to her neck and accepts that her cervicogenic headaches are related to the Accident; she argues that Ms. Barron's more significant headaches were related to fluorescent lighting and not the Accident. Defence counsel suggests the following cases are comparable to this one:
- a) *Ludwiczak v. Nguyen*, 2020 BCSC 1202--\$50,000 (awarded to a 35 year-old plaintiff for mild to moderate soft tissue injuries leading to headache and neck pain that resolved within 18 months and chronic low back discomfort with prolonged physical exertion);
 - b) *Cegielka v. Grace*, 2020 BCSC 115--\$40,000 (awarded to the 32 year-old male plaintiff who had mild ongoing neck and back pain that resulted in 3.5 months off work); and
 - c) *Brass v. Von Chudentiz*, 2020 BCSC 343--\$50,000 (including loss of housekeeping capacity, awarded to the 20 year-old plaintiff with ongoing upper back and left shoulder pain, likely to be more manageable with active rehabilitation, affecting her work, social, and recreational life).

Analysis and Conclusion

- [108] While the cited authorities provide some guidance, none is determinative. Each case must be decided on its own unique facts. Notably, none of the authorities relied on by defence counsel involve plaintiffs with psychological conditions.
- [109] Ms. Hearsun described Ms. Barron as "bubbly", outgoing, and free-spirited before the Accident; she said Ms. Barron did what she wanted and always had fun. Ms. Hearsun remembers her as a confident and relaxed driver who would "go with the flow" of traffic and was a bit of a speed demon. Mr. Hillenga, who met Ms. Barron after the Accident, knows

her as a sweet, kind, and happy person. He agreed she is an anxious driver and passenger, particularly if travelling unfamiliar territory, challenging road conditions, or at highway speed. However, Ms. Barron still drives in the mountains, in the winter, and regularly for work. She is now a slower and more cautious driver. She has not relocated despite the fact that living on a mountain regularly requires her to drive a road with switchback turns. Mr. Hillenga agreed that Ms. Barron's driving confidence has improved since the Accident; he is unable to comment on her driving abilities before the Accident. He described sleeping in the car while Ms. Barron drove them to a hot spring in June 2017; I infer from that evidence that Mr. Hillenga has a reasonable degree of confidence in Ms. Barron's driving abilities. He also said that he was able to "change Ms. Barron's mindset" when she was a passenger with simple distraction techniques.

- [110] Ms. Barron wears clothing with front fasteners to avoid the need to reach overhead. She lives in a small apartment in Nelson. She and Mr. Hillenga both agreed it is well suited to her: it has short counters and no high cupboards, thereby reducing the need for overhead reaching. With pacing and minor accommodations (such as using a squeegee on a stick to clean windows, placing items where they are easy to reach, and spreading household tasks out over the week) she is able to do her own housework. She squats to lift and carries heavy items close to her body. "Maybe once a year" her friend, Sarah, helps her clean the oven and ceiling fans. Mr. Hillenga agreed Ms. Barron is capable and can do a lot of things. Ms. Barron complains that she has trouble chopping vegetables, shredding cheese, and actions involving a scrubbing motion.
- [111] In Dr. Caillier's opinion, Ms. Barron currently requires no household assistance. Mr. Padvaiskas agreed Ms. Barron is currently able to manage her personal care and homemaking needs.
- [112] On Ms. Barron's own evidence, she has a full range of motion in her neck. Neck pain does not preclude her from engaging in any activities. She still has a circle of friends and continues to do things she enjoys, although not always to the same extent as before the Accident. She has not had any headaches since the summer 2020. Despite complaints of ongoing right shoulder pain, she has been working full-time since the Accident, often in two jobs concurrently, and remains quite functional. I accept that she has developed an entrenched heightened response to pain.
- [113] Ms. Barron does not seek a separate award for the loss of housekeeping capacity. I have considered her injuries and her corresponding physical and mental limitations in assessing general damages, including those which impair her ability to perform domestic chores: *Riley v. Ritsco*, 2018 BCCA 366; *Liu v. Bains*, 2016 BCCA 374.

[114] Taking into account Ms. Barron's age, physical injuries, psychological difficulties, resulting limitations, level of function, the duration of her symptoms, her guarded prognosis, and the chronicity of her complaints, I assess general damages, including damages for a modest loss of housekeeping capacity, in the amount of \$85,000. After applying a discount of 20% for a failure to mitigate, general damages total \$68,000.

SPECIAL DAMAGES

[115] Ms. Barron seeks to recover special damages of \$4,876 to cover the costs of obtaining doctors' notes required by her employer, a theraband, medications, physiotherapy, kinesiology, massage therapy, IMS treatments, mileage, and public transit. She also seeks to recover the cost of her airfare to attend her examination for discovery in Vancouver.

