

CANADA / JUDGMENT

Bryan v. Mansouripour

2025 BCSC 820

COURT

Supreme Court of British Columbia

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2025 BCSC 820 Bryan v. Mansouripour

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bryan v. Mansouripour,

2025 BCSC 820

Date: 20250501

Docket: M2010114

Registry: Vancouver

Between:

Miliana Victoria Bryan

Plaintiff

And

Ahmad Mansouripour

Defendant

Before: The Honourable Justice Jones

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

June 17-21 and 24-26, 2024

Place and Date of Judgment:

Vancouver, B.C.

May 1, 2025

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I. Introduction

- [1] The plaintiff, Miliana Victoria Bryan, was injured in a motor vehicle accident on October 13, 2018 at the intersection of Main Street and East 2nd Avenue (the "Intersection") in Vancouver, B.C. (the "Accident").
- [2] The defendant denies liability for the Accident.
- [3] The issues for determination are liability for the Accident and, if the defendant is found liable for the Accident, damages claimed by the plaintiff for her injuries caused by the Accident, including claims for non-pecuniary damages, past and future loss of earning capacity, future care costs and special damages.

II. Liability

The Accident

Overview

- [4] The plaintiff was driving a white Smart Car (the "Smart Car") northbound on Main Street. She was using the Smart Car through the car rental service Car2Go. Her intention was to turn left at East 2nd Avenue ("2nd Avenue").
- [5] The defendant was driving his Mercedes Benz C280 southbound on Main Street, intending to pass straight through the Intersection at 2nd Avenue to continue southbound on Main Street.
- [6] The two vehicles collided in the Intersection.
- [7] The plaintiff submits that she turned left on an advance green arrow from the dedicated left turn lane on Main Street to 2nd Avenue and she had the right of way. The plaintiff alleges the defendant ran a red light and collided with her vehicle.
- [8] The defendant submits that as he approached the Intersection the light was green for southbound traffic on Main Street. As he entered the Intersection at the pedestrian crosswalk on the north side of the Intersection, the traffic signal for him turned yellow. He continued southbound and the plaintiff suddenly made a left turn, colliding with his vehicle. He denies running a red light.
- [9] Given the operation of the traffic lights at the Intersection, the two parties' accounts of the Accident cannot be reconciled, that is, it is not possible that the traffic signals could be showing an advance green arrow for Main Street northbound traffic turning left at the same time that a green or yellow light was indicated for Main Street southbound through traffic.
- [10] As a result, the parties' evidence and the operation of the traffic lights at the Intersection must be carefully considered.

Plaintiff's Evidence

- [11] The plaintiff gave evidence in direct examination about how the Accident occurred.
- [12] The plaintiff's evidence is that she takes the bus to work, or rents a car from Car2Go and drives the approximately 10-15 minute route, depending on traffic. Before the Accident she would use a Car2Go vehicle approximately three to four times per week.
- [13] On the morning of the Accident, October 13, 2018, the Smart Car was in the same parking spot where the plaintiff had parked it the night before after using it to get groceries, so she decided to use it that day.
- [14] Her work shift started at 10:00 a.m. The Accident occurred at about 9:30. The weather was sunny and clear. The Smart Car was in good working order, with no issues.
- [15] Her evidence is that she was driving towards downtown on Kingsway, then northbound on Main Street. As she approached 2nd Avenue driving downhill, the traffic light at 2nd Avenue was green when she first saw it, then as she approached the Intersection the light turned yellow, then red. She stopped completely in the left hand turning lane.
- [16] She testified she was stopped in the left turn lane on a red signal, waiting for the green light with a flashing arrow for the advance left signal.
- [17] When the green arrow came on, she proceeded to make the left turn and the Accident occurred.
- [18] Her evidence is that there was one car ahead of her in the left turning lane, and she recalls two to three cars in the lane behind her.
- [19] There was light traffic going southbound on Main Street, and she recalls one or two cars on the opposing side of the Intersection in the left turn lane. There was light traffic west and east. Her evidence is that she waited there for a full light cycle, the advance green light arrow came on for her lane, and the car ahead of her started to turn. She followed three car lengths behind, she heard a honk in the distance, she turned her head to southbound traffic and that is when she got hit.
- [20] There was a loud noise and the air bag deployed.
- [21] It took her a minute to figure out what had just happened. It blindsided her, she did not see the other vehicle or anything until the last second before the impact.
- [22] It took her a little by surprise. She sat in her car in astonishment. All the air bags were deployed from the steering wheel and over the doors, so she had to open her door and crawl out under the air bags, and then she stood by her car in a daze.
- [23] She estimated her speed when she was crossing the Intersection at 15 kph.
- [24] She estimated the speed of the other vehicle at 60-70 kph.

- [25] The driver of the other vehicle walked up to her insinuating it was her fault. She was trying to process everything. The cars behind her all went around them, and traffic continued as normal. A fire truck came and firefighters spoke to them. She called her mother. She asked for the other driver's information and she took a photograph of the car.
- [26] She was asked if she needed an ambulance or to go to the hospital. She was shaken up, but did not want attention drawn to her, she said she was okay and waved them off.
- [27] She ended up limping to work, two and a half blocks from the Accident. She was late for work. Her boss looked at her and said she was not working that day. She left work after about 45 minutes to an hour and walked to a walk-in medical clinic.
- [28] She had bruising around her armpit and chest from the air bag on the steering wheel. She had a swollen and bruised leg from it banging into the side door, and cuts and bruising on the calf of her left leg. The leg injury was the first thing she noticed after the adrenaline wore off. After she left work she started to get a really bad headache.
- [29] In cross-examination, she described seeing the traffic signals as three different lights "on the post that you would see at that intersection, the first two were green for traffic to flow through going north and south, and the turning lanes were both red."
- [30] She described her light being red, the north and south traffic were continuing to flow, but starting to slow down as their green turned to yellow, then all north and south traffic was stopped on a red light.
- [31] She described the traffic light as a yellow cylinder with three lights on it - red, yellow, green.
- [32] I note that given the light sequencing for that Intersection, discussed in more detail below, what the plaintiff describes regarding the traffic lights is not possible because if the traffic light for her was red, the traffic lights for the through traffic north and south would also be red. The left turn signal is a dedicated fourth light at the bottom of a four light traffic signal head, with red, yellow and green lights for all traffic above the light for the left turn signal. The left turn signal is a green flashing arrow when activated, which then turns to a solid yellow arrow before extinguishing.
- [33] When the plaintiff stopped at the Intersection, she recalled one car in front of her. She stated it stayed there until the advance green light turned green. She stated there was probably a three second delay before it started to move after the light changed to a green arrow. She followed it to make the left turn, she was two-and-a-half to three car lengths behind it at a speed of 15-20 kph.
- [34] She agreed that at her examination for discovery she stated that she believed that there was one car ahead of her, and her speed was 20-30 kph, maybe 25, 30 kph.

- [35] When she was asked whether she would be able to enter the Intersection and make a left turn if the northbound lane had a green ball, she responded no, it was an advance green for the left turn, and when the left turn signal was red she could not make a turn.
- [36] I note this is another misinterpretation by the plaintiff about the traffic lights at the Intersection. As discussed in more detail below, there is no red left turn signal. Northbound vehicles turning left to 2nd Avenue westbound can turn left on a green flashing arrow, and later in the light sequence with a green light, but must then wait for a gap in southbound through traffic.
- [37] She recalls seeing two to three cars in the southbound left turning lane facing her across the Intersection, and the two middle lanes of the southbound through lanes were pretty empty. There was also a fourth lane southbound for turning right from Main Street to 2nd Avenue, with a few turning right onto 2nd Avenue.
- [38] She describes seeing east and west traffic going.
- [39] The next light she saw was the advance green blinking arrow for her lane and for the opposing left turning lane from Main Street southbound turning left to 2nd Avenue eastbound.
- [40] She then proceeded into the Intersection and she was blind-sided by the Accident.
- [41] When asked if the green arrow was straight or blinking, she said she believed it was flashing, but when asked if she recalled, she said she could not say whether it was flashing or stagnant.
- [42] She stated there was definitely a car in front of her, but she cannot recall what kind of car it was.
- [43] When it was put to her that on her discovery she stated that she did not know if there were any cars behind her, she said she thought about it after. When it was put to her that at the time of impact she did not know how many cars were behind her, she said there were probably one or two, but could not confirm or deny, and could not recall if any cars were behind her, but she did recall cars coming around her after the Accident.
- [44] She said the impact took her by surprise, she agreed she did not see the other vehicle at all before the impact, she heard a honk, she looked to the left and right and saw him come and hit her. Her evidence is she was "into lane 1, 2-3 ish" (lane 1 being the left turning lane, progressing west through the centre lanes 2 and 3 to the curb lane 4).
- [45] She estimated the defendant's speed at 60-70 kph based on the impact and how far his car went after the collision.
- [46] She agreed with the suggestion in cross examination that she did not see the other car until about two seconds before the Accident, then she stated she saw the car as it was crashing into her car, but she also said he would have been over the crosswalk when she saw his car.

- [47] She stated there was the car ahead of her, she waited and proceeded, she cannot recall the timing, but she agreed she said in her discovery that when she first saw the other vehicle it was about half way past the pedestrian crosswalk on the north side of the Intersection, then she sees it drive for about two seconds before the impact.

Defendant's Evidence

- [48] The defendant gave evidence about the Accident. The defendant also called one expert witness, James Bower on accident reconstruction, and a City of Vancouver employee, Rich Carmona, who gave factual evidence about the traffic light sequencing at the Intersection where the Accident occurred.
- [49] The defendant is a 59 year old resident of Vancouver.
- [50] On the day of the Accident, Mr. Mansouripour was driving a Mercedes Benz C280, a four door sedan.
- [51] He had dropped off his family at home and was driving to visit a friend on East Broadway.
- [52] He was westbound on 1st Avenue to Main Street, he turned right on Main Street and headed southbound towards 2nd Avenue. He was in the centre lane of the three southbound through lanes.
- [53] He saw the plaintiff's car in the left hand turn lane from a distance of 50 yards, when his light was green.
- [54] As he entered the Intersection and passed the pedestrian crosswalk, the light for him turned yellow. Suddenly the plaintiff's car was turning left at a distance of 10 yards from him. He attempted to brake but had no chance to do so, or to sound his horn because she was too close, and the Accident happened.
- [55] He estimated his speed at 50 kph as he was driving through the Intersection.
- [56] After the collision he pulled over to the right lane, about 15 yards further, where he parked his car.

Traffic Signal Operation

- [57] A significant issue in this case is the operation of the traffic lights at the Intersection, specifically the left turn light sequence, and the plaintiff's understanding and perception of that light sequence.

- [58] For these reasons, the following description of the traffic signal operation is detailed, the focus being on the fact that the left turn signals at the Intersection do not follow one set sequence because the northbound and southbound left turn lights are activated independently of each other according to the number of vehicles detected by sensors in the dedicated left turn lanes, both northbound and southbound, turning left from Main Street to 2nd Avenue.
- [59] At trial, evidence of the operation of the traffic signals at the Intersection was given by Mr. Carmona, a senior engineer at the City of Vancouver in the area of traffic and data management branch. Mr. Carmona's role is to design, review and coordinate traffic signal operations.
- [60] Mr. Carmona was not called as an expert witness. He gave factual evidence, including referring to a signal information letter he prepared regarding aspects of the traffic lights at the Intersection (the "Signal Letter").
- [61] The Signal Letter confirms that there were no malfunctions recorded in the City's central data system regarding the traffic signals at the Intersection on the date of the Accident, Saturday, October 13, 2018 at 9:30 a.m.
- [62] The Signal Letter summarizes the operation of the traffic signal light equipment at the Intersection, focussed on the left turn sequencing, as follows, the cardinal points referring to the direction of traffic, for example "north" means northbound traffic, and "east" means eastbound traffic. Right turns are not relevant for the purposes of the analysis of the Accident:

The traffic signal equipment installed at Main Street and 2nd Avenue is a fixed-time type with actuated left turn flashing arrows at all four approaches.

Left turns are protected during the left turn flashing arrow, and are permitted on the two-way green during gaps in opposing traffic.

When the east to north left turn flashing arrow is active, the right turn overlap for traffic turning from south to west is protected.

When the north to west left turn flashing arrow is active, the right turn overlap for traffic turning from east to south is protected.

The operation of the left turn arrows is determined by traffic volumes, so we cannot give you precise timings at any specific instant. Normally, three or more cars are required to actuate a left turn arrow. A left turn arrow can be skipped if there is insufficient demand for it, and its phase time is added to the opposing through movement.

[Emphasis added, and paragraph breaks added.]

- [63] Mr. Carmona's testimony at trial explained the terminology and traffic light sequences he describes in the Signal Letter, above, summarized as follows:

- a) "fixed time type" refers to the traffic signal time phase for each light sequence. The length of time for each light sequence is generally not variably adjusted by vehicle demand, the time for each light sequence remains the same length through the specified intervals, but the left turn light sequence can vary according to how many vehicles are in the left turn lanes when the left turn signal sequence is actuated.
 - b) "actuated" means the left turn movements are actuated by detection loops in the ground at a distance of 7 metres and 20 metres in the left turn lane, back from the Intersection, that is, when a sufficient number of vehicles are detected in the left turn lane the left turn arrow is displayed.
 - c) "protected" means when the left turn flashing arrow is displayed there is no conflicting movement, for example if the northbound (Main Street) to west (2nd Avenue) green flashing arrow is displayed, there would be no southbound through traffic on Main Street, and no pedestrian signal allowing pedestrian traffic across 2nd Avenue on the west side of the Intersection. Left turns are permitted during gaps in the opposing traffic when the green ball is displayed.
 - d) "skipped" means that if there are less than 3 vehicles in the left turn lane, a flashing green arrow will not be triggered, and the time allocated for that green arrow which does not appear will be added to the through traffic green signal.
- [64] Mr. Carmona also described what traffic signals a northbound driver on Main Street would see when stopped at 2nd Avenue, as follows:
- a) For northbound traffic on Main Street at 2nd Avenue there are four traffic signal heads: one on a pole on the west side of the Intersection, two on the horizontal mast arm on the north side of 2nd Avenue suspended over Main Street, and a fourth on a pole on the east side of the Intersection.
 - b) The two traffic signal heads on the horizontal mast arm are as follows:
 - i. the signal head on the left side of the arm has four signal displays, (described as lights, lamps, ball-shaped, or circular), from top to bottom: red; amber; green; flashing green arrow turning to solid amber (or yellow) arrow;
 - ii. the signal head on the right side of the arm has three signal displays: red, amber, green.
 - c) Mr. Carmona did not describe in detail the signal heads on the west and east sides of the Intersection.
- [65] The complete set of traffic light sequencing options is included in Mr. Carmona's Signal Letter in the following table, described as the minimum and maximum greens and clearances for each of the eight phases, in seconds, not including walk signals, with underline emphasis for the northbound and southbound traffic sequence options relevant to this matter, specifically phases 4 and 7 for northbound traffic on Main Street:

Phase

Description

Minimum

Maximum

Amber *

All Red

1

East to North left turn flashing arrow

South to West red with right turn flashing arrow

5

6

4

0

2

Westbound through

24

36

3.5

2

3

South to East left turn flashing arrow

5

7

4

0

4

Northbound through

27

38

3.5

2

5

West to South left turn flashing arrow

5

6

4

0

6

Eastbound through

24

36

3.5

2

7

North to West left turn flashing arrow

East to South red with right turn flashing arrow

5

7

4

0

8

Southbound through

27

38

3.5

2

*For left turn phases this denotes a steady amber arrow.