[116] The defendant disputes special damages claims for public transit after May 2016 when Ms. Barron returned to driving and full-time work, mileage to attend physiotherapy (as Ms. Barron said she walked to those appointments), mileage for her attendance at three IMEs in connection with this action, and airfare costs related to her attendance at an examination for discovery. On that basis, the defendant resists paying \$2,389.43 in special damages. In reply, plaintiff's counsel conceded that her special damages claim is appropriately discounted by \$649 to deduct mileage for her attendance at an IME by Mr. Padvaiskas, thereby reducing her special damages claim to \$4,227.

[117] I award Ms. Barron the cost of public transit up to May 2016 in the amount of \$104 and \$267.40 for mileage. Ms. Barron's costs of attending IMEs and her examination for discovery are recoverable as disbursements in this action and I have not awarded those costs as special damages.

[118] I award special damages as follows:

- a) Physiotherapy: \$848
- b) Kinesiology: \$252
- c) Medications (as set out in Exhibit 16, not including Visanne): \$126.25
- d) Counselling: \$492
- e) Massage Therapy: \$283.50
- f) Doctors' Notes: \$80
- g) Theraband: \$6.00
- h) Public transit to May 2016: \$104
- i) Mileage: \$267.40

Total: \$2,459.15

PAST LOSS OF INCOME

Legal Framework

- [119] Compensation for past loss of earning capacity is based on what Ms. Barron would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [120] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for net past income loss only. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. The trial judge has the discretion to determine what period(s) of time are appropriate for the determination of net income loss: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106 at paras. 181-186 [Lines]. When exercising this discretion, a trial judge must remember that Ms. Barron is to be returned to the position she would have been in if the accident had not occurred: *Lines*, at paras. 185-186.
- [121] The burden of proof regarding actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. Ms. Barron is not required to prove these hypothetical events on a balance of probabilities, she only needs to raise a real and substantial possibility. Future or hypothetical possibilities will be considered, if they are real and substantial and not mere speculation: *Gao v. Dietrich*, 2018 BCCA 372 at paras. 34-40.

The Evidence

- [122] Ms. Barron missed one day of work after the Accident, thereafter returning to her Lordco parts delivery position. She had pain in her neck and upper trapezius area. She recalls being unable to shoulder check properly and needing to turn her whole body in order to do so. She says that she was scared, less focused than usual, and felt unsafe driving. She had others help her load and unload Lordco parts in and out of her car if they were heavy. Her GP, Dr. Wasti, gave her a note advising her to take a week off work. Thereafter, she transitioned to a desk job and then to the machine shop general helper position doing light duties, before relocating to Nelson.

Positions of the Parties

- [123] Ms. Barron seeks to recover past income loss in 2016 and thereafter damages based on an alleged loss of opportunity to earn income. Ms. Wine admits \$2,000 of gross past income loss.

Analysis and Conclusion

2016 Income Loss: Lordco Auto Parts

- [124] At the time of the Accident, Ms. Barron was working full-time for Lordco earning \$11.50/hour. She calculates her gross past income loss in 2016 by subtracting her expected hours of work (based on historical hours worked for Lordco) from actual hours worked. On that basis, she calculates a loss of 316.27 hours to July 10, 2016, when she re-located to the machine shop in June or July 2016. Based on her hourly rate of \$11.50, she seeks past income loss from Lordco in 2016 of \$3,637.11.
- [125] Defence counsel assesses gross past wage loss of approximately \$2,000, based on the CL15 claim form (indicating 167 hours of missed work) which Ms. Barron accepted in cross-examination, although her answer reflected some uncertainty.
- [126] I conclude that the most reliable evidence of Ms. Barron's lost hours of work in 2016 are the Lordco pay records. On that basis, I award gross past income loss from Ms. Barron's employment with Lordco in 2016 of \$3,637.11. This figure must be discounted for tax and I leave it to counsel to do so.

2016 Loss of Income: Billy Miner Pub

- [127] By the time of the Accident, Ms. Barron had worked as a server at Billy Miner Pub since June 2015, earning both an hourly wage and tips. She argues that, because of the Accident and her related functional limitations, she transitioned to a "shift supervisor" role, earning the same rate of pay but no tips. Based on the parties' agreed statement of facts, Ms. Barron earned \$2,093 in "other income" (i.e., tips) over approximately seven months in 2015.
- [128] Ms. Barron's pay records from June 2015 to June 2017 (when she left Billy Miner) are in evidence. Based on those records, Ms. Barron worked an average of 38.46 hours per pay period before the Accident (while also working full-time for Lordco). After the Accident, her average hours per pay period with Billy Miner dropped to 20.3 in 2016. She argues that, given her demonstrated work ethic and history of working more than one job simultaneously, this reduction in hours can only be explained by the Accident. A comparison of her average hours worked per pay period at Billy Miner before the Accident to those she worked after the Accident, indicates an average of 18.16 fewer hours per pay period after the Accident in 2016.
- [129] Up to September 15, 2016, Ms. Barron's wage with Billy Miner was \$9.20 per hour. Accordingly, she calculates her loss for this period to be \$2,673.15 (\$9.20 per hour x 18.16 hours x 16 pay periods). Thereafter, the pay records indicate her pay increased to \$9.60 per hour. Accordingly, she calculates her income loss for this period to be \$1,220.35 (\$9.60 per hour x 18.16 hours x 7 pay periods).

- [130] Finally, Ms. Barron argues that she lost tip income in 2016 that she earned as a server in 2015. But for the Accident, she says she would have continued serving at Billy Miner through 2016. Her monthly tip income in 2015 was \$299 (\$2,093/7 months worked in 2015). For the eleven months post-Accident, she seeks \$3,289.00 (\$299 x 11 months post-Accident in 2016). She calculates her cumulative past loss of income at Billy Miner in 2016 to be \$7,182.50.
- [131] Defence counsel disputes Ms. Barron's claim for past wage loss from her employment at Billy Miner Pub, arguing it is unclear on her evidence whether she worked more or less hours after the Accident and how tip income was determined.
- [132] Ms. Barron testified that she worked fewer hours at Billy Miner after the Accident because of her injuries and that she was not eligible to earn tips in her supervisory role. I am satisfied that she suffered a loss of income in 2017 due to the Accident. I find the pay records are the most reliable evidence of this loss. I award \$7,182.50 for gross past income loss in 2017 and leave it to counsel to discount this figure for tax.

Past loss of Income Earning Capacity: 2017-2020

- [133] Ms. Barron seeks additional damages of \$16,707 for an alleged past loss of income earning capacity. She argues that, but for the Accident, she would have left Lordco in early 2017 and transitioned to full-time employment as a support worker, earning an income at least equal to her what she now makes in her position with KSCL. She argues this claim is supported by the following evidence:
- a) She had an interest in this kind of work and the qualifications and experience required to do it;
 - b) At the time of the Accident, she considered her Lordco job to be a short-term break from her SEA work;
 - c) Soon after moving to Nelson, she applied for work as a teaching assistant but learned that she required volunteer hours and local references to be competitive;
 - d) Absent the Accident, she was not restricted in doing SEA work;
 - e) Her only limitations in accessing SEA work in 2016 and 2017 were her emotional condition and inability to perform the most physically demanding aspects of this job as a result of the Accident; and
 - f) Ms. Barron has been employed as a community support worker, at least part-time, since March 2019.

[134] Plaintiff's counsel argues that, but for the Accident, she would have transitioned into full-time SEA work in 2016. He suggests the plaintiff has been appropriately conservative by calculating this claim from 2017 to 2020 because: (a) Ms. Barron was not attempting to find SEA work at the time of the Accident; and (b) she does not account for potential promotions or seniority-based wage increases with KSCL (or an alternative employer), which he argues would likely have occurred as she gained experience, absent the Accident.

[135] Ms. Barron now earns \$20.00 per hour and typically works 36 hours per week; this translates into an annual income of \$37,740. Ms. Barron earned \$28,935, \$35,529, and \$32,049 in the years 2017 to 2019, respectively. On that basis, she calculates damages for past loss of income earning capacity of \$16,707, as set out below.

Year

Projected Earnings (\$20 per hour, 36 hours per week)

Actual Earnings

Total Gross Loss

2017

\$37,740

\$28,935

\$8,805

2018

\$37,740

\$35,529

\$2,211

2019

\$37,740

\$32,049

\$5,691

TOTAL:

\$16,707

[136] The defendant disputes this claim.

[137] Ms. Barron did not suggest that she planned to reposition herself in the workforce by returning to SEA work within any particular timeframe, absent the Accident. She was taking no steps to return to SEA work at the time of the Accident.

[138] Accordingly, I conclude that to award damages for past loss of income-earning capacity on this basis would be speculative and I decline to do so.

2017 Loss of Income: Billy Miner Pub

[139] As an alternative to her claim for past loss of income-earning capacity, Ms. Barron seeks lost tips and income from Billy Miner from January 2017 to May 2017, inclusive. In 2017, she worked 184.7 hours over 11 pay periods, an average of 16.79 per pay period. In 2017, Billy Miner moved to a 26 pay-period year from a 24 pay-period year in 2015. Plaintiff's counsel calculates Ms. Barron's adjusted pre-Accident hours worked per two-week pay period to be 35.5 (38.46 hours x 24/26). Subtracting average hours worked per pay period at Billy Miner before the Accident from those worked in 2017, indicates an average of 18.71 fewer hours per pay period in 2017 compared to those worked before the Accident. Accordingly, plaintiff's counsel argues that Ms. Barron lost earnings from Billy Miner in this period of \$1,975.78 (\$9.60 per hour x 18.71 hours x 11 pay periods). He calculates lost tip income lost in 2017 of \$1,495.00 (\$299 x 5 months) for a total past income loss from Billy Miner of \$3,470.78.

[140] Defence counsel argues that the evidence on this matter is insufficient to support this claim.