[66] The Signal Letter also includes the following explanation of the three different left turn light sequence scenarios referring to the phase numbers in the table above, with underline emphasis for the northbound traffic sequence scenarios for this matter:

- With all left turns actuated, the sequence would be: 1&5, 2&6, 3&7, 4&8, 1&5 etc. [Scenario #1];
- With no left turns actuated, the sequence would be: 2&6, 4&8, etc. [Scenario #2];
- With only one left turn signal actuated [one of two opposing], the sequence would be: 1&6, 2&6, 4&8, etc.[4&7, 4&8 3&8, 4&8] [Scenario #3(N) and #3(S)].

[67] Mr. Carmona described these three scenarios with reference to a northbound vehicle stopped in the left hand turning lane intending to turn westbound on 2nd Avenue, as follows:

- a) Scenario #1 (both north and south left turns actuated): If there are three or more vehicles in the northbound left hand turning lane, and similarly three or more vehicles in the opposing southbound left hand turning lane, then a flashing green arrow will show in the bottom lamp of the traffic signals with four lights, for both the northbound and southbound left turning vehicles, with a red display in all four traffic signal heads for the through traffic (phases 3 and 7). After 5-7 seconds, the green flashing arrow will change to a solid amber yellow display for 4 seconds, followed by the amber display extinguishing, the red lamp at the top extinguishing, and the green lamp showing in all four traffic signal heads for both northbound and southbound traffic (phases 4 and 8). After the amber arrow extinguishes and the green lamp shows, any vehicles remaining in the left hand turning lanes must now wait for a gap in the opposing through traffic to complete their left hand turns.
- b) Scenario #2 (no left turns actuated): If there are less than three vehicles in the left hand turning lane, and similarly less than three vehicles in the opposing southbound left hand turning lane, no green flashing arrow will be activated, there will be no separate signal light for left turning vehicles, and the traffic light showing will be a green ball on all traffic signal heads northbound and southbound, whether turning or not, meaning the vehicles in the left hand turning lane would need to wait for a gap in the southbound through traffic to safely turn left (phases 4 and 8).
- c) Scenario #3(N) (only the one northbound to westbound left turn signal activated): If there are three or more vehicles in the northbound Main Street left turning lane, and less than three vehicles in the southbound left turning lane, then the flashing green arrow on the traffic heads on the fourth lamp will flash for 5-7 seconds for northbound left turning traffic only (phase 7), and all northbound traffic will additionally see a green light on all four traffic signal heads (phase 4).

The southbound left turning vehicles will not trigger the flashing green arrow (no phase 3).

Consequently, all southbound traffic, left turning and through traffic, will see a red lamp, until the northbound flashing green arrow changes to amber then extinguishes, at which point northbound and southbound traffic will all see a single green light in all signal traffic heads, indicating that any vehicles remaining in the northbound left turning lane will now need to wait for a gap in the southbound through traffic before turning left (phase 8). The northbound through traffic will also continue with a green lamp (phase 4).

- d) Scenario #3(S) (for only the southbound to eastbound left turn signal activated, the converse of Scenario #3(N), above): If there are three or more vehicles in the southbound left turning lane, and less than three vehicles in the northbound left turning lane, then the southbound left turning vehicles will see the flashing green arrow, but the northbound left turning vehicles will not actuate the flashing green arrow.

Consequently, for southbound traffic the left turning dedicated fourth lamp will show flashing green for 5-7 seconds (phase 3), and all southbound through traffic will also see a green lamp (phase 8).

The northbound traffic, both left turn and through traffic, will see a red lamp until the southbound flashing green arrow changes to amber, followed by the green lamp for all traffic northbound and southbound, indicating that any vehicles remaining in the southbound left turning lane will now need to wait for a gap in the northbound through traffic, which will have a green lamp to proceed northbound, or to turn left through a gap in southbound traffic (phase 4).

James Bower, accident reconstruction

- [68] James Bower was called by the plaintiff as an expert witness qualified to give expert opinion evidence as a professional engineer with expertise in assessing accident dynamics and providing opinion evidence on accident reconstruction including sequence of events related to traffic signals, speed and distance of vehicles.
- [69] Mr. Bower authored a report dated March 21, 2024.
- [70] Mr. Bower's opinion is that the left front corner of the Smart Car contacted the left front tire on the Mercedes and the contact was prolonged as the Mercedes continued forward, the left front corner of the Smart Car maintaining contact with the left side of the Mercedes from the rear of the left front fender along the side of the driver and rear passenger doors to the rear left fender.
- [71] Mr. Bowler assumes that if the defendant was travelling at 50 kph, it would take 1.25 seconds to reach the site of the impact from when the defendant entered the Intersection, defined as the north curb extension across Main Street.

- [72] The timing of the movement of the Smart Car from a stop to the point of impact could take 3.7 seconds, but it depends on several variables, including the point at which the Smart Car was stopped, the acceleration rate, the speed of the Smart Car and the behaviour of the car ahead of it.
- [73] Mr. Bower's report shows the different light sequences for the northbound and southbound directions of travel if the left turn arrow is activated. There is no dedicated red light for the left turn lanes.
- [74] Mr. Bower concludes that the defendant's and plaintiff's version of the traffic light timing cannot both be accurate. The defendant describes the light as a green ball changing to a yellow ball, which is at the end of the light cycle for northbound and southbound traffic. The plaintiff describes the light as changing from a red ball to a green arrow which is at the beginning of the northbound/southbound traffic light cycle.

III. Credibility and reliability

- [75] Credibility and reliability are separate concepts. Credibility relates to honesty and the willingness of a witness to speak truthfully. Reliability relates to the ability of a witness to accurately observe, recall and recount the events in issue: see *Mand v. Cheema*, 2024 BCSC 1701 at para. 25.
- [76] The factors to be considered when assessing credibility were summarized by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, as follows:
- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (BCCA) [*Faryna*]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).
- [Emphasis added.]
- [77] Another commonly referenced case discussing how the court goes about assessing credibility is *Gichuru v. Smith*, 2013 BCSC 895, *aff'd* 2014 BCCA 414, as follows:

[130] Moreover, the assessment of a witness's credibility must reasonably subject the witness's story to an examination of its consistency with the probabilities of the surrounding conditions or circumstances. The real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. See *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), at pp. 356-357.

[Emphasis added.]

[78] Here, the plaintiff and the defendant both gave evidence at trial.

Defendant's credibility and reliability

[79] The plaintiff submits that the defendant "blatantly lied" by stating that the plaintiff's light was red at the time of the Accident and then conceded in cross examination that it was a guess. The plaintiff submits that the Court should not condone this sort of "tactic" by witnesses in trial, and on that basis the plaintiff submits the defendant's evidence should be rejected.

[80] However, if a finding of credibility against the defendant were to be made on that basis, following that same logic a similar finding against the plaintiff's credibility would have to be made because when the plaintiff was asked what the next light she saw for her direction of travel after she was stopped and saw the east and west traffic go, her answer was: "Then it turns to the advance green blinking arrow for my lane and for the opposing side's lane to make our advance lefts," and she also stated that when she approached the Intersection the two left turn lanes (north and south) were both red.

[81] However, she could not have seen the southbound left turning traffic light. She may have assumed that if she had an advance green light then the opposing left turn lane would also have an advance green light, and if she had a red light for left turning vehicles then the southbound left turning vehicles would also have a red light, but from the evidence of Mr. Carmona those assumptions are not correct because the two opposing left turning lanes do not work in tandem. The two left turning lights work independently of each other. They may follow the same pattern, but only if they are both actuated, or not actuated, at the beginning of the traffic signal sequence for northbound and southbound traffic.

[82] Further, the plaintiff's answer was not that she saw the light for her direction of travel turn to an advance green blinking arrow, she said "then it turns to the advance green blinking arrow", a narrow point, but one indication, similar to some of her other answers, that her evidence appears to be what she understands to be the traffic light sequence, not necessarily what she actually saw that day.

- [83] In my view, for both the defendant and the plaintiff in these circumstances, despite their inability to see the traffic light of opposing traffic, they each made an assumption about the traffic light of opposing traffic based on their evidence of the traffic light they say was the case in their direction of travel, and their understanding of what they understood to be the light sequence.
- [84] As a result, I place no weight on the evidence or credibility of either party on their evidence of the opposing traffic's traffic light, other than they were both willing to make an assumption about the opposing traffic lights without being able to see those lights.
- [85] The plaintiff also submits that the defendant's evidence is not credible because he was exaggerating when he testified that in his 20 years of driving he did not drive over the speed limit, on even one occasion, and he did not have a specific recollection of his speed, despite testifying he was driving 50 kph, he could have been over 40 kph, but not 60 kph.
- [86] The plaintiff also submits that the defendant gave three different accounts of when he first saw the plaintiff's vehicle: first, at the outset of his examination for discovery he said that it was 10 yards; second, at the end of his examination for discovery he stated that it was immediately before the Accident occurred; and third, at trial he gave evidence that the first time he saw the vehicle was 50 yards away.
- [87] I agree that the defendant states on discovery that he first saw the plaintiff's vehicle at 10 yards, and 50 yards at trial; however, there is some consistency to the defendant's evidence in that his testimony at trial was that he first saw the plaintiff's vehicle at an approximate distance of 50 yards, he then saw her turn at 10 yards distance. The turn at 10 yards was immediately before the Accident. The credibility issue is that he did not mention the 50 yards at his discovery.
- [88] The plaintiff also submits that at his examination for discovery the defendant gave evidence that the sun visor was down prior to the Accident, and that is an admitted fact in his response to notice to admit. The plaintiff submits that at trial the defendant said he did not remember about the evidence he provided at his examination for discovery on February 13, 2024 that his sun visor was down.
- [89] I agree the defendant did not remember if the sun visor was down when he had admitted on his relatively recent discovery and response to notice to admit that the visor was down.
- [90] The plaintiff also makes a number of submissions regarding the defendant's evidence in relation to the conclusions of the accident investigation report authored by James Bowler. In my view, those submissions relate primarily to the liability analysis below, and are discussed there because they compare the defendant's evidence about entering the Intersection on a yellow light to Mr. Bowler's speed and distance analysis, the plaintiff submitting that the defendant ran a red light and critiquing the defendant's evidence about seeing the traffic light and the plaintiff's vehicle at the same time.

- [91] The plaintiff also challenges the defendant's credibility by submitting that the defendant gave near perfect evidence to avoid responsibility, he did not remember an admitted fact under cross examination in that his sun visor was down, he was evasive, and his evidence was rehearsed and self-serving.
- [92] In my view, the plaintiff has not demonstrated that the defendant was evasive, or that his evidence was perfect, rehearsed and self-serving. Although the defendant spoke English well, it is apparent that English is not his first language and at times he struggled a bit with questions, which I attribute to language, not evasiveness.
- [93] The plaintiff is critical of the defendant's evidence as being too perfect a recollection of events that benefitted his case; however, the events from the defendant's perspective are relatively simple and straightforward, as follows: he described driving east on East 1st Avenue, he turned right on Main Street and proceeded one block south. In that block he viewed the traffic light at the Intersection at 2nd Avenue as green, and as he entered the Intersection he saw the plaintiff's vehicle in the northbound left turn lane as the light turned to yellow. He proceeded through the Intersection. At 10 yards from the plaintiff's vehicle she turned left and collided with his vehicle, leaving him no time to take action to avoid the collision. His evidence about braking was not inconsistent in his statement that he attempted to apply his brakes but he had no chance to do so before the collision.
- [94] As a result, there were some inconsistencies in the defendant's evidence regarding when he first saw the plaintiff's vehicle, the position of his sun visor, and his statement about the colour of the light the plaintiff would have seen. His evidence about never having driven over the speed limit is difficult to believe, but these relatively limited issues with his evidence do not support the plaintiff's submissions that he gave perfect evidence and his evidence should be rejected in its entirety, or disbelieved.
- [95] Some inconsistencies in the defendant's evidence is not unexpected, in part because his discovery and the trial were well over five years after the Accident
- [96] The defendant's evidence of entering the Intersection as the light turned yellow was not effectively challenged in cross examination, and he did not waver in his account of how the Accident occurred.
- [97] The plaintiff cites *Dahlke v. Davidson*, 2023 BCSC 1884, in which the Court found the defendant's evidence unreliable on the basis of her defensiveness and evasiveness on cross examination, and her commonly conflating confident views about what she actually recalled at the time of the accident with her inference of what would have probably happened at the time in certain respects.
- [98] I refer to the *Dahlke* case in more detail below in the analysis of liability, finding that the facts are more analogous to the plaintiff's evidence here, not the defendant's evidence.

[99] As a result, considering all of the plaintiff's submissions on the defendant's credibility and reliability, I do not agree with the plaintiff's submissions that the Court should reject the defendant's evidence in its entirety.

[100] I find that the defendant was a credible and reliable witness; however, his evidence will still be the subject of careful analysis in the liability section below regarding the actions he took as a driver in the circumstances of his approach to the Intersection on the morning of the Accident.

Plaintiff's credibility and reliability

[101] The defendant submits the plaintiff's evidence is unreliable and the plaintiff is not credible.

[102] On reliability, the defendant refers to a number of inconsistencies in the plaintiff's recollection of the dates or years when she participated in various employment and educational activities, including the following:

- a) The plaintiff testified that she began working at Dairy Queen at the age of 13 which would mean she began in 2010. She testified working there from 2010 to 2016; however, her resume indicates she worked there from 2012 to 2017. Her mother, Ms. Irena Bryan ("Ms. Bryan"), also testified that the plaintiff began working there when she was 14 or 15 years old.
- b) The plaintiff testified that she began the Fine Arts Bartending course in 2015; however, her resume and discovery evidence was that she did this in 2016.
- c) Although the plaintiff said she worked at Mosaic in 2016, her T4 indicates she worked there in 2017.
- d) The plaintiff says she attended Blanche Macdonald from August 2016 - July 2017; however, her transcript from Blanche Macdonald indicates she attended Blanche Macdonald from August 2017 to July 2018.
- e) The plaintiff said she began working at the Legacy liquor store in August of 2016; however, her record of employment indicates she worked there from June 21, 2017 to September 30, 2019.
- f) The plaintiff testified that she worked at Mehndi & More from March 2017 onwards; however, correspondence from her employer indicates that she worked there from 2020 to 2021. The defendant submits it is difficult to reconcile the plaintiff's evidence on direct examination as to how she began working here when she was studying at Blanche Macdonald and working at Legacy.
- g) The plaintiff testified she was married in January of 2018 after moving in with her then boyfriend; however, she was married in 2017.