[141] Ms. Barron did not say that her hours of work at Billy Miner were guaranteed. This was a part-time position. However, on her evidence, she worked fewer hours at Billy Miner and lost tip income after the Accident due to her injuries. That statement is supported by the pay records in evidence. I conclude that the Billy Miner pay records are the best evidence of her past income loss from this employment. Accordingly, I award \$3,470.78, representing a loss of earnings and tip income from Billy Miner in 2017.

[142] In summary, I award gross past income loss as follows:

a) Lordco: 3,637.11

b) Billy Miner Pub:

i. 2016: \$7,182.50

ii. 2017: \$3,470.78

Total: \$14,290.39

[143] I leave it to counsel to discount this figure for tax and then by 20% for a failure to mitigate.

FUTURE LOSS OF INCOME

Legal Framework

- [144] A claim for loss of future earning capacity raises two key questions: 1) has Ms. Barron's earning capacity been impaired by her injuries; and, if so 2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiv* (1985), 26 B.C.L.R. (3d) 353 (S.C.) [Brown]; *Pallos v. Insurance Corp. of British Columbia* (1995), 100 B.C.L.R. (2d) 260 (C.A.) [Pallos]; *Pett v. Pett*, 2009 BCCA 232 at para. 19. The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18 [Rosvold]. To the extent possible, a plaintiff is to be returned to the position she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185. The court's essential task is to compare the plaintiff's likely future working life with and without the Accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [145] There are two possible approaches to the assessment of loss of future earning capacity: the "earnings approach" from *Pallos*, and the "capital asset approach" in *Brown*. Both are correct. The "earnings approach" is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. When the loss "is not measurable in a pecuniary way", the "capital asset" approach is more appropriate: *Perren*, at para. 12. The earnings approach involves a form of math-oriented methodology such as: i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or ii) awarding the plaintiff's entire annual income for a year or two: *Pallos*; *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 233 [Gilbert].
- [146] A court must consider all relevant factors when making an award for the loss of a capital asset, including:
- [1] whether the plaintiff has been rendered less capable overall from earning income from all types of employment;
 - [2] whether the plaintiff is less marketable or attractive as an employee to potential employers;
 - [3] whether the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
 - [4] whether the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market. (*Rosvold*, at para. 10)

Positions of the Parties

- [147] Ms. Barron seeks \$120,000 for future loss of income-earning capacity. She says this figure represents less than 7% of her projected without-Accident future earnings (assuming a present value of \$1,750,000). Plaintiff's counsel submits that such an award, which equals approximately 2 years of estimated average future earnings, fits within the generally accepted approach of using a factor of annual earnings as a rough tool to guide the assessment of the lost capital asset.
- [148] Ms. Barron says she has lost the ability to perform frequent or heavy overhead work and forward reaching with her arms outstretched on a durable and sustainable basis. Plaintiff's counsel argues that this will restrict Ms. Barron's future employment options and render her less capable overall from earning income or taking advantage of all types of job opportunities. He suggests her experiences at various "non-support" jobs since the Accident demonstrate the real and substantial possibility that, but for the Accident, she would have accessed any number of jobs with varying physical demands. Plaintiff's counsel submits that the most physically demanding opportunities are now either closed to Ms. Barron or would require varying degrees of accommodation.
- [149] Plaintiff's counsel argues that Ms. Barron satisfies all the criteria in Rosvold and that her loss is appropriately assessed based on the capital asset approach given her relatively young age and limited employment history. He suggests that she required significant accommodation at Lordco in 2016 and 2017, noting that the new job of machine shop helper was necessarily created for her in Maple Ridge. Despite this "light duties" position, she found certain tasks (including cleaning the machines, light sweeping, light vacuuming, and loading the garbage dumpster) triggered right neck, upper back, and shoulder pain. Her driving anxiety was accommodated at the Lordco machine shop. Plaintiff's counsel argues that Ms. Barron will continue to struggle with these tasks and is therefore less marketable or competitively employable than if she were healthy.
- [150] Ms. Barron required some accommodation at Billy Miner, where she worked as a "shift supervisor" until June 2017. Plaintiff's counsel asserts she would face the same limitations doing server work now. At Lordco's Nelson branch, where she worked as a cashier, Ms. Barron described difficulties transferring and restocking heavy jugs of oil. She claims she was less able to manage two consecutive jobs when she worked as a security guard at the Savoy Hotel in Nelson in conjunction with her Lordco work in 2018.
- [151] Finally, plaintiff's counsel argues that while her CC and KSCL work has not been particularly physical (apart from some cooking and cleaning which she is able to manage), Ms. Barron has so far avoided the full spectrum of physical support worker tasks, including assisting wheelchair-bound clients. Ms. Barron said that she would feel unsafe moving and transferring wheelchair-bound clients because of the strain it would potentially place on her right shoulder and neck. On her evidence, assisting wheelchair-bound clients forms a core aspect of the overall job description for a community support worker at CC and KSCL.

Accordingly, plaintiff's counsel argues Ms. Barron is less capable of earning income in all areas of employment that were open to her before the Accident.