[103] The defendant also submits that the plaintiff is not credible, citing a number of examples of the plaintiff exaggerating her evidence, as follows:

- a) She gave evidence that she often worked during the evenings at Dairy Queen for 7 - 8 hours per shift after school about 4 times per week. Her mother testified that the plaintiff worked the odd weekday shift at Dairy Queen while she was at school. She recalls the plaintiff worked the odd weekend and not most days.
- b) The plaintiff testified she required her parents' permission to work at Dairy Queen whereas her mother did not recall providing such permission.
- c) The plaintiff's evidence is she stopped playing volleyball when she was 19 because of work commitments; however, she reported to the functional capacity expert, Jennifer Lane, that she played regularly prior to the Accident.
- d) The plaintiff exaggerates her experience. She says she has been bartending at family parties since she was 6. She also said that she used to play sports as a 10-year old with individuals who were 40 or 50 years old. She has put videos on her social media platform indicating she has been a certified makeup professional since the age of 16. When challenged on this, she testified that makeup artists with only 1 year of experience lied about how much experience they had.
- e) The plaintiff testified that she was no longer interested in working at a bar or restaurant as the work was difficult for her. When it was put to her that she had testified at her examination for discovery that she had recently applied, she stated that she had only applied to appease her father who had been pushing her to get a job; however, she agreed that her discovery evidence was true when it was given in that she had applied but was not interested as the positions were only part-time and she was looking for full-time work.
- f) The plaintiff exaggerated to Dr. Waseem and Ms. Lane with respect to her difficulties at work and needing to turn down clients, as the plaintiff gave evidence that she did not turn down work.
- g) The plaintiff's reports of the extent of her current symptoms are inconsistent, especially as relating to her experience of migraines or headaches. She reported a greater severity and frequency to Dr. Waseem with respect to migraines than during her testimony at trial, or as she reported to Ms. Lane.
- h) The plaintiff insisted that when she arrived at the Intersection she was in the left-turn lane which had a red light while through traffic in the same direction of travel had a green light. Evidence at trial indicates this scenario does not exist.
- i) The plaintiff has changed her evidence about the Accident on a number of occasions. At her examination for discovery she testified she was about a car-length or so from the vehicle in front of her when they commenced their left turns but the distance reported at trial was greater; the plaintiff testified she was travelling at approx. 15 kph while her earlier testimony had been 20 - 30 kph.

- [104] The plaintiff testified that her condition did not improve over time. However, when her discovery evidence was put to her, she agreed she told the truth that her back and headaches worsened considerably when she returned from Kosovo in the summer of 2022 and began to work an increased number of shifts at Canadian Brewhouse and Umbrella.
- [105] She also reported to the experts she saw that she had to limit the number of clients she sees in her personal makeup/service business. In cross-examination, she agreed there is no evidence before the court that the plaintiff limited the number of clients she saw. In addition, the plaintiff testified that she had decided to cut back on cosmetic tattooing when she realized she could not do back-to-back clients. Her employment records from Batwing Beauty Bar do not indicate she has had back-to-back cosmetic tattooing appointments.
- [106] In addition, she gave evidence that when she did the course for cosmetic tattooing in 2022, she performed this service on clients and was able to complete the program. The plaintiff then testified that she decided to cut back after her December client. However, a video of the plaintiff's promotions in the New Year indicate that she was promoting this service in January of 2024. The plaintiff then testified that a discussion with her mother after this video lead her to think she should cut back on this service.
- [107] The defendant submits the plaintiff has demonstrated a continued pattern of unreliable and contradictory testimony. In some instances - particularly those related to times when she indicated her injuries had improved or she had to cut back on clients - she appears to have deliberately tailored her evidence to contradict these statements, the inconsistencies all lean towards exaggerating her injuries.
- [108] I agree with the defendant that the plaintiff's testimony demonstrates weakness in her ability to accurately observe, recall and recount past events. Given the number of jobs she has worked at over the years, it is not surprising that there would be some inconsistencies in dates relating to each job and other events; however, the plaintiff's inconsistencies in her recollection of what event happened in what year are so prevalent that her evidence must be treated with caution.
- [109] Similarly, regarding her evidence about the Accident, she was not sure about how many cars, if any, were behind her in the left turning lane, and to some extent she appeared to be relying on her assumptions about what events occurred, rather than her specific memory of the events.
- [110] For example, she stated that she believed there to have been cars behind her in the left turning lane because after the Accident they continued around her. However, if there were any cars behind her at the time of the Accident, and it took her a minute to figure out what was going on as she was sitting in her car in astonishment, and she had to open her door and crawl out under the air bags, there was a period of time that any such cars could have passed by her during that time before she exited her vehicle, after which the defendant came up to her and insinuated it was her fault and she was not paying attention. They had a bit of an argument, and her evidence is that at that point cars were going around her and

traffic continued as normal.

- [111] In answer to a later question on the same point about any cars behind her in the left turn lane, she stated that when she finally got out of the vehicle, traffic had resumed very shortly after the collision.
- [112] At her examination for discovery she had answered that she did not know if there were any cars behind her.
- [113] Another credibility issue is her estimate of the defendant's speed at 60-70 kph. In cross examination she based that estimate on the impact she felt, the damage and how far his car went; however, she did not explain how those factors related to a speed of 60-70 kph. Since she did not see the defendant's vehicle until very shortly before the Accident, if at all, it is hard to understand how that estimate is more than the plaintiff trying to place blame on the defendant for the Accident without the evidence to support it.
- [114] Regarding the timing, she gave evidence in a number of different ways that emphasized that she did not see the defendant's vehicle before the Accident, or not until very shortly before the Accident; for example, the defendant's vehicle "blind-sided" her, suggesting she did not see the vehicle before the Accident; and she also stated that it was two seconds, but then stated that she looked over and it happened fast, with emphasis by snapping her fingers, and she stated he was over the crosswalk when she saw him, which would be less than two seconds according to Mr. Bowler's report, the timing more consistent with her seeing the defendant's vehicles at less than two seconds before the Accident.
- [115] Another credibility issue is the plaintiff's answer in cross examination when it was put to her that she exaggerated her experience by stating on her website that she was a certified makeup artist for 11 years, when she had worked as a makeup artist, but not certified for 11 years; and she had a tendency to exaggerate if it suits her needs, to misrepresent facts if it suits her needs, and she does not remember a lot of things.
- [116] She disagreed with that proposition, stating that she is very honest when she needs to be, but she is not good with dates and numbers. That may have been a somewhat casual or offhand remark, but it does leave the appearance of a somewhat evasive and odd answer to the question in light of the proposition put to her.
- [117] Finally, the plaintiff's evidence regarding the traffic lights cannot be considered to be reliable because her evidence is that when she approached the Intersection she described a traffic light sequence that could not have existed, and her evidence made it clear that she did not understand the traffic lights for left turning vehicles in the left turning lane at that Intersection.
- [118] For example, she stated there was a red ball for the left turning lane northbound on Main Street and traffic continued to flow northbound and southbound, then turning to yellow and red; however, it is very clear from Mr. Carmona's evidence that there is no dedicated red light for the left turning lane. If there is any red light displayed for northbound traffic it is

red for all four traffic signal heads visible to northbound traffic, with the additional separate flashing green arrow for left turning traffic for a short period if the flashing green arrow has been actuated, following which the arrow turns to a solid yellow arrow, then extinguishes, and the red light then turns to green for all northbound traffic.

- [119] Another example is that she was adamant, but mistaken, that vehicles in the left turning lane cannot turn left on a green light without the advance green signal because it is red for left turning vehicles. She stated it is red and she cannot make a turn if the northbound lanes have a green light, which is incorrect. When the light is green for northbound traffic it is green for all northbound traffic, including left turning vehicles, but the left turning vehicles must wait for a gap in the southbound traffic before turning left.
- [120] Similarly, she also disagreed that with a green light a left turning vehicle at that Intersection can turn left if the Intersection is clear, stating that you cannot do that where there is an advanced green light signal with a designated left turning lane.
- [121] She could not confirm or deny whether the green arrow she says she saw was flashing or stagnant, but she stated it is a green arrow when traffic is supposed to go.
- [122] She disagreed, and repeated her disagreement when it was put to her that a separate red light for the left turning lane does not exist, finally stating that she was "pretty sure".
- [123] Finally, she confirmed her view of the traffic signals again by agreeing with what counsel put to her, that is, that she believes her version of events is correct because she is confident that when she arrived at the Intersection the light was green for northbound and southbound traffic and it was red for the left turning lane.
- [124] The plaintiff's apparent misunderstanding of the traffic light operation at the Intersection brings into question her ability to accurately observe, recall and record what occurred at the time of the Accident.
- [125] I can infer that the plaintiff was familiar with the Intersection because she had been working at Legacy, located near the Intersection, since September 2016, she had lived in the apartment at Joyce and Kingsway since June 2018, she used a Car2Go vehicle 3-4 times per week, and her evidence about what she understood to be the traffic signal sequence regarding the left turn lane signals indicated that she had experience turning left at the Intersection, even though she was mistaken about the operation of the left turn traffic light signal.
- [126] It is not expected that any driver would have a detailed understanding of the operation of the traffic signal as discussed above in the section on traffic signal operation; however, the plaintiff's evidence about the traffic lights displayed her misunderstanding of some aspects of how the traffic lights at the Intersection controlled the traffic flow.

IV. Legal Framework

[127] The analytical framework relating to motor vehicle negligence was recently summarized by Justice Crerar in *Giller v Herron*, 2024 BCSC 186, as follows:

1. Motor vehicle negligence: the analytical framework

[46] The rules of the road set out in the Act are the starting point, but not the end point, for the assessment of whether either party was negligent, and to what extent. In *Boyd v. Baldwin*, 2015 BCSC 887, Fitch J (as he then was) summarises the role of the Act in the common law negligence analysis:

[59] In determining whether, and to what extent, parties to an accident met their common law duties of care, a court will be informed by the rules of the road. While the rules of the road provide guidelines for assessing fault in motor vehicle accident cases, they do not, standing alone, provide a complete legal framework. As noted in *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21, "[t]his is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way".

[47] *Stewart v. Dueck*, 2012 BCSC 1729 describes the common-law duties of motorists:

[38] The authorities establish that all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care. All motorists have a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards: *Hmaied v. Wilkinson*, 2010 BCSC 1074 at para. 23.

[39] It is a well-settled proposition that drivers in this province are entitled to assume, within reason, that the other users of the roads in British Columbia will obey the law: *Mills v. Siefred*, 2010 BCCA 404 at para. 26.

[40] The Court's task is to determine whether each of the parties in an accident met their common law duties of care. The analysis of the standard, which is relevant to the particular circumstances, is informed by both the reasonableness of the parties' actions and by the rules of the road; *Salaam v. Abramovic*, 2010 BCCA 212 at para. 21; *Kilian v. Valentin*, 2012 BCSC 1434 at para. 28.

[41] While these general propositions are endorsed by the authorities, ultimately, the determination of liability turns on the particular facts of each case.

[Emphasis added.]

[48] Section 144 of the Act echoes this overarching common-law duty to exercise what constitutes, in all of the circumstances, reasonable and due care:

Careless driving prohibited

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions .

[49] Sections 127-128 set out the rules governing green and yellow (i.e. amber) lights:

Green light

127 (1) When a green light alone is exhibited at an intersection by a traffic control signal,

- (a) the driver of a vehicle facing the green light
- (i) may cause the vehicle to proceed straight through the intersection

Yellow light

128 (1) When a yellow light alone is exhibited at an intersection by a traffic control signal, following the exhibition of a green light,

- (a) the driver of a vehicle approaching the intersection and facing the yellow light must cause it to stop before entering the marked crosswalk on the near side of the intersection, or if there is no marked crosswalk, before entering the intersection, unless the stop cannot be made in safety,

[52] Section 174 governs left turns:

Yielding right of way on left turn

174 When a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn.

[Emphasis in original.]

[53] *Salaam v. Abramovic*, 2010 BCCA 212 confirms that the Act does not represent a complete code for assessing fault in motor vehicle cases, but does determine who is the dominant driver in a given situation:

[21] In the end, a court must determine whether, and to what extent, each of the players in an accident met their common law duties of care to other users of the road. In making that determination, a court will be informed by the rules of the road, but those rules do not eliminate the need to consider the reasonableness of the actions of the parties. This is both because the rules of the road cannot comprehensively cover all possible scenarios, and because users of the road are expected to exercise reasonable care, even when others have failed to respect their right of way. While s. 175 of the Motor Vehicle Act and other rules of

the road are important in determining whether the standard of care was met, they are not the exclusive measures of that standard.

- [33] The words "immediate hazard" appear in both ss. 174 and 175 of the Motor Vehicle Act and are used to determine when a vehicle may lawfully enter an intersection. They determine who is the dominant driver, but do not, by themselves, define the standard of care in a negligence action.

[Bold and italics emphasis in original, underline emphasis added.]

- [54] Walker v. Brownlee, [1952] 2 DLR 450 (SCC) sets out the common law test for the duty of care on dominant and servient users of the highway. A driver is entitled to expect that others will observe that they have the right of way, until such time that the driver ought to be aware that the other party is not yielding the right of way. The individual exercising the right of way is referred to as the "dominant user"; the person without the right of way is referred to as the "servient user." Estey J at 457 describes each driver duty:

[Emphasis added.]

The respective positions of these drivers are, however, different in this important respect: the law required [the servient user] to yield the right-of-way, while [the dominant user] had a right to expect, and, therefore to proceed upon that basis, that [the servient user] would stop at the intersection. When, however, he ought to have seen that [the servient user], without stopping, was proceeding into the intersection, then a duty devolved upon him to use due care to avoid a collision.

- [55] Where a driver in a servient position disregards his statutory duty to yield the right of way and a collision results, the servient driver must establish that after the dominant driver became aware (or by the exercise of reasonable care should have become aware) of the servient driver's own disregard of the law, the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself. As Cartwright J states in Walker at 461:

While the decision of every motor vehicle collision case must depend on its particular facts, I am of opinion that when A, the driver in the servient position, proceeds through an intersection in complete disregard of his statutory duty to yield the right-of-way and a collision results, if he seeks to cast any portion of the blame upon B, the driver having the right-of-way, A must establish that after B became aware, or by the exercise of reasonable care should have become aware, of A's disregard of the law B had in fact a sufficient opportunity to avoid the accident of which a reasonably careful and skillful driver would have availed himself; and I do not think that in such circumstances any doubts should be resolved in favour of A, whose unlawful conduct was fons et origo mali.

- [56] Salaam, accordingly, confirms that a dominant driver will not typically be found liable for an accident:

[25] A driver like the defendant, who is in a dominant position, will not typically be found to be liable for an accident. Drivers are generally entitled to assume that others will obey the rules of the road. Further, though defensive driving and courteous operation of motor vehicles are to be encouraged, they do not necessarily represent the standard of care or the purposes of a negligence action. A driver will not be held to have breached the standard of care simply because he or she failed to take extraordinary steps to avoid an accident or to show exceptional proficiency in the operation of a motor vehicle.

[Emphasis added.]

[57] That said, *Pirie v. Skantz*, 2016 BCCA 70, drawing on *Walker*, confirms that a through driver may still be wholly or substantially at fault for an accident:

[14] I take no issue with the appellant's submission that a through driver can, in appropriate circumstances, be found wholly at fault for an accident involving a driver who turns left on a stale yellow light. As a practical matter, a driver like the respondent, who is in a dominant position, will not typically be found to be liable for an accident: *Salaam v. Abramovic*, 2010 BCCA 212 at para. 25. Having said that, where a through driver: (1) approaches an intersection at an excessive rate of speed or otherwise conducts himself in such a way as to deprive the left-turning driver of the ability to reasonably anticipate he is about to enter the intersection on a stale yellow light; (2) fails to bring his vehicle to a stop in circumstances where other vehicles travelling in the same direction have already done so; or (3) should have become aware of the left-turning driver's own disregard of the law in circumstances that afforded him a sufficient opportunity to avoid the accident through the exercise of reasonable care, the through driver may be found wholly or primarily at fault for the accident: *Pacheco (Guardian ad litem) v. Robinson* (1993), 75 B.C.L.R. (2d) 273 (B.C.C.A.); *Walker v. Brownlee*, (1952), 2 D.L.R. 450 (S.C.C.).

[Emphasis in original.]

[58] *Nerval v. Khehra*, 2012 BCCA 436 is the leading case on s. 174: left turns. At paras 12-13, Harris JA expressly approves the s. 174 analysis of *Armstrong J* at trial, including his summary of the relevant law. I paraphrase that summary below:

- a) The first question is whether the through driver constituted an immediate hazard before the left-turning driver started their turn. The answer to that question will determine which of the two was the dominant driver before the collision.
- b) A motor vehicle is an immediate hazard if its driver must take a sudden or violent action to avoid the threat of collision if a servient vehicle is about to make a left turn entering or crossing the highway in the path of the approaching vehicle.
- c) The time to assess the question of an immediate hazard is when the left-turning vehicle commences the turn.

- d) A dominant through driver may still be in breach of their duty of care to the left-turning driver if they failed to take reasonable care when entering into the intersection in hazardous circumstances (such as where they were speeding or had an obscured view).
- e) The left-turning driver bears the burden of proving that the negligence of the dominant vehicle caused or contributed to the accident. In other words, that the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed themselves.
- f) In such circumstances, any doubt should be resolved in favour of the dominant driver.
- g) The obligation imposed on the left-turning driver by s. 174 of the Act not to start a turn if there is an immediate hazard has priority over certain other obligations imposed on a through driver (such as by s. 158 not to pass a vehicle on its right unless it is safe to do so).
- h) The resulting onus placed on the left-turning driver is not absolute. It may be qualified by the conduct of the through driver.

2. Contributory negligence

[59] The Negligence Act, RSBC 1996, c 333, s. 4(1) requires the Court to "determine the degree to which each person was at fault" for the damages claimed by the plaintiffs.

[60] Apportionment is to be determined based on "the degree to which each person was at fault", not the degree to which the fault of each caused the damage. Fault requires a consideration of blameworthiness which is "a gauge of the amount by which each proximate and effective causative agent fell short of the standard of care that was required... in all the circumstances": *Cempel v. Harrison Hot Springs Hotel Ltd.* (1997), 43 BCLR (3d) 219 (CA) at para 19. The task of the court is to assess the degree to which each party departed from the norm of reasonable conduct: para 21. Lambert JA provides guidance on that process:

[24] In the apportionment of fault there must be an assessment of the degree of the risk created by each of the parties, including a consideration of the effect and potential effect of [occurrences] within the risk, and including any increment in the risk brought about by their conduct after the initial risk was created. The fault should then be apportioned on the basis of the nature and extent of the departure from the respective standards of care of each of the parties.

[61] In *Aberdeen v. Township of Langley, Zanatta, Cassels*, 2007 BCSC 993 at paras 62-63, rev'd on other grounds 2008 BCCA 420, Mr Justice Groves provides a useful list of nine factors to assist in assessing the nature and degree of departure from the standard of care in order to determine an appropriate apportionment of fault:

1. The nature of the duty owed by the tortfeasor to the injured person
2. The number of acts of fault or negligence committed by a person at fault

3. The timing of the various negligent acts. For example, the party who first commits a negligent act will usually be more at fault than the party whose negligence comes as a result of the initial fault
4. The nature of the conduct held to amount to fault. For example, indifference to the results of the conduct may be more blameworthy. Similarly, a deliberate departure from safety rules may be more blameworthy than an imperfect reaction to a crisis
5. The extent to which the conduct breaches statutory requirements. For example, in a motor vehicle collision, the driver of the vehicle with the right of way may be less blameworthy
6. [T]he gravity of the risk created;
7. [T]he extent of the opportunity to avoid or prevent the accident or the damage;
8. [W]hether the conduct in question was deliberate, or unusual or unexpected; and
9. [T]he knowledge one person had or should have had of the conduct of another person at fault.

[128] The standard of care of a driver is not perfection but is that of acting as would the ordinarily prudent person: *Hadden v. Lynch*, 2008 BCSC 295 at 69.

V. Analysis - Liability

- [129] The traffic light sequence at the Intersection for northbound and southbound traffic on Main Street can be most generally summarized as the three green, amber and red lights for all four traffic signal heads are always operating in the same sequence, that is, they are all green, amber or red at the same time for the same length of time.
- [130] The light that deviates from that fixed pattern is the fourth light at the bottom of the traffic signal heads with four lights, that bottom fourth light being the dedicated left turning light, which either displays a flashing green light, turning to a solid amber arrow, then extinguishing, or no arrow appearing at all if there is an insufficient number of vehicles in the left turning lane to activate the left turn flashing green arrow.
- [131] The first point to note is that the plaintiff's description of the traffic light sequence when she approached 2nd Avenue on Main Street describes a light sequence that does not exist. She described stopping in the left turn lane because it had a red light, and the other two lights she could see for northbound traffic were green; however, there is no light sequence that is consistent with her evidence that when she stopped in the left turning lane it had a red light, while the northbound and southbound through traffic continued to flow through the Intersection with a green light, starting to turn from yellow to red.

- [132] If she did see northbound traffic continuing to move, she would have been able to turn left at that time if there was no oncoming southbound traffic, and that evidence is consistent with the defendant's evidence that the light was green for him, turning to yellow as he entered the Intersection.
- [133] A driver approaching the Intersection would not be expected to understand the specific characteristics of the light sequences as detailed in Mr. Carmona's evidence outlined above; however, as described above, all motorists have an overarching common law duty to exercise what constitutes, in all the circumstances, reasonable and due care, including a general duty to keep a proper look-out and to take reasonable precautions in response to apparent potential hazards, including being aware of, and to drive as directed by traffic control devices.
- [134] The two parties' descriptions of what they saw for their light cannot be reconciled.
- [135] If the light for the plaintiff was a flashing green arrow, then the light for the defendant was red.
- [136] If the light for the southbound defendant was green as he approached the Intersection, then the northbound traffic, including the left turn lane, would all see the same green ball on all four traffic signal heads, indicating that any left turning vehicle would need to wait for a gap in the southbound traffic to make the left turn. If the defendant's green light turned to yellow as he entered the Intersection, as he testified, then the northbound traffic would also see the green turning to yellow.
- [137] Given my findings on credibility above, and that the plaintiff did not understand the light sequence, I find that it is more likely than not that the light was as described by the defendant, green as he approached the Intersection, turning to yellow as he entered the Intersection.
- [138] Given that finding of fact, the plaintiff was facing a green light as was all the northbound traffic. If there was a vehicle in front of the plaintiff, that vehicle must have turned left ahead of the plaintiff during a gap in the southbound traffic.
- [139] The plaintiff then proceeded to turn left without appreciating that the southbound through traffic had the right of way over her as a left turning vehicle.
- [140] The defendant's vehicle was there to be seen by her, and as a left turning vehicle she should have been aware of southbound vehicles that could be a hazard to her as a left turning vehicle.
- [141] Section 174 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA] casts the burden of proving the absence of an immediate hazard at the moment the left turn begins on the left turning driver.
- [142] A left turn must not be commenced unless it is clearly safe to do so.

- [143] If there are no vehicles in the intersection or sufficiently close to be an imminent hazard, the driver may turn left and approaching traffic must yield the right of way.
- [144] I find that the defendant constituted an immediate hazard to the plaintiff before the plaintiff started her turn.
- [145] When the defendant first saw the plaintiff's vehicle he was aware she was in the dedicated left turning lane. The defendant had the right to assume that the plaintiff would not turn into his path.
- [146] Given the defendant's evidence that he saw the plaintiff's vehicle turning left at a distance of ten yards from his vehicle, I accept the defendant's evidence that he had no time to brake or take other action to attempt to avoid the collision.
- [147] The fact that the plaintiff's vehicle collided with the defendant's vehicle at the front left wheel and fender of the defendant's Mercedes is further evidence that the defendant's vehicle was an immediate hazard. The plaintiff did not turn into the path ahead of the defendant's vehicle, she turned into the side of the defendant's vehicle.
- [148] The defendant's vehicle must have been visible to the plaintiff when she commenced her turn because, in her own words: "as I proceeded to turn and make my left turn, that's when the accident happened".
- [149] A dominant through driver may still be in breach of their duty of care to the left turning driver if they failed to take reasonable care when entering into the intersection in hazardous circumstances (such as where they were speeding or had an obscured view).
- [150] Here, there is no evidence the defendant was speeding, nor that he had an obscured view. The plaintiff submits that the defendant had his sun visor down and the sun was in his eyes, but the defendant's evidence is that it was sunny a little but the sun did not bother him. I can infer that logically when the defendant was driving east on East 1st Avenue in the morning he could have put his visor down to shield his eyes from the sun rising in the east. When he turned south on Main Street the sun would have been to his left.
- [151] From the principles outlined above, the left-turning driver bears the burden of proving that the negligence of the dominant vehicle caused or contributed to the accident. In other words, that the dominant driver had a sufficient opportunity to avoid the accident of which a reasonably careful and skilful driver would have availed themselves; in such circumstances, any doubt should be resolved in favour of the dominant driver.
- [152] Here, there is no evidence that the defendant had a sufficient opportunity to avoid the Accident of which a reasonably careful and skilful driver would have availed themselves, and the plaintiff has not proven on a balance of probabilities that the defendant, as a dominant driver, had a sufficient opportunity to avoid the Accident.

- [153] The plaintiff did not see the defendant even though he was there to be seen as an immediate hazard, for any left-turning driver the most obvious immediate hazard being the oncoming through traffic. She agreed there were no impediments to her vision of the Intersection.
- [154] The plaintiff believed that she had a green arrow that gave her the right of way; however, her evidence that the northbound lanes had a green light, which was turning from yellow to red, is consistent with the defendant's evidence because the southbound traffic would see the same sequence, green, turning to yellow.
- [155] She disagreed that if the northbound left turning lane had a green ball, she could enter and make a left turn, explaining that it was an advance green, when red you could not make a turn; however, there is no dedicated red light for the left turn lane.
- [156] She could not confirm that the green arrow for northbound left turning traffic was a flashing or stagnant green.
- [157] She disagreed that a red light for the left turning lane does not exist.
- [158] On cross-examination she insisted that there was a separate left turn signal for northbound left turning vehicles that could show a red ball or red arrow.
- [159] She also disagreed that if there was a red light it would be red for all traffic. To confirm, if there is a red light it will be red for all northbound traffic, or red for all southbound traffic, or both, but it can be red for all northbound traffic, but not southbound traffic, and vice versa if only one left turn signal is activated and the other left turn signal is not activated.
- [160] She also disagreed that where there is an advance green light signal for a designated turning lane such as at the Intersection, a left turning vehicle can turn left after the green arrow is extinguished if the Intersection is clear for a left turn with no oncoming vehicles being an immediate hazard.
- [161] I find that the plaintiff was not paying attention to the signals, and she missed seeing the defendant's vehicle which was there to be seen.
- [162] Her evidence is that there was a three second delay for the car in front of her, then she followed it at a distance of two to three car lengths. The delay in the car turning in front of her can be explained by her evidence that the northbound traffic was continuing through the Intersection when she arrived in the left turn lane. The delay of the car in front of her could have been because it was waiting for a gap in the southbound traffic, it did so and she followed, not appreciating that she had to give way to oncoming traffic.

- [163] The plaintiff relies on *Cruz v. Bains*, 2020 BCCRT 1396, without an explanation of the relevance of the case; however, I infer that the case is cited because in *Cruz* the plaintiff was a left turning driver from Cambie Street onto West 12th Avenue, and the defendant approaching from the opposite direction assumed the plaintiff had a red light, similar to the assumption made by the defendant in the case at bar.
- [164] Otherwise, however, *Cruz* is distinguished on the basis that the tribunal found that the plaintiff had an advance green light turning from Cambie Street left onto West 12th Avenue. Also, the defendant was turning right at the intersection at a red light, not on a yellow light, and the defendant was not entering the intersection as through traffic. The collision occurred after the defendant made a wide right turn to West 12th Avenue into the left lane, colliding with the plaintiff completing his left turn from Cambie Street into the left lane of West 12th Avenue.
- [165] The plaintiff's written submissions referring to applicable sections of the MVA appears to be a quote of the *Cruz* references to ss. 129(1), 130, 165(1) and 144 of the MVA, but s. 165(1) has no application in this case because it concerns a vehicle turning right at an intersection.
- [166] The plaintiff also refers to *Henry v. Bennett*, 2011 BCSC 1254, in which a collision occurred at an intersection between the defendant turning left, and the plaintiff driving straight through the intersection. The court found the plaintiff solely at fault for the accident.
- [167] That case can be distinguished on numerous points, and is of no assistance to the plaintiff, including the following points regarding the actions of the left turning defendant in *Henry*, which are distinguished from the plaintiff's actions in the case at bar:
- a) the evidence in *Henry* was that the left turning defendant observed the oncoming traffic with care, waiting for an opportune window to make her turn;
 - b) the defendant waited in the left turn lane until the light turned amber before turning;
 - c) when the light turned to amber the defendant was entitled to act on the assumption that approaching vehicles which could stop safely would do so unless the oncoming traffic was apparent;
 - d) the defendant exercised extra caution;
 - e) the defendant waited until the traffic light was red before moving into her turn;
 - f) the defendant nosed left cautiously; and
 - g) the defendant's car did not strike the plaintiff's car; rather, the plaintiff ploughed into her car.
- [168] From the plaintiff's side in *Henry*, the case can be distinguished regarding the plaintiff's actions, who was driving through the intersection:

- a) the plaintiff entered the intersection at the very end of the amber phase, just as it was turning red;
- b) the plaintiff had ample opportunity to safely stop before the intersection, but chose to proceed into the intersection;
- c) the plaintiff passed by other vehicles on either side that had come to a stop; and
- d) the plaintiff was well behind other cars that had passed through the intersection.

[169] The plaintiff also submits the defendant had his sun visor down and so his vision of the Intersection and the lights could have been partially blocked by the visor, or the sun was in his eyes; however, the defendant's evidence is that while his sun visor was down it did not block his vision and the sun was not in his eyes.

[170] The plaintiff made the following submissions regarding Mr. Bowler's opinion and the evidence:

- a) Mr. Bowler opined that assuming the Mercedes was driving at a constant 50 kph, it would take 1.25 seconds from when it breached the intersection, which is defined by the north curb extension, to impact.
- b) The defendant gave evidence that upon impact, he had a yellow light while the plaintiff ran a red light. This is contrary to the expert opinion of Mr. Bowler, who opines: If I assume the defendant's traffic light changed from a green ball to an amber ball as he entered the intersection then the Smart's light would also have gone from a green ball to an amber ball at the same time, mirroring the Mercedes' light colour.