[152] Plaintiff's counsel submits that the following factors are appropriately considered in assessing Ms. Barron's future loss of capacity claim:

- a) Her young age and future working life of 36 to 41 years;
- b) Her prognosis (which suggests she will have ongoing right shoulder pain and related functional limitations when using her right arm away from her body);
- c) Her work history (which demonstrates a career path that is now limited by her Accident-related injuries and suggests that she might have considered alternate work);
- d) The possibility that she might lose her KSCL job and be required to seek alternate employment; and,
- e) Her suggested without-Accident earning capacity based on
 - i. Average earnings for BC workers with a high school diploma or equivalency certificate of \$53,207 per year, with a present value to age 68 of \$1,562,402 ($\$53,207 \times 29.3646$); and
 - ii. Average earnings for BC workers with a college or other non-university certificate or diploma of \$61,681 per year, with a present value to age 68 of \$1,811,237 ($\$61,681 \times 29.3646$).

[153] Defence counsel denies Ms. Barron has established a real and substantial possibility of future events leading to an income loss. She argues that Ms. Barron demonstrated the ability to sit for extended periods at trial, has continued to work in different jobs with varying demands since May 2016, and has not established an ongoing disability resulting from the Accident. She submits that there is no evidence Ms. Barron cannot do the heavier tasks associated with a SEA position with the assistance of a lift or sling.

Medical Evidence

[154] In his March 3, 2018 report, Dr. Anderson opines that Ms. Barron's vocational functioning was primarily affected by her physical symptoms, including her fatigue and pain. He described her as emotionally fragile and less likely to cope with stressful work situations, noting that she has experienced cognitive difficulties due to pain, fatigue, and emotional problems. Dr. Anderson opines that Ms. Barron will likely be able to continue working at her present job (a cashier at the time of his assessment) unless her physical, cognitive and/or psychiatric symptoms worsen or work stressors increase. He concluded that her vocational options have likely narrowed as a result of her ongoing physical, cognitive and emotional symptoms following the Accident and, as long as they persist, she will not likely be able to work at a physically demanding job or one involving high stress or requiring strong cognitive skills.

[155] In her December 5, 2019 report, Dr. Caillier opines as follows:

- a) Ms. Barron is capable of working full-time as a bank teller;
- b) She is capable of working as a home support worker with demands comparable to her current position; and
- c) She is likely capable of returning to work as a parts delivery driver if she benefits from treatment recommendations to manage her physical and emotional symptoms.

[156] Mr. Padvaiskas concluded that Ms. Barron is capable of working full-time in the sedentary, select light, and lower medium strength categories (based on Department of Transportation definitions) or limited select light and medium strength tasks (based on National Occupational Classification criteria). In his December 4, 2019 report, he offered the following opinions:

- a) Ms. Barron is not suited to work as a delivery driver, does not fully meet the strength requirements of this job, and, in his view, her primary limitation is psychological and related to fear and avoidance of driving;
- b) Work capacity testing indicates she meets the demands of a cashier position (with occasional assistance to move or carry some heavy items or to break down boxes to carry lighter portions);
- c) While she does not meet the full demands for a support worker position, there are jobs (like her CC and KSCL positions) that involve reduced physical demands that she has tolerated;
- d) Ms. Barron demonstrates the ability to perform the work of a bank teller;
- e) She is able to perform the basic demands of a teacher's assistant's job but her full suitability would be influenced by the potentially physical nature of this work; and
- f) Her reported poor tolerance for fluorescent lighting might affect her suitability for work in certain environments.

Analysis and Conclusion

[157] Ms. Barron is relatively young and did not have an established career before the Accident. She had completed an SEA course but did not have the required volunteer experience necessary to obtain work as a teacher's assistant in the Nelson School District. After taking a break from her SEA work, she secured a variety of entry level jobs. She has now returned to working with special needs individuals and found a job that she likes assisting clients with varying needs. She does this work with minimal adaptations and no formal accommodations. She is now earning more income than she was before the Accident.

- [158] Plaintiff's counsel argues that Ms. Barron was unable to work concurrently at Lordco and at the Savoy Hotel in Nelson as a security guard, suggesting this was because of her Accident-related symptoms and reduced stamina. However, Ms. Barron worked from approximately 10 pm until 3 am at the Savoy Hotel, sometimes following this work with a shift at Lordco the next day. I conclude that doing so would likely have been fatiguing for her, absent the Accident.
- [159] Ms. Barron argues that, while she managed her CIBC work, some aspects of it triggered or intensified her right shoulder pain. However, in cross-examination, she admitted that this pain typically responded to Advil within about 30 minutes. When asked why she did not take Advil with her to work, she said that sometimes she forgot to do so.
- [160] Notably, Ms. Barron is managing her work-related driving duties. Given her choice to rent accommodation on a mountain side, which requires her to drive switchback roads regularly, I conclude that her driving anxiety is less disabling than she suggested at trial.
- [161] In my view, Ms. Barron's assessment of the present value of her estimated lifetime earnings overstates her loss. It is based on annual earnings which significantly exceed her current income and her earnings at the time of the Accident. Her 2019 T4 (which includes her CC and KSCL support worker income) was \$32,049.
- [162] While I accept that Ms. Barron has satisfied the criteria in Brown and that there is a real and substantial possibility she may be less competitive in her ability to earn income in the future, I conclude her loss of capacity is relatively modest. On the medical evidence, she is limited by her ability to use her right arm to reach overhead and in front of her body. While I accept that she may have some degree of chronic pain indefinitely, she is currently managing well in her support worker job. There is a real and substantial possibility that she may be able to mitigate any difficulties transferring patients by using adaptive aids such as a sling or lift. Based on her CV, she has those skills. I also find there is a real and substantial possibility that, with the kind of cognitive behavioural therapy Dr. Anderson said would have offered Ms. Barron significant benefit if she had pursued it earlier, she will be able to improve her symptoms of anxiety and depression and her perception and management of pain which will, in turn, moderate her mood and improve her overall function.
- [163] I assess Ms. Barron's loss of future income-earning capacity in the amount of \$50,000. This figure is equal to almost twice her 2019 annual T4 income. Once discounted by 20% to reflect my finding that she has failed to mitigate, damages for the loss of future income earning capacity total \$40,000. I am satisfied this figure is reasonable and fair to both parties.

FUTURE COST OF CARE

Legal Framework

- [164] A plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition to the extent possible. When not possible, the court must strive to ensure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Gignac v. ICBC*, 2012 BCCA 351 at paras. 29-30, citing *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.). Where a plaintiff has not used, sought out, or resisted a service or treatment in the past, it will usually be difficult to justify a claim for that service: *Warick v. Diwell*, 2018 BCCA 53 at para. 55.
- [165] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the plaintiff's specific care needs. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case must be determined on its particular facts: *Gilbert*, at para. 253. An assessment of damages for cost of future care is not a precise accounting exercise: *Krangle v. Brisco*, 2002 SCC 9 at para. 21; *Uhrovic v. Masjhuri*, 2008 BCCA 462 at paras. 28-31.

Positions of the Parties

- [166] Ms. Barron seeks \$56,823 for future care costs including occupational therapy, physiotherapy, active rehabilitation therapy, massage therapy, a lifetime gym pass, counselling, and various medication costs. She submits that these resources will maximize her function and promote her continued health, function, and well-being. Plaintiff's counsel submits that an expert need not testify about the medical necessity of each and every item claimed, citing *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39; *Aberdeen v. Zanatta*, 2008 BCCA 420 at paras. 43 & 63.
- [167] Defence counsel resists an award for future care, saying that such costs are, at most, nominal, even if it is found that Ms. Barron has ongoing complaints which could be alleviated with further treatment. She observes that Ms. Barron's condition has improved despite having had almost no treatment since 2017.

Medical Evidence

- [168] Dr. Anderson opines that physical and emotional factors interact to create Ms. Barron's pain condition. He recommended that she undergo assessments by a neurologist for headache pain, an orthopedic surgeon for any ongoing right shoulder pain, an occupational therapist for consideration of ergonomic interventions, cognitive remediation strategies, homemaking assistance, functional capacity, psychiatry, vocational assessments, and treatment for 5 to 6 weeks at a comprehensive multidisciplinary pain clinic. In cross-

examination, he agreed that her attendance at a pain clinic now is unlikely to reduce her pain significantly. Apart from attending for a FCE and physiatry assessment arranged by her counsel, Ms. Barron has followed-up on none of these recommendations since they were made almost three years ago.

[169] Mr. Padvaiskas noted that Ms. Barron has had essentially no treatment since 2017; she was pursuing massage therapy and counselling when he assessed her in December 2019.

[170] In her December 5, 2019 report, Dr. Caillier made the following treatment recommendations:

- a) Ongoing monitoring to ensure sleep is optimised;
- b) Physical reconditioning to increase the strength of neck, upper back, and shoulder girdle muscles, possible further trials of myofascial trigger point injections, an ergonomic work space, postural mini breaks, and treatment with Cambia (an anti-inflammatory), Advil or Tylenol;
- c) Implementation of chronic pain self-management strategies available through online courses regarding;
 - i. possible myofascial trigger point injections to the neck or shoulder girdle to improve pain management;
 - ii. Increased activity and participation in a regular strengthening endurance training program; and
 - iii. An ergonomic work set-up and mini postural breaks as needed at work.

Analysis and Conclusion

Occupational Therapy

[171] Ms. Barron seeks \$3,000 for occupational therapy. Mr. Padvaiskas recommended 15 to 20 hours of occupational therapy to provide support regarding home, work, and community functional demands at a rate of \$118/hour, plus 25 to 30% for therapist travel. Defence counsel says Ms. Barron does not require the assistance of an occupational therapist as she is currently functioning in her social and vocational life.