[171] However, as discussed above, the defendant did not know the plaintiff's light was red, he assumed the plaintiff had a red light because he was entering the intersection with the right of way, his yellow light following a green light. If the defendant saw a yellow light as he entered the intersection, then the plaintiff's light was a green lamp allowing her to turn left if safe to do so in a gap in the oncoming southbound through traffic, her green lamp also turning to yellow at the same time as the defendant's yellow light.

[172] The plaintiff also submits that if the Court is to accept the defendant's version of events, this would mean that he noticed the yellow light and the plaintiff's vehicle all within 1.25 seconds, suggesting that is unlikely. The plaintiff submits that what mostly likely occurred, is that the defendant was not paying attention and ran a red light.

[173] However, this submission does not explain how a conclusion can be reached that the defendant was not paying attention and ran a red light. The defendant's evidence did not waver in his assertion that the light turned yellow for his southbound traffic as he entered the Intersection at the crosswalk. The defendant's evidence is he saw the plaintiff's vehicle turning left at a distance of 10 yards. The defendant was not asked whether or not the plaintiff's vehicle and the yellow light were or were not both in his field of view at the same time; it is possible that they were--the plaintiff's vehicle was ahead of him and to his left, the

yellow light would have been directly ahead of him in the traffic signal head on the horizontal mast over the southbound lanes on the south side of the Intersection.

- [174] The plaintiff submits that the defendant was travelling faster than 50 kph and only provides evidence of the speed limit to avoid responsibility of the Accident; however, the plaintiff does not point to any evidence that demonstrates that the defendant was travelling faster than 50 kph.
- [175] The plaintiff submits that if the defendant was travelling faster than 50 kph then the time it would take from when he breached the curb to the Accident occurring would thus be less than 1.25 seconds for the defendant to see the light change and to see the plaintiff's vehicle, and that would be nonsensical, without pointing to any evidence or explaining why that would be nonsensical.
- [176] In fact, Mr. Bowler's opinion that at 50 kph the defendant would have travelled from the point at which he breached the Intersection to the collision in 1.25 seconds is consistent with the defendant's evidence that he saw the yellow light as he passed the pedestrian crosswalk, the pedestrian crosswalk being very similar to Mr. Bowler's point at which the defendant breached the Intersection, and Mr. Bowler referring to the north curb extension across the north side of the Intersection.
- [177] The plaintiff cites Dahlke, in terms of the defendant's credibility, quoting paras. 60, 91 and 92, in which the Court found the defendant's evidence unreliable on the basis of her defensiveness and evasiveness on cross examination, and her commonly conflating confident views about what she actually recalled at the time of the accident with her inference of what would have probably happened at the time in certain respects. She said she was a careful driver with "roadstar" status, which did not assist the Court to determine what happened on the day of the accident. Several of her answers on discovery were different than at trial, and she purported to have a good recollection of the relevant events, while the Court found she did not. The defendant contended that instead of her hitting the plaintiff's vehicle, the plaintiff had entered her lane and hit her vehicle; however, the Court found that did not happen, the defendant struck the plaintiff's vehicle as the plaintiff moved from a parking spot and entered an adjacent through lane, the defendant was not looking out diligently, was distracted and she braked late, and the collision ensued.
- [178] Here, it is the plaintiff's evidence that she approached the Intersection when the lights for northbound Main Street traffic were still green, both on the left and right traffic signal heads on the mast arm. If there was a vehicle in front of her in the left hand lane, and it was stopped, it would have been waiting for the southbound traffic to clear before it made the left turn to second Avenue. If there was a vehicle there, it likely turned, leaving the plaintiff with a green light, not an arrow, and the ability to turn left if the Intersection was clear of any hazard of southbound through traffic on Main Street; however, I find that the plaintiff, believing she was entitled to turn left, did not see the defendant's vehicle, failed to give-way to the defendant's vehicle as the vehicle with the right of way, she turned left, causing the

collision.

[179] The defendant cites *Andrews v. Mainster*, 2012 BCSC 823 [Andrews 2012], which I agree is very similar factually to the case at bar.

[180] In *Andrews 2012* the two plaintiffs in two actions were the two drivers in the same accident.

[181] Ms. Mainster was turning left to Fir Street from West 16th Avenue, while Ms. Andrews was opposing through traffic on West 16th Avenue. Ms. Andrew's traffic light turned amber as she was about one car length away from the intersection. Ms. Andrews was found to be the dominant driver, she was not driving at an excessive speed, and she had a clear unobstructed view up West 16th Avenue. Ms. Mainster turned left into the lane of oncoming traffic at the time the light for traffic on West 16th turned yellow.

[182] It was held that Ms. Andrews' vehicle constituted an "immediate hazard" to Ms. Mainster, Ms. Mainster did not "yield", and she did not become the dominant driver. Ms. Mainster could not explain why she did not see the other vehicle. The first time she saw the other vehicle was at the time of the collision. She did not see the other vehicle as she was not paying proper attention to oncoming traffic. She did not meet the standard of care of a driver in her circumstances. Ms. Andrews was not expected to anticipate that Ms. Mainster would move into her lane when she did. It was concluded that the proximity of the two vehicles was such that when Ms. Mainster moved into the lane of oncoming traffic that Ms. Andrews would have been unable to take sufficient action to avoid the collision. Ms. Mainster was found to be entirely liable for the accident.

[183] Here, the facts are very similar to *Andrews 2012*, and I find the reasoning to be compelling.

Findings of Fact

[184] I make the following findings of fact:

- a) On October 13, 2018, the plaintiff was the driver and sole occupant of the Smart Car.
- b) The defendant was the driver and sole occupant of the Mercedes.
- c) At approximately 09:30 a.m. on October 13, 2018, the plaintiff was driving northbound on Main Street in Vancouver, B.C. approaching the Intersection of Main Street and 2nd Avenue.
- d) At the same time, the defendant was driving the Mercedes southbound on Main Street approaching the Intersection. He was in the second lane from the curb, intending to proceed directly through the Intersection.
- e) The defendant had been driving eastbound on 1st Avenue before turning right to 2nd Avenue southbound.
- f) The weather was sunny and clear, and the roads were clear and dry.
- g) The sun visor in the Mercedes was down on the driver's side of the vehicle.

- h) At the Intersection, Main Street is aligned approximately north/south, with three lanes in each direction, with an additional centre lane dedicated to left turning vehicles for each direction, for northbound traffic on Main Street turning left to westbound on 2nd Avenue, and for southbound traffic turning left to eastbound on 2nd Avenue.
- i) 2nd Avenue on the west side of the Intersection is aligned approximately east/west.
- j) The plaintiff was in the centre left turning lane northbound on Main Street, intending to turn left to proceed on 2nd Avenue westbound.
- k) When the plaintiff proceeded to turn left from Main Street to 2nd Avenue, the left turn signal was not a flashing green arrow, nor was it a solid amber arrow.
- l) From the plaintiff's perspective as the driver of a left turning vehicle, the defendant's vehicle was oncoming traffic in the Intersection and constituted an immediate visible hazard to the plaintiff turning left.
- m) The defendant had the right of way.
- n) The plaintiff was not operating her vehicle with due care and attention, contrary to s. 144 of the MVA, which provides that a person must not drive a motor vehicle on a highway without due care and attention.
- o) The defendant was the dominant driver. His vehicle was an immediate hazard to the plaintiff. The plaintiff did not yield to the defendant as she was required to do pursuant to s. 174 of the MVA.

Conclusion on Liability

[185] I find that the plaintiff did not meet the standard of care of a driver in her circumstances.

[186] I find that the plaintiff has not proven on a balance of probabilities that the defendant was negligent, that is, she has not proven that the defendant failed to take reasonable care when he entered the Intersection, or that he had a sufficient opportunity to avoid the collision.

[187] As a result, I find the plaintiff to be entirely liable for the Accident.

VI. Damages

[188] Having found the plaintiff entirely liable for the Accident, the defendant is not liable to the plaintiff for damages; however, if I am wrong on the question of liability, the following is my assessment of the plaintiff's damages if the defendant were to be found liable in whole or in part for the Accident.

[189] The following is a summary of the plaintiff's evidence of her circumstances before and after the Accident. As noted above, some of the dates of employment and other events in the plaintiff's evidence are not wholly accurate.

A. The Plaintiff's Circumstances Before the Accident

- [190] The plaintiff was 27 years old at trial.
- [191] As a young child she played sports including squash, volleyball, field hockey and rugby, and she danced.
- [192] By the time she reached age 14 she was focussing on volleyball. She played volleyball competitively to about age 18 or 19, then became more involved with work.
- [193] She attended high school in Victoria and worked at a Dairy Queen from age 13, working nights and weekends. She was promoted to manager at age 17 while still in high school.
- [194] While in high school she developed an interest in makeup, including reaching out to makeup schools, Blanche Macdonald and Complexions.
- [195] She graduated high school in 2015, moved out of her parents' house, continued to work at Dairy Queen and took a fine arts bartending program.
- [196] In early 2016 she moved to Vancouver and enrolled at Blanche Macdonald for a program starting in August, 2016.
- [197] She had no health concerns at this time. She had earlier suffered some migraine headaches in January 2015 in Grade 12 for two to three weeks, which did not persist.
- [198] In Vancouver she lived with her brother's godparents for a few months before moving into a house with a friend from Victoria and a co-worker.
- [199] Two weeks after she arrived in Vancouver she started working at a Hop and Vine pub in Burnaby until June 2016.
- [200] Within a week of leaving Hop and Vine she started at Mosaic doing liquor sampling displays at liquor stores, standing for up to eight hours without difficulty.
- [201] After about a year at Mosaic working three days a week she sought more income stability and found a job at Legacy liquor store in the Olympic Village area. She started there in August 2016 at the same time as the Blanche Macdonald program began. The job at Legacy involved working as a cashier, stocking shelves and helping customers. She had no difficulty with the physical aspects of the job, which included moving pallets, cleaning shelves, and moving heavy boxes up to the store attic.
- [202] The Blanche Macdonald program was three days a week, Monday to Wednesday. She enjoyed the program, including the social aspects and particularly the creative aspects of the makeup work and trying new things and different techniques.
- [203] The work involved long hours of standing as she worked on someone, which she did without any physical difficulties. The program ended in July 2017. Before completing the program, she started another job at Mehndi & More, a face-painting company. She continued to work at Legacy as well.

[204] In January 2018 she moved from the house to a two bedroom apartment with a friend and a co-worker at Legacy with whom she had become involved romantically, and they were married that same month, but a little over a year later they broke up, and they ultimately divorced. The relationship ended in March 2019, five months after the Accident on October 13, 2018.

B. The Accident

[205] The morning of the date of the Accident, October 13, 2018, the plaintiff was scheduled to start working at Legacy at 10:00 a.m.

[206] The details of the Accident are described above.

[207] After the Accident, which occurred at about 9:30 a.m., she limped to work, about two and a half blocks from the scene of the Accident. She spoke with her boss, who looked at her and said she would not be working that day. She called ICBC and her mother. Her boss said she should get checked out so she left work after about 45 minutes to an hour and went to a walk-in medical clinic.

C. The Plaintiff's Injuries and Treatment

[208] When the Accident occurred, the plaintiff recalled slamming into the driver's side airbag and the front one as well.

[209] After the Accident she developed bruising around her armpit and chest from the air bag on the steering wheel, and swelling, cuts and bruises on her left leg where it banged on the side door. The leg injury was the first thing she noticed, and then she started to get a really bad headache.

[210] She took two weeks off on the advice of a doctor. After two weeks she still had a bad limp, her leg was sore, the bruising on her chest and armpit were sore, she had headaches, hip pain, and wrist and elbow soreness.

[211] She continued to have constant migraine headaches two weeks after the Accident, and they continue until today.

[212] She has taken Botox for the migraine headaches the past nine months, which has helped to lessen the symptoms of the headaches. Before Botox she had used Tylenol or Ibuprofen, and tried to sleep them off.

[213] The Botox has helped her migraine headaches a lot, they are not nearly as severe as before, just little headaches here and there, once or twice a month, when she had it she has no blurred vision, no fainting, no pressure where she cannot open her eyes due to light sensitivity. She takes Botox by injection every three months, paying \$175 for each visit.

- [214] She continued to limp for about a month after the Accident. Today she experiences leg pain once in awhile, if she is working out or doing something strenuous. If she overexerts the leg it starts to hurt. She finds it a little weaker than it was before the Accident.
- [215] The swelling and bruising lasted about a month after the Accident.
- [216] The right wrist pain occurred a few days after the Accident and lasted for a good two to three weeks afterwards. Sometimes when she works out it acts up randomly.
- [217] The right side hip pain occurred because of her favouring her right side, limping around that occurred after the fact. Once in awhile it comes up.
- [218] She has back pain, which started lower then worked up her spine to between her shoulders and her neck, the back and neck pain continuing to today..
- [219] She experienced pain in her right shoulder, which progressed, but does not hurt a much as at the time of the Accident.
- [220] She had really bad anxiety when getting behind the wheel of a car the first month after the Accident, into the second month. She recalls going to a job in Squamish for Mehndi & More. When driving back she had a panic attack. She called her roommate who calmed her down. Her anxiety has been heightened a lot after that, sometimes she has a panic attack triggered by her back injury and the migraine headaches.
- [221] She has had some difficulty with sleeping, if her body is contorted during the night she wakes up with back pain.

D. The Plaintiff's Circumstances After the Accident

- [222] At the time of the Accident the plaintiff was working at the Legacy liquor store and Mehndi & More face painting.
- [223] After the Accident, at Legacy she could not stand for eight hours and modified that with a stool to sit next to the cash register. She could not do any heavy lifting for a month and a half after the Accident. She was still limping and her back issues did not allow her to carry what she used to be able to carry, and limited the time she could stand.
- [224] In August 2019 she stopped working at Legacy. She planned to move back to Victoria and to do a less strenuous job with less physical labour because she could not perform the way she used to.
- [225] In Fall 2019 she worked as an assistant manager at the seasonal pop-up store, Halloween City, managing staff, scheduling and paperwork, directing display setup, and helping customers.
- [226] She continued to work at Mehndi & More on call, her last work with them in about the beginning of 2020. She was hunched over doing the designs and after four hours her back was killing her. Then COVID hit, the owner closed the business and moved to Australia.