[172] On the evidence, Ms. Barron is encountering no significant difficulties functioning in her home, at work, or in her community. She is independent in all the usual activities of daily living. She manages her own housework. She functions at work with minimal adaptations and has worked mostly full-time since the Accident. She does not work in an office setting and it is unclear on the evidence what, if any, ergonomic alternations might be made to her workplace.

[173] I am not persuaded that Ms. Barron requires the support of an occupational therapist. However, if her work or home situation changes, she might benefit from this kind of professional input. Accordingly, I award a modest contingency fund in the amount of \$1,500, to be accessed by Ms. Barron over her lifetime as her future needs dictate.

Physiotherapy

[174] Ms. Barron seeks \$1,750 for physiotherapy.

[175] Mr. Padvaiskas recommended 12 to 15 physiotherapy sessions to identify exercises and treatment options at a rate of \$63 to \$190 for 20 to 60 minute sessions (based on the BC Physiotherapy Association's recommended fee guidelines) or \$75 to \$100 per session (based on his experience).

[176] Defence counsel argues that, because Ms. Barron was not forthcoming about her pre-Accident activity levels or gym attendance, and since this information was not considered by any expert, damages for future physiotherapy or kinesiology costs ought to be denied. Alternatively, she relies on the evidence of Dr. Caillier and Mr. Padvaiskas that Ms. Barron requires either physiotherapy or kinesiology but not both.

[177] Ms. Barron told Dr. Caillier that she "hated" physiotherapy and found it to be a "waste of time" as it "did not help" and "was not working". Similarly, she told Mr. Padvaiskas that she did not find physiotherapy to be helpful.

[178] I have awarded no costs for future physiotherapy. Ms. Barron has had this treatment in the past, reported it to be of no benefit, and pursued no physiotherapy between July 2016 and August 2020. On all the evidence, I am not persuaded that she would access this therapy in the future or that she requires funding for both physiotherapy and a supervised exercise program.

Active Rehabilitation Therapy

[179] Ms. Barron seeks \$5,727 for enrollment in a supervised exercise program.

[180] Dr. Caillier recommends that Ms. Barron address her physical deconditioning by participating in a regular exercise program, suggesting she would benefit from working with a kinesiologist or personal trainer to address her fear of pain. She recommends 20 - 22 sessions with a personal trainer or kinesiologist and 6-8 kinesiology or personal training sessions per year for the next three years and one to two kinesiology or personal training sessions on an ongoing basis. Dr. Anderson recommends enrollment in a supervised exercise program under the direction of a kinesiologist or personal trainer.

[181] Mr. Padvaiskas estimated the cost of active rehabilitation therapy to be \$75/session. Dr. Horlick recommended access to a kinesiologist who could attend with Ms. Barron at a gym to ensure her safe, effective, and appropriate use of musculoskeletal training equipment. In cross-examination, he agreed that 24 sessions of physiotherapy and 12 sessions of kinesiology would be reasonable.

[182] I accept that Ms. Barron could benefit from an active rehabilitation program. However, I am not persuaded she requires the lifetime support of a kinesiologist or personal trainer as a result of the Accident. I conclude that, once she has established an exercise program, she can implement what she has learned on her own. I award \$3,503.52, equal to the present value of 24 sessions with a kinesiologist or personal trainer at \$75/session for the next two years:

- a) Year one-\$1,764.72 for 24 sessions with a kinesiologist or personal trainer @ \$75/session (discounted to present value based on the 0.9804 multiplier provided by plaintiff's counsel); and
- b) Year two-\$1,738.80 for 24 sessions @ \$75/session (discounted to present value based on the multiplier of 0.966 (1.9416 - 0.9756) provided by plaintiff's counsel).

Massage Therapy

[183] Ms. Barron seeks \$17,514 for ongoing massage therapy.

[184] Mr. Padvaiskas recommends massage therapy to manage pain flares at a rate of \$80 to \$100 per session but does not specify frequency or a recommended number of sessions. Dr. Caillier suggests 4-6 massage therapy sessions per year to assist with pain flares, recognising that Ms. Barron's need for this treatment will decrease over time. Dr. Horlick recommends she be given access to massage therapy during a trial of IMS (for synergistic benefit). He also recommends active rehabilitation therapy, together with conjunctive massage therapy (once a week for two months, followed by monthly sessions for a few months thereafter, for a total of approximately 10 sessions).

[185] Massage therapy is not curative and provides Ms. Barron with temporary, short-term symptomatic relief only. On her own evidence, it provides only slightly longer lasting relief than her personal massage chair.

[186] The evidence does not support an award for ongoing massage therapy for life. If Ms. Barron engages in cognitive behavioural therapy to improve her perception and management of pain and pursues an active rehabilitation program to address her physical deconditioning and to improve her strength, her condition may improve. The evidence of her own experts does not support ongoing passive therapies (including massage) as beneficial.