- [227] In November 2019 she moved back to Victoria for a slower pace than Vancouver and to re-group. She wanted to save money to go to Europe, with travel being her main goal.
- [228] She started working in the Cascadia liquor store within a week or two after moving to Victoria. She was a cashier there as well, stocking, cleaning shelves, helping customers with selection of products. She found it more difficult than before the Accident because they had lower shelving than Legacy, with more kneeling and crouching work than before. She would be putting away orders in the back room where there were ladders moving 50 pound boxes. That was strenuous and her back really hurt after a day of work there.
- [229] She stopped working at Cascadia in December 2019 because she was tired of getting home and having back issues and hurting after work.
- [230] She got a job as a bartender at the 1550 Restaurant in Victoria, a restaurant style pub. She enjoyed working there taking orders, stocking everything, making drinks, and making sure the beer was properly hooked up, but she had difficulty and required assistance with the heavier moving of tanks and kegs.
- [231] She was laid off from the 1550 Restaurant in March 2020 because of the COVID pandemic shutdown.
- [232] She received CERB (Canadian Emergency Response Benefits) for awhile, then decided to do DoorDash deliveries on the side for a little bit. She did that in Victoria for about four months from April to August 2020.
- [233] In August 2020 she went back to work for Dairy Queen. She did not want to go back to work there as a matter of pride. Physically her back hurt after eight hours working on tile flooring and carrying boxes up steep staircases. She stopped working there after a month because they paid her less than their original agreement.
- [234] In the Fall of 2020, Ms. Bryan believing it to be September, she began to work at Modern Beauty in Victoria, a wholesaler of products for hairstylists, makeup artists, and estheticians.
- [235] She was a floor staff member, helping clients, stocking shelves, picking through old inventory and putting it on pallets, then shipping them out, unpacking new ones.
- [236] The job involved a lot of manual labour and she would go home in pain, mainly back main, and some days migraines from the back pain.
- [237] She stopped working there in August 2021 because of politics and the management. She ran into a woman she knew from Modern Beauty she had interned with, who was up and coming with a new makeup company, MisMack Cosmetics. Makeup was the plaintiff's passion that she wanted to do long term. The new opportunity offered her a gateway back into the makeup industry for which she had gone to school.

- [238] The plaintiff believed she started working at MisMack Cosmetics in August 2021, but it appears from other records to be June 2021 for approximately one year until May 2022.
- [239] She was a salesperson at MisMack Cosmetics, giving free pampering sessions for 45 minutes to customers, doing makeup and showcasing products as a paid service. She typically worked five days a week full-time, sometimes six clients each day on busy Fridays and Saturdays, during the week approximately one to three or four clients each day.
- [240] Physically she found some sessions more challenging than others, depending on how her back felt, there were definitely some days she would go home in pain, and experience migraines.
- [241] She enjoyed the work. In early 2022 she left her position and travelled to Kosovo to visit her partner for a few months. While in Europe she did some promotional videos for MisMack Cosmetics.
- [242] When she returned to Victoria in June 2022 she started working at the Canadian Brewhouse as a bartender, and delivering medication with I.D.A. Pharmacy.
- [243] At the Canadian Brewhouse, physically it could be demanding going up and down two flights of stairs, and changing heavy beer kegs. She would normally get assistance from others to do that because of the weight of the kegs. At times her back and shoulders would hurt from the physical effort.
- [244] On cross-examination, she agreed her back pain worsened when she returned from Kosovo in 2022 and when she worked increased hours at Canadian Brewhouse and delivered medications.
- [245] She was laid off from the Canadian Brewhouse in December 2022, her shifts were getting dropped as business slowed in the winter, and she needed more consistent pay.
- [246] She liked the social aspects of the bar and restaurant industry, but she does not like the long hours and some of the manual aspects that she finds difficult. She does not see herself continuing in that industry because of her goal to stay in the makeup and beauty industry.
- [247] Her work, delivering medications, is physical, driving around the city, getting in and out of the car, and up and down stairs. Sometimes her back hurts from the physical effort. She enjoys her co-workers and finds the work relaxing in that it is not super high stress depending on the day. She meets some nice people and she is proud that she is helping people.
- [248] Over time she has done independent makeup work. More recently, in September 2023 she started her own business as a sole proprietor, Batwing Beauty Bar, doing makeup services, bodypainting and tattooing. She enjoys the creativity and meeting new clients. She finds it gratifying to give people a new look. She hopes to stay in the makeup industry and grow her business, possibly with her own cosmetic line and services. She promotes herself on various social media platforms including Facebook, Instagram, TikTok and Batwing Beauty

websites.

- [249] The plaintiff agreed in cross examination that she tried to promote her business. She did promotions and created social media content. She agreed she got a bit of a following through her work with MisMack and was building on that.
- [250] She agreed the makeup industry was cutthroat. She agreed the market in Vancouver was busier than the market in Victoria, with fashion shows and commercial work more available in Vancouver than Victoria.
- [251] She agreed that MisMack closed in May of 2024. They were not making enough money to stay open in Victoria. When the plaintiff had returned to work in May of 2023, MisMack could not afford to hire her for more than 1 day per week at 7 hours per shift.
- [252] The plaintiff said that she was looking for a new job as she wanted something in her actual field. She does not want to remain with the pharmacy long-term.

Self-reporting

- [253] Given my concern about the plaintiff's credibility, her evidence relating to her injuries requires some careful consideration.
- [254] I am mindful of the Court of Appeal's recent decision in *McGlue v. Girvan*, 2024 BCCA 208 at paras. 47-50, citing *Mariano v. Campbell*, 2010 BCCA 410, referring to the need to take care in cases where there is limited objective evidence of continuing injury, the correct approach being that "there must be evidence of a 'convincing' nature to overcome the improbability that pain will continue, in the absence of objective symptoms, well beyond the normal recovery period, but the plaintiff's own evidence, if consistent with the surrounding circumstances, may nevertheless suffice for the purpose.": *McGlue* at para. 48
- [255] See also *Dhaliwal v. Greyhound Transportation Corp.*, 2015 BCSC 2147 at para. 280 regarding limited objective medical evidence requiring examining the plaintiff's own evidence with a skeptical eye and critical view, and the need for compelling evidence that the plaintiff's complaints are a true reflection of a continuing injury.
- [256] Here, there were very limited medical records in evidence, the plaintiff relying on her own evidence and the expert reports of Dr. Waseem and Jennifer Lane, described below, which were also informed by the plaintiff's self-reporting.
- [257] As noted below, Dr. Waseem's report refers to what he describes as objective findings on examination, being pain on palpation of the spine - cervical, thoracic and lumbar.
- [258] Jennifer Lane's report also refers to her observations of the plaintiff appearing to experience some pain on some activities during her assessment.
- [259] The plaintiff's witnesses including her mother and her friends, Quinn Groves and Bianca Bancy, also described below, all gave some evidence that they observed a change in the plaintiff from before the Accident to after the Accident, including apparent limitations in

the plaintiff's physical abilities, and mood change. I considered these witnesses to have given their evidence in a straightforward manner. There may be some element of their sympathy to the plaintiff; however, I do not consider that factor to be a reason to discount their evidence.

[260] The various witnesses, although in some cases having more limited recent contact with the plaintiff, were consistent in their observations of the plaintiff's mood changes after the Accident, and their observations of the plaintiff appearing to experience pain, particularly when she had physically exerted herself.

[261] As a result, I am satisfied that the plaintiff's reports of continuing back pain and migraines are credible, while also accepting that there is evidence of the plaintiff exaggerating her symptoms.

VII. Witnesses

Plaintiff's witnesses

[262] The plaintiff called two expert witnesses, Dr. Zeeshan Waseem, a physiatrist, and Jennifer Lane, an occupational therapist.

[263] The plaintiff also called the following non-expert witnesses:

- a) Quinn Groves, a friend of the plaintiff whom she has known since high school in Victoria.
- b) Bianca Bancy, a friend of the plaintiff who met her while they both were taking a course at Blanche Macdonald in 2017-2018.
- c) Irena Bryan, the plaintiff's mother.
- d) Tahara Hosseini, the plaintiff's current employer.

Dr. Zeeshan Waseem, physiatrist

[264] Dr. Zeeshan Waseem, a physiatrist, was qualified to give expert opinion evidence as a medical doctor with expertise in physical, medical and rehabilitation, with a special focus on the diagnosis, treatment and prognosis of musculoskeletal injuries, myofascial injuries, chronic pain and related symptoms for patients.

[265] Dr. Waseem assessed the plaintiff on February 6, 2014 and prepared a report dated March 16, 2024.

[266] Dr. Waseem's report refers to the plaintiff's pre-accident history including episodic migraines occurring once every six months at a moderate to severe intensity with photophobia lasting for approximately five hours and abating with a combination of rest and Tylenol.

- [267] The plaintiff's evidence was inconsistent in this respect in direct examination because she stated that she had a migraine headache in June 2015, but she did not continue to experience migraines after that.
- [268] In cross examination, the plaintiff was referred to clinical records providing evidence of her reports of at least two further episodes of migraines before the Accident.
- [269] Dr. Waseem described her current symptoms, as reported to him by the plaintiff, as being constant pain involving her neck, upper back, mid back and lower back that is usually moderate in intensity. There has been no substantial improvement in her symptoms since the Accident. She reported aching and throbbing headaches a few times per week, which have improved since she started Botox injections.
- [270] The plaintiff reported she was independent with respect to personal care, mobility transfers and driving.
- [271] Dr. Waseem's opinion is that the plaintiff suffered sprain/soft tissue injuries of the cervical, thoracic and lumbar spine as a result of the Accident, which has resulted in chronic myofascial pain and aggravated migraines. The prognosis for full recovery is poor. She is not disabled from work except for the first two weeks following the Accident. She continues to work with pain. She is largely able to perform her usual housekeeping activities normally. Some repetitive bending tasks makes her lower back pain worse.

Jennifer Lane, occupational therapist

- [272] Jennifer Lane, an occupational therapist, was qualified to give expert opinion evidence as an occupational therapist with an expertise in functional capacity evaluations and cost of care assessments.
- [273] Ms. Lane assessed the plaintiff and prepared a functional capacity evaluation and cost of future care report dated March 21, 2024.
- [274] Ms. Lane's testing of the plaintiff's strength and range of motion indicates that the range of motion was within normal limits for the plaintiff's back (cervical, lumbar and thoracic), and upper (shoulder, elbow and wrist) and lower extremities (hip, knee, ankle).
- [275] Ms. Lane's report also refers to numerous physical tests administered by Ms. Lane with the plaintiff, including non-material handling, various movement tests, hand and pinch grip, strength, material handling, aerobic weight capacity, work activity, work simulation, and work endurance.
- [276] All of the results of these tests in Ms. Lane's report appear to score the plaintiff as having completed the tests without difficulty other than some observations of some pain and discomfort with some testing, for example she scored "constant" in her ability to sit and stand for 125 and 65 minutes, respectively; "competitive" for work rate level; and "completed" for non-material and material handling movements.

- [277] The one area of the report, the job match comparison table, refers to various physical activities such as kneeling, bending, reaching, against which Ms. Lane has indicated whether some of the plaintiff's jobs such as the pharmacy deliveries, MisMack, and Batwing Beauty Bar are a "match", with Ms. Lane's ultimate conclusion being that the plaintiff is best suited for work that involves alternating postures and positions as she had some difficulty with prolonged periods of neck and back flexion and she was observed to request breaks, change postures and modify the tasks. Regarding job-specific comments, Ms. Lane observed that for the pharmacy medications delivery, the plaintiff had some limitation with lifting, but she has modified the job to accommodate. With Batwing Beauty Bar, she had some limitations with certain postures, and some pain and discomfort.
- [278] Ultimately, Ms. Lane summarizes the functional assessment by opining that the plaintiff is able to complete personal care tasks independently; she can cook simple meals for herself; she can walk in the community independently with some reported pain; she can complete grocery shopping tasks, including lifting a variety of items; she can complete household cleaning tasks with some pain and discomfort; and she is not responsible for lawn and garden care, nor house maintenance tasks.
- [279] Her cost of care recommendations include botox injections (\$700-\$4,300 annually); psychologist sessions (\$2,585 fixed cost for one assessment and ten sessions); kinesiologist sessions (\$2,816 fixed cost for 24 sessions, and \$526 for six sessions annually); housecleaning services (\$2,080 annually for two hours every two weeks); and future lawn care and garden care (\$1,138.50 annually).
- [280] These recommendations are considered in more detail in the future cost of care section below.

Quinn Groves

- [281] Mr. Groves met the plaintiff in high school in Victoria and they remained friends after high school. He moved to Burnaby and was one of the plaintiff's three roommates before he moved to East Vancouver where he lived with the plaintiff and her partner.
- [282] Mr. Groves testified that after the Accident he saw the plaintiff at their residence, she was limping, flustered, on edge and frazzled, and in her room crying on and off. For two weeks after the Accident she was super quiet and stayed in her room. Six months after the Accident the plaintiff was irritable and in and out of pain, holding her neck a lot, limping and stretching. In cross examination he agreed she was limping for three weeks to a month.
- [283] Mr. Groves testified that the plaintiff is not as active after the Accident. Mr. Groves testified that prior to the Accident, the plaintiff was super active, played volleyball, always hung out, and came to bars. She is more irritable after the Accident, but she is still a good friend.

[284] Mr. Groves and Ms. Bryan were no longer roommates after she moved back to Victoria around the time of COVID in 2020. In cross examination he stated that he has not seen her as much since she moved to Victoria, only when he goes back to the Island where his parents also live.

Bianca Bancy

[285] Bianca Bancy testified that she met the plaintiff at Blanche Macdonald in 2017, where she and the plaintiff started and completed the program at the same time. Ms. Bancy's first impression of the plaintiff was that she was outgoing, bubbly, full of life, and a passionate student. The two of them would do activities together such as going to the mall, going to the beach, and clubbing.

[286] Ms. Bancy's evidence is that after the Accident she has seen the plaintiff a handful of times. She and the plaintiff stopped going to the beach, clubbing, and the mall after the Accident. She would mostly go to the plaintiff's house to sit and talk. She described the plaintiff as having low energy and not being her normal bubbly self, struggling to walk long distances.

[287] In cross examination Ms. Bancy agreed that she spoke to the plaintiff about the breakdown of the plaintiff's marriage, which she was pretty upset about. Ms. Bancy was interested in a career in the make up industry, but COVID impacted the industry, it slowed down, and it made her change her career plans.

Irena Bryan

[288] Irena Bryan is the plaintiff's mother. She is 60 years old and works as an executive assistant for Island Health.

[289] Ms. Bryan's evidence is that the plaintiff was a happy child, full of life, she loved to run around and explore.

[290] She testified that the plaintiff was active as a teenager, playing many sports including club level volleyball, field hockey, and baseball. She encouraged her kids to be active in sports because she and her husband were active their whole lives.

[291] As a teenager the plaintiff liked to explore makeup. Like herself, the plaintiff has a creative side, and she encouraged the plaintiff's interests; for example, when the plaintiff was aged around 11 to 13, Ms. Bryan booked an appointment for the plaintiff to learn how to apply makeup.

[292] Ms. Bryan's evidence is that the plaintiff had no health issues or migraine headaches growing up.

- [293] She testified that she did not visit the plaintiff in Vancouver at any point in time after the Accident. She was concerned about the plaintiff's ability to care of herself after the Accident, and arranged grocery shopping for the plaintiff for 2 to 3 weeks following the Accident.
- [294] Ms. Bryan testified that she paid for physiotherapy for the plaintiff after the Accident until the plaintiff moved back to Vancouver Island because the plaintiff did not have enough money to pay for it.
- [295] Ms. Bryan's evidence is that she observed differences in the plaintiff after the plaintiff moved back to Vancouver Island following the Accident. She testified that the plaintiff was in discomfort, had regular headaches and would regularly say her head hurts.
- [296] She testified that her observations of the plaintiff have been steady. She testified there has not been a week go by where the plaintiff has not had a headache, or her back is bothering her.

Tahara Hosseini

- [297] Ms. Hosseini is the plaintiff's current employer at Forbes Pharmacy, which has a program for mental health and addiction patients, including a medication delivery program partnered with the Umbrella outreach program, through whom she met the plaintiff.
- [298] Ms. Hosseini's evidence is that the plaintiff has been working with Forbes Pharmacy for two years in the same role, including medication deliveries all over town, requiring driving and walking. The plaintiff uses her own vehicle for the delivery runs.
- [299] Ms. Hosseini refers to specific delivery routes, including the "DSC" delivery route, which requires carrying bins up and down stairs.
- [300] Ms. Hosseini also described the "Munsi" delivery route as not being good for the plaintiff physically, the plaintiff having informed her it was hard on her back and challenging for her.
- [301] She stated that she tried to limit difficulties for the plaintiff, for example trying not to schedule the plaintiff for the Munsi route because the plaintiff found that route to be physically challenging.

Defendant's witnesses

- [302] The evidence of the defendant's witnesses, James Bowler, and Rich Carmona, has been considered in the liability section above.

VIII. Causation

- [303] The primary test for causation asks: but-for the defendants' negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendants' conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [304] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendants' negligence, no better or worse. 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 (the thin skull rule). However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.
- [305] In *Sarginson v. Nordquist*, 2019 BCSC 1386, Justice Winteringham (as she then was), summarized the principles of causation as follows:
- [43] As previously noted, although the defendant has admitted liability, the defendant defends Ms. Sarginson's claims for damages on the basis that they are excessive and (except for the wrist injury) the issues now affecting her are not causally connected to the accident.
- [44] Ms. Sarginson must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to each of the injuries she sustained in the accident. In order to establish causation, Ms. Sarginson must prove on a balance of probabilities that but for the accident, she would not have suffered the injuries of which she now complains.
- [45] The defendants' negligence need not be the sole cause of the injury so long as it is part of the cause beyond the range of de minimus. The tortfeasor must take their victim as the tortfeasor finds the victim and is liable even if other causal factors for which the defendant is not responsible result in the victim's losses being more severe than they would be for the average person (known as the "thin-skull" principle). At the same time, the tortfeasor need not put the victim in a better position than the victim would have been in and need not compensate the victim for the effects of a pre-existing condition that the victim would have experienced in any event. Causation need not be determined by scientific precision: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 13-17 [*Athey*]; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [46] The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendants' conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23.
- [47] Causation must be established on a balance of probabilities before damages are assessed. As McLachlin, C. J. C. stated in *Blackwater v. Plint*, 2005 SCC 58 at para. 78:

Even though there may be several tortious and non-tortious causes of injury, so long as the defendants' act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*

[48] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendants' negligence, no better or worse. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the crumbling skull rule): *Athey* at paras. 32-35.

[49] In *Rabiee v. Rendleman*, 2015 BCSC 595, the defendants took issue with the lack of objective evidence supporting the plaintiff's injuries. As such, Justice Sharma considered the standard of proof regarding subjective and objective evidence of injury and confirmed that the standard of proof remains unchanged, stating:

[65] I do not take these quotes to mean that a stricter standard of proof applies where the main evidence about injury comes from a plaintiff's subjective reports to doctors and testimony in court. The standard of proof does not change and it does not matter if the evidence is "objective" or "subjective". In fact, after considering the above quotation, the Court of Appeal in *Butler v. Blaylock*, [1983] B. C. J. No. 1490 (B.C.C.A.) clarified: "It is not the law that if a plaintiff cannot show objective evidence of continuing injury that he cannot recover. If the pain suffered by the plaintiff is real and continuing and resulted from the injuries suffered in the accident, the plaintiff is entitled to recover damages. "

[66] The key consideration is whether the evidence, as a whole, establishes that the plaintiff's injuries were caused by the defendants' negligence on a balance of probabilities. I have concluded that Ms. Rabiee has met that burden. Thus, the fact that the evidence of her injuries is based largely on subjective reports does not detract from the application of the *Stapley* factors.

[Emphasis added.]

[306] Here, as noted above, the witnesses called by the plaintiff - her mother and two friends, Quinn Groves and Bianca Bancy, gave evidence of their observations of a change in the plaintiff from before the Accident to after the Accident, including apparent limitations in the plaintiff's physical abilities, and mood change.

Back Pain

- [307] Dr. Waseem's report refers to an examination of the plaintiff including palpation of the cervical, thoracic and lumbar spines where pain was noted, and muscle stiffness, increased muscle tone, and spasms. Taut bands and trigger points were notable. Examination of the upper and lower extremities note no pain with palpation.
- [308] Dr. Waseem's opinion is that the sprain/strain soft tissue injuries of the cervical, thoracic and lumbar spines as a result of the Accident have resulted in chronic myofascial pain of the affected regions and aggravated migraines. Her back pain has not improved substantially, but her headaches have much improved since starting Botox injections. A pre-existing history of migraines has led to a protracted and less than complete recovery. The prognosis for full recovery is poor, with some improvement possible.
- [309] Considering Dr. Waseem's evidence, the plaintiff's and other witnesses' evidence, I find that the plaintiff has proven on a balance of probabilities that she continues to suffer back pain from the injuries she suffered in the Accident.

Migraine Headaches

- [310] Regarding the plaintiff's migraine headaches, the Court must consider the pre-existing non-tortious cause of the plaintiff's headaches, as the claim is for the aggravation of headaches, the plaintiff having suffered headaches before the Accident.
- [311] There are a number of different complicating factors in the evidence of the plaintiff's headaches, including the fact she had been taking Botox for a separate condition, hyperhidrosis, or excessive sweating, from Dr. Beneloulou in 2021, her headaches had a connection to her back pain in that when her back pain was worse the headaches were also worse; her back pain was worse when she returned from Kosovo and worked at the CDN Brewhouse, suggesting there had been some improvement before that. Her headaches increased, in part because of less sleep because of the long late night shifts, and the loud atmosphere. The back pain was also linked to her medication delivery work when exposed to smoke and fumes, in the air, triggering her migraines.
- [312] She had a migraine headache in 2015 in high school, describing it as the only one she had before the Accident, but explained a pre-Accident migraine in 2018 on a tattoo infection, and admitted in cross-examination that she had also had bad migraines before the Accident in 2020 in relation to day drinking with a friend resulting in the plaintiff feeling sick for two weeks with bad migraines and nausea.
- [313] In cross-examination, Dr. Waseem stated that the plaintiff had a pre-existing history of migraines she experienced episodically. It was his understanding they were not terribly frequent, but they had worsened since the Accident. He did not feel he needed to go into them in any detail, he reviewed her current condition as an extension of what she already had. He described her migraines as an extension of headaches she experienced before that

had been diagnosed as migraines, not making a distinction between the term "headaches", that term used as a catchall phrase, and migraines-when he refers to headaches he is referring to migraines- she was suffering prior to the Accident, which worsened shortly after the Accident.

[314] I find that but for the Accident, the plaintiff would not, on a balance of probabilities, have suffered the aggravation of her migraines that she had experienced before the Accident. The plaintiff has met the test of establishing that the defendant's negligence was a "cause in fact" of the aggravation of the migraines. I am also satisfied that the Accident was a proximate cause of the aggravation of the migraine headaches.

[315] Before the Accident, the plaintiff had experienced migraine headaches. She appeared to attempt to minimize the extent to which she had experienced headaches, but those headaches, as a pre-existing condition, were part of the plaintiff's pre-Accident condition.

[316] The assessment of damages can include a deduction in the overall award if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, as explained in *Athey* at para. 35, as follows:

The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage: *Cooper-Stephenson*, supra, at pp. 779-780 and *John Munkman, Damages for Personal Injuries and Death* (9th ed. 1993), at pp. 39-40. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award: *Graham v. Rourke*, supra; *Malec v. J. C. Hutton Proprietary Ltd.*, supra; *Cooper-Stephenson*, supra, at pp. 851-852. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position.

[Emphasis in original.]

[317] The question, as a matter of compensation, is whether a deduction should be made from any or all of the awards for non-pecuniary damages, past and future loss of capacity to earn income, and future cost of care.

[318] Here, the plaintiff's pre-existing migraine headaches were manifest at the time of the Accident and continue to affect her, aggravated by the Accident. There is no evidence this pre-existing condition will get progressively worse, or improve.

- [319] There is a risk the pre-existing migraine headaches will continue in the future, regardless of the Accident. As a result, an assessment is required to determine the amount of a reduction of damages assessed in relation to the Accident, if any, and whether a reduction should be applied to some or all of the awards for non-pecuniary damages, past and future loss of capacity to earn income, and future care costs.
- [320] Given the finding that but for the Accident the plaintiff would not, on a balance of probabilities, have suffered the aggravation of her pre-existing headaches, the plaintiff has established that the Accident was a cause in fact of the aggravation of the headaches; however, I am not satisfied that the Accident caused all of the plaintiff's ongoing headache symptoms as she had pre-existing symptoms, her current symptoms can arise from lack of sleep and environmental factors such as smells or fumes.
- [321] Given these factors, I find that it is likely, even in the absence of the Accident, that the plaintiff would have continued to suffer headaches.
- [322] In the liability section above, *Andrews 2012* is discussed in terms of its similar facts. The damages assessment of the plaintiff in that case, Ms. Andrews, involved a separate trial, the reasons for judgment cited as *Andrews v. Mainster*, 2014 BCSC 541.
- [323] In that case, one of the issues was an apportionment of damages between non-tortious and tortious causes, the Court finding that 50 percent of the plaintiff's present symptoms were attributable to the accident, 40 percent were attributable to the plaintiff's pre-existing mood and anxiety disorder, and 10 percent to subsequent intervening events.
- [324] Here, although difficult to assess with any precision, a percentage of the plaintiff's headache symptoms that are attributable to the Accident, I find that a range of 40 - 60 percent of the plaintiff's headache symptoms is a reasonable estimate as the basis for an assessment of an award, the average of that range being 50 percent.
- [325] However, the plaintiff's migraine headaches do not appear to be the most significant aspect of the plaintiff's ongoing pain, it is her back pain that appears to predominate, the back pain often being a factor in the migraine headaches.
- [326] Based on the limited evidence of the impact of the plaintiff's migraine headaches before the Accident, and after the Accident, on a percentage basis I consider that impact to be minimal or nominal, and the 50 percent of the migraine headaches as pre-existing needing to be reduced to a lower percentage as a proportion of the plaintiff's ongoing pain as a whole, which I estimate as 10 percent.
- [327] For this reason, I consider it appropriate to reduce the award for non-pecuniary damages by 10 percent. I do not reduce the award for past and future loss of capacity to earn income, since, as discussed below, it appears that the plaintiff's back pain is the most significant factor in that analysis.

- [328] Finally, the award for Botox as a component of the future cost of care award is also impacted by the existence of the pre-existing migraine headaches, discussed below in the future cost of care section.
- [329] Given these various factors discussed above, I find that it is likely, even in the absence of the Accident, that the plaintiff would have continued to suffer headaches.
- [330] Although difficult to assess with any precision, a percentage of the plaintiff's headache symptoms that are attributable to the Accident, I find that a range of 40 - 60 percent of the plaintiff's headache symptoms is a reasonable estimate as the basis for an assessment of an award, the average of that range being 50 percent.

A. Non-Pecuniary Damages

Legal Framework

- [331] A non-exhaustive list of common factors to be considered in assessing non-pecuniary damages was set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, which include: the age of the plaintiff; the nature of the injury; the severity and duration of the pain; the degree of disability; emotional suffering; any loss or impairment to life, family, marital or social relationships or physical and mental abilities; and, loss of lifestyle. In addition, the plaintiff's stoicism should not generally be used against him.
- [332] The purpose of non-pecuniary damages is to put the plaintiff in the same position he would have been had it not been for the defendants' negligence. Awards will have to vary in each case to meet the specific needs and circumstances of each individual. As stated in *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 1981 CanLII 35, the amount of an award for non-pecuniary damages is not dependent solely on the seriousness of the injury, but must take into account its ability to ameliorate the condition of the victim given their particular circumstances.
- [333] Courts also have a duty to approach the issue in a reasonable manner, remembering that one cannot provide a complete or perfect compensation but make sure that the award is moderate and fair to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 1978 CanLII 1.
- [334] Non-pecuniary damages are meant to compensate the plaintiff for pain and suffering, loss of enjoyment of life, or loss of amenities. The issue is what, based on the evidence, is needed to put the plaintiff in the position he would have been but for the defendants' negligence: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 22 [Krangle]. While similar cases can be helpful, they only can serve as a rough guide as each case depends on its unique facts: *Trites v. Penner*, 2010 BCSC 882 at para. 189; and *Boal v. Parilla*, 2022 BCSC 2075 at para. 131.

Plaintiff's Position on Non-Pecuniary Damages

[335] The plaintiff claims \$200,000 for non-pecuniary damages, relying on the following cases, emphasizing the Lim and Khosa cases:

- St. Jules v. Cawley, 2021 BCSC 1775 - \$200,000, adjusted to \$222,462;
- Felix v. Hearne, 2011 BCSC 1236 - \$200,000 adjusted to \$262,696;
- Donaldson v. Grayson, 2023 BCSC 1675 - \$250,000;
- Mickelson v. Sodomsy, 2019 BCSC 806 - \$200,000 adjusted to \$232,111;
- Lim v. Busha, 2019 BCSC 1223 - \$160,000 adjusted to \$188,000;
- Khosa v. Kalamatimaleki, 2014 BCSC 2060 - \$140,000 adjusted to \$179,000; and
- Lo v. Vos, 2021 BCCA 421 - \$140,000 adjusted to \$160,000.

[336] In support of the plaintiff's submission on the assessment of non-pecuniary damages, the plaintiff submits that:

- a) The plaintiff is a 27-year-old woman who has been inflicted with severe chronic pain and the defence has not tendered an expert report to say otherwise.
- b) The plaintiff was an athletic, outgoing, and social person who is no longer who she once was.
- c) Given the catastrophic nature of her injuries, the poor prognosis, and the Stapley factors, the plaintiff submits non-pecuniary damages in the amount of \$200,000 is fair and just.

Defendant's Position on Non-Pecuniary Damages

[337] The defendant submits that the range of non-pecuniary damages sustained by the plaintiff should be assessed in a range of \$20,000 - \$40,000, referring to the following cases:

- Manson v. Kalar, 2011 BCSC 373 - \$25,000 adjusted to \$33,000;
- Wallner v. Uppal, 2012 BCSC 1602 - \$20,000 adjusted to \$26,000; and
- Sharma v. Bhullar, 2020 BCSC 379 - \$40,000.

[338] In support of the defendant's suggested range of non-pecuniary damages, the defendant submits that:

- a) the plaintiff's condition worsened in 2022 after she returned from Kosovo and began working at an increased clip. She gave evidence that she hurts when she gets home but it is notable that she goes on with her life and continues to work. There are no significant limitations. The increase in the plaintiff's symptoms in 2022 are unrelated to the Accident.
- b) The plaintiff's social life and recreation has not been impacted by the Accident. The plaintiff continues to live her life how she wishes.

- c) She has made improvement since she obtained Botox for her headaches. The increase in these was unrelated to the Accident as was the resulting treatment of her headaches.