[187] I award a contingency fund in the amount of \$2,500 for Ms. Barron's use as necessary to fund massage therapy to assist in managing acute flares in her pain and for short-term synergistic effect in conjunction with active rehabilitation therapy and a possible repeat trial of IMS, as recommended by Dr. Horlick.

Gym Pass

[188] Ms. Barron seeks \$13,951 to cover the cost of a lifetime gym pass.

[189] Mr. Padvaiskas recommends a one to two-year membership at the Nelson Community Centre to promote her access to a range of therapeutic activity at an annual cost of \$466.70. I award \$933.40 to cover the cost of a two-year gym membership, in accordance with Mr. Padvaiskas' recommendation. Ms. Barron periodically attended the gym before the Accident and I am not persuaded on the evidence that the lifetime cost of a gym membership is either warranted or wholly Accident-related.

Counselling

[190] Ms. Barron seeks \$8,340 for counselling.

[191] Dr. Anderson recommends a course of psychotherapy (i.e., 15-20 sessions of cognitive behavioural therapy) with a registered psychologist experienced in treating patients with pain, anxiety and depression. Dr. Caillier suggested that Ms. Barron would benefit from working with a psychologist or counsellor to provide her with strategies or techniques to manage her pain. She defers to a mental health professional in this regard.

[192] On all the evidence, I conclude that Ms. Barron's most disabling Accident-related problems are psychological. In my view, if she engages in cognitive behavioural therapy, there is a reasonable likelihood that she might improve her physical and mental health and overall function. She has derived benefit from the counselling she initiated in 2019. I award \$4,000 for cognitive behavioural therapy, representing the high end of the range recommended by Dr. Anderson at a cost of \$200/session (based on the evidence of Mr. Padvaiskas).

Medication

[193] Ms. Barron seeks \$6,541 for medications as follows:

a) Gabapentin and Aventyl

i. Initial Trial: \$20.24 (gabapentin) + \$30.82 (Aventyl) = \$51

ii. Long-term Contingency: \$605 (gabapentin) + \$1,334 (Aventyl) = \$1,939

b) Cymbalta

i. Initial Trial: \$25

ii. Long-term Contingency: \$2,509

- c) Tylenol #3 - \$517
- d) Over-the-counter medications and treatments - \$1,500

[194] Defence counsel notes that Mr. Padvaiskas provided information regarding the price of Cymbalta, Pristiq, and Effexor only, and that Dr. Anderson did not opine that Ms. Barron required medications to manage the diagnoses he made in March 2018. She submits that, even if Ms. Barron's mood issues are related to the Accident, she is currently doing much better and there is no evidence that she requires medication to address her psychological condition.

[195] Defence counsel resists an award for gabapentin and/or Aventyl on the basis that Dr. Caillier did not establish a need for these medications. On her own evidence, given on discovery and accepted at trial, Ms. Barron agreed she only takes T3s every few months, when her heating pad and essential oils do not manage her pain effectively. She confirmed that she prefers to use essential oils, stretching, and drinking water instead of medication to address her complaints.

[196] Dr. Anderson recommends possible treatment with a therapeutic dose of anti-depressant medication if Ms. Barron does not respond to a course of psychotherapy; at trial, he narrowed this to Cymbalta (up to 120 mgs daily). He suggested the possible prescription of Nortriptyline to improve sleep and to reduce night time pain. Dr. Caillier suggested treatment with gabapentin or Lyrica be considered and a possible trial of 1-3 mg of Cannabinoid at night for pain and sleep management. On Ms. Barron's evidence, over-the-counter melatonin gummies are an effective sleep aid. Accordingly, I conclude that she does not require medication to improve her sleep.

[197] Because Ms. Barron has undertaken no cognitive behavioural therapy to date, any assessment of her possible need for antidepressant medication is speculative. On her own evidence, she has had no headache pain since the summer 2020, after leaving her CIBC job where she was exposed to fluorescent lighting. Accordingly, I conclude that she no longer requires the regular use of Tylenol. I award a contingency fund of \$3,000 for Ms. Barron's use as necessary to cover the cost of possible future medication.

[198] I award total future care costs as follows:

- a) Occupational Therapy: \$1,500
- b) Active Rehabilitation Therapy: \$3,503.52
- c) Massage Therapy: \$2,500
- d) Gym Pass: \$933
- e) Counselling: \$4,000
- f) Medication: \$3,000

TOTAL: \$15,436.52

[199] Once discounted by 20% for a failure to mitigate, net future care costs total \$12,349.22.

SUMMARY

[200] I award damages as follows:

- a) General Damages - \$68,000
- b) Special Damages - \$2,459.15
- c) Gross Past Income Loss - \$14,290.39 (before discounting for tax and by 20% for a failure to mitigate)
- d) Loss of Future Income-Earning Capacity - \$40,000
- e) Future Cost of Care - \$12,349.22

TOTAL: \$137,098.76

[201] Absent matters of which I am unaware, Ms. Barron is entitled to costs on Scale B. If there are any matters arising from these reasons, the parties may apply to speak them within 30 days.

"Douglas J."

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