Analysis of Non-Pecuniary Damages

- [339] The plaintiff's submissions that the plaintiff has been "inflicted with severe chronic pain" and "catastrophic injuries" significantly exaggerates the impact of the Accident on the plaintiff.
- [340] By so saying, I do not mean to minimize the impact of the Accident on the plaintiff's life; however, the plaintiff's own description of the pain she suffers, and how her injuries have impacted her life do not rise to the level of "severe" and "catastrophic".
- [341] The plaintiff's description of her injuries following the Accident were armpit bruising, cuts and bruising on the calf of her left leg. Following the Accident, she limped the two and a half blocks to work, then did not work for two weeks.
- [342] After two weeks, she described her injuries as still having a bad limp, her leg was sore, she had soreness from bruising on chest and armpit, she had headaches, hip pain, and wrist and elbow soreness.
- [343] After the Accident, as described above, the continuing impact of her injuries are summarized as follows:
- a) The right wrist pain occurred a few days after the Accident and lasted for a good two to three weeks afterwards. Sometimes when she works out it acts up randomly.
 - b) The swelling and bruising lasted about a month after the Accident.
 - c) She continued to limp for about a month after the Accident. Today she experiences leg pain once in awhile, if she is working out or doing something strenuous, and it is a little weaker than before the Accident. If she overexerts the leg it starts to hurt.
 - d) She continued to have constant migraine headaches two weeks after the Accident, and they continue until today; she had taken Botox for the migraine headaches the past nine months, which has helped to lessen the symptoms of the headaches. The Botox has helped her migraine headaches a lot, they are not nearly as severe as before, just little headaches here and there, once or twice a month, when she had it she has no blurred vision, no fainting, no pressure where she cannot open her eyes due to light sensitivity.
 - e) Right side hip pain occurred because of her favouring her right side, limping around that occurred after the fact. Once in awhile it comes up.
 - f) She has back pain, which started lower then worked up her spine to between her shoulders and her neck, the back and neck pain continuing to today.

- g) She experienced pain in her right shoulder, progressed over time that her shoulder are tight, but do not hurt a much as at the time of the Accident.
 - h) She has had really bad anxiety when getting behind the wheel of a car the first month after the Accident, into the second month. Sometimes she has a panic attack triggered by her back injury and the migraine headaches.
 - i) She has had some difficulty with sleeping, if her body is contorted during the night she wakes up with back pain.
- [344] The plaintiff's evidence regarding her employment is summarized above.
- [345] After two weeks off work at Legacy in Vancouver, the plaintiff returned to work doing her full duties, full-time.
- [346] The plaintiff moved to Victoria the following year. In November 2019 she worked at Cascadia Eagle Creek liquor store until January 2020 and then at 1550 Restaurant as a bartender until March 2020. She had some difficulty with heavy lifting because of her back, but would get others to help her with the kegs. She enjoyed working at 1550 Restaurant, but was laid off because of COVID.
- [347] When she returned to work at Dairy Queen in October and November, 2020, physically her back hurt after eight hours of work because of the tile floor and carrying boxes up 30 steps to the main floor area. She gave no evidence she was unable to do the work, or worked less than she would have otherwise worked because of her injuries from the Accident.
- [348] The plaintiff worked at Modern Beauty, a wholesaler for hairstylists, makeup artists and estheticians, from November 2020 to July 2021. Her employment ended with her termination because of disagreements with the employer including allegations of time theft on her part.
- [349] The plaintiff's evidence of her work at Modern Beauty from November 2020 to July 2021 involved a lot of manual labour as she was required to follow planograms of the store's layout by changing displays, moving shelving units and stocking the shelves. The physical effort left her with back pain when she went home at the end of the day, sometimes she experienced migraine headaches if the back pain was really bad.
- [350] After Modern Beauty the plaintiff worked full-time, five days a week with MisMack from June 2021 until May 2022, the latter few months of this time she was doing social media work while travelling in Europe. When working in the store she did in-store application of makeup on customers and sold products. She would stand while the client sat in a high-rise director chair, 45 minutes for each client, with 1 - 3 of 4 clients per shift, up to 6 on the busier Fridays and Saturday if fully booked.
- [351] Physically some of the sessions were more challenging than others depending on how her back felt, there were days she would be in pain when she got home.

- [352] From January 2022 to May 2022 the plaintiff travelled to Kosovo for three months to visit her current partner, returning to Kosovo in late 2023 for two weeks.
- [353] When she returned to Victoria from Europe in June 2022 she started working at the Canadian Brewhouse as a bartender, and as a delivery driver for delivering medications in the Victoria area, both physically demanding jobs, which she was able to do with some modifications.
- [354] The plaintiff gave no evidence she was unable to do the work at the Canadian Brewhouse, or worked less than she would have otherwise worked because of her injuries from the Accident. She did experience back pain and her headaches became worse during that time, in part from working increased hours. She also experienced worsened sleep.
- [355] As a summary of the impact of her back pain on her work, the plaintiff's evidence was limited in terms of any restrictions on her ability to do the work, or that she lost time as a result of the pain. The plaintiff gave no evidence she was unable to do the work, or worked less than she would have otherwise worked because of her injuries from the Accident.
- [356] The authorities cited by the plaintiff generally involve more serious injuries and a much greater impact on the plaintiff's life. For example, the plaintiff's summary of the St. Jules case refers to the plaintiff's injuries causing her to lose her job, influencing the breakdown of her marriage, she developed somatic symptom disorder, generalized anxiety disorder, and recurrent major depressive order.
- [357] Similarly, the plaintiff's summary of the Felix case describes the plaintiff suffering very significant multiple injuries including ongoing neck and back pain and related chronic headaches, loss of function in her left wrist, injury to her left shoulder and ankle and pervasive emotional disorders that left her unable to work, a very different situation than the plaintiff in the case at bar.
- [358] The same is true of the Donaldson and Lo cases where the plaintiffs suffered much more significant injuries. In the Mickelson case the Court based the award largely on the impacts of a concussion, which distinguishes that case from the case at bar.
- [359] The plaintiff focuses on the Lim and Khosa cases.
- [360] In Lim, the plaintiff was injured in three accidents. Her testimony and the testimony of other witnesses and medical experts gave evidence that led to a finding that her life had dramatically changed, with each accident compounding her injuries.
- [361] The medical evidence was that the disabling pain and symptoms would continue, with chronic soft tissue injuries to her neck, back, and shoulder, with significant pain and dysfunctional limitations to both her neck-related headaches and migraine headaches. As a result of her injuries she lost her career path and recreational activities she loved, the Court finding that she was unable to work on a full-time basis, and she would likely have limitations indefinitely.

- [362] In Khosa, the plaintiff was involved in a terrifying accident when a semi-trailer turned right alongside her, impacting the side of the plaintiff's vehicle and dragging the vehicle around the corner and some distance down the street.
- [363] The plaintiff suffered soft tissue injuries with significant pain in her neck and down her whole left side. She sustained psychological injury. She attempted to return to work a number of times, but had difficulty performing the work because of physical, cognitive and/or emotional issues. She was able to secure part-time work, but abandoned her plan to pursue a career as a registered nurse. Her relationship with her husband became strained, she could not perform household duties she used to undertake, and she had nightmares and was fearful of driving.
- [364] The Court found that she was physically and psychologically disabled from her previous employment as an LPN, and from housework, and she was impaired largely due to psychological injuries caused by the accident, and her injuries have had a profound impact on her self-image and her relationships with her husband and children.
- [365] The above summaries of Lim and Khosa provide an indication of the distinguishing features of those cases compared to the case at bar, that is, they involve a more significant accidents, and the impact of the physical and psychological injuries on the plaintiffs' lifestyle, relationships and work are more significant than in the case at bar. For these reasons, I do not find the cases cited by the plaintiff to be particularly helpful in an assessment of an award for non-pecuniary damages.
- [366] Here, the plaintiff's analysis and conclusion is that the plaintiff was an athletic, outgoing, and social person who is no longer who she once was. Given the catastrophic nature of her injuries, the poor prognosis, and the Stapley factors, the plaintiff submits that non-pecuniary damages in the amount of \$200,000 is fair and just.
- [367] The plaintiff's submissions do not review the evidence in light of the Stapley factors, and I disagree that the plaintiff's injuries were "catastrophic", the use of that term to describe the plaintiff's injuries are again a significant exaggeration of the impact of the Accident on the plaintiff.
- [368] In the St. Jules case cited by the plaintiff, the Court commented on the difficulty in comparing cases, as follows:
- [90] The range represented by the authorities cited by both parties shows the difficulty in trying to reconcile the claims of a plaintiff with past awards to similarly situated plaintiffs. Setting aside the defence authorities dealing with injuries with chances of recovery, the range here is between \$125,000 (Iampietro) and \$264,546 (Courdin adjusted to 2021). This perhaps indicates why the authorities can be a rough guide at best, used for keeping the decision at hand within reason.
- [369] The range here is even greater - between \$30,000 and \$200,000.

- [370] Of all the authorities cited by the parties, I find the defendant's reference to Sharma to be of some assistance in assessing the plaintiff's damages; however, no two cases are alike, and following my review of the Sharma case I refer to the plaintiff's circumstances with reference to the Stapley factors.
- [371] In Sharma, the plaintiff, a 21 year old young woman, was a passenger in a vehicle rear-ended in the first of two accidents, after which the vehicle was written off. In the second accident, the plaintiff was the driver of a vehicle that was rear-ended, resulting in minor damage to her vehicle.
- [372] After the first accident she suffered injuries to her neck, right shoulder, back (upper, mid, and lower), headaches, low mood, anxiety, and lack of sleep. She testified that the second accident aggravated each of these conditions and also injured her left shoulder.
- [373] The plaintiff testified that her duties at work did not change as a result of the accidents and that she was able to perform all of them, albeit with pain and with the help of pain medication. She missed two days of work after the second accident.
- [374] The plaintiff testified that she has not missed any hours of work at her job in Calgary due to her accidents-related pain symptoms and has been able to perform all of her duties despite her ongoing pain.
- [375] The Court found that despite the plaintiff not being a credible or reliable witness regarding the severity and duration of her pain symptoms, the Court did find that the plaintiff did suffer a mild to moderate whiplash type injury with associated intermittent headaches. She did not lose any hours of work after the first accident and only modest hours after the second accident, and she had not lost her ability to perform all of her job functions.
- [376] All of the medical experts were in agreement that the plaintiff's symptoms had mostly resolved. To the extent that she may continue to experience some discomfort, I accept the experts' unanimous opinions that the intensity of that discomfort has neither impaired her ability to function nor will it in the future. All of the medical experts agreed that the plaintiff's prognosis for a full recovery is very good.
- [377] The Court awarded \$40,000 subject to reduction for her failure to mitigate.
- [378] Although there are many similarities between the Sharma case and the case at bar, specifically the reservations about credibility and reliability, and the limited impact of the injuries on the plaintiff's ability to work despite ongoing pain, I consider the plaintiff's injuries here to be of a more significant degree and duration than in Sharma. Where in Sharma the finding was a mild to moderate whiplash type injury and the plaintiff's symptoms had mostly resolved; here, the plaintiff's back pain, which was her focus at trial, appears to be of a moderate variety, which is consistent with her report to Dr. Waseem.
- [379] Sharma was referred to in *Toora v. Caldwell*, 2023 BCSC 1985, as follows

[178] As discussed, despite the credibility and reliability issues with Ms. Toora's evidence, I have found, on the basis of those aspects of her evidence I do accept and the other evidence I accept, that Ms. Toora suffered musculoligamentous injuries at her neck, myofascial injuries at her back and related cervicogenic and myofascial headaches, with occasional migraines as a result of the Accidents. I am satisfied these injuries caused her considerable pain, particularly in the first few months after the Accidents. Her symptoms continued but improved over time to the point she began to experience extended pain-free periods that are occasionally disrupted by flare-ups of her symptoms. Unlike the plaintiff in Sharma whose prognosis for a full recovery was found to be very good, Ms. Toora's prognosis, although optimistic for at least moderate recovery, is a bit more guarded. Unlike the plaintiff in Prasad, Ms. Toora's flare-ups, headaches and migraines continue to impact her life in ways that are not insignificant. Again, I do not accept her flare-ups, headaches and migraines occur with the frequency and severity she describes, but I am satisfied they do continue to occur and when they do, they impact her life in meaningful ways.

[179] Ms. Toora was 28 years old at the time of the Accidents. She was busy, healthy and active. After the Accidents, she was unable to work and engage in her pre-Accidents activities for a time. She continued to have symptoms after her return to work. These symptoms gradually improved over time, but never completely resolved, as she continued to experience occasional flare-ups, headaches and migraines. Since she began working from home a few years ago, she has been able to reduce the occurrence of these symptoms by making adjustments as needed. While she has extended pain-free times, when her flare-ups, headaches and migraines occur, they are painful and limiting. They impact her enjoyment of life, her ability to care for her child, her engagement in work, and her ability to do certain activities and certain housekeeping tasks. I also accept that during the times she is pain-free, she is fearful of doing things that may trigger a flare-up, making her more cautious in how she approaches her life. All of this naturally undermines her mood and sleep from time to time.

[Emphasis added.]

[380] Although the continuing pain experienced by the plaintiff in Toora is described as more of a flare-up, where the plaintiff here refers to her pain as more consistent, otherwise I consider Toora to be of greater assistance to the analysis of an award of non-pecuniary damages than all of the cases referred to by the parties.

[381] The award in Toora for non-pecuniary damages was assessed at \$95,000.

[382] Referring to the Stapley factors, the plaintiff is young, 28 years old at trial.

[383] Her injuries, as described above, are moderate soft-tissue injuries, with ongoing pain primarily focused on her back, but also experienced in her neck/shoulder, and migraine headaches.

- [384] There has been some improvement in the severity of her pain, based on the continuance of her pain since the Accident, and as opined by Dr. Waseem, she is expected to continue to experience chronic pain, but the pain is not disabling, she is able to work with some restrictions, she is frustrated by her feeling that she is not able to work at as driven a level as she used to.
- [385] The plaintiff's typical mood appears to have been negatively affected by her injuries, but there was no medical opinion evidence at trial that provides evidence she is suffering from a psychological condition.
- [386] Her injuries have had a limiting impact on some of the more physical and social aspects of her life. She was very active as a child in numerous sports and activities, then more focused on volleyball during her teenage years; however, the evidence at trial regarding her activity level was limited, she stated that although she would like to play volleyball and squash, she is not confident in her ability to do so. She walks her dog and continues to do hikes, keeping it to easier trails than more demanding routes. If she is in pain she is less likely to go out.
- [387] I note that there is an element of stoicism in the plaintiff's frustration at not being able to perform the way she used to, that stoicism not to be used against her in this analysis.
- [388] Taking all of the submissions, cases and analysis above, I consider the amount awarded in Toora - \$95,000 - to be a fair and reasonable assessment of an award for non-pecuniary damages in this case.
- [389] For the reasons set out in the causation section above regarding the plaintiff's pre-existing migraine headache condition, I consider it appropriate to reduce the award for non-pecuniary damages by 10 percent on that account.
- [390] Reducing the \$95,000 award by 10 percent equals \$85,500, which I consider to be a fair and reasonable assessment of the impact of the injuries from the Accident on the plaintiff's life.

B. Past Loss of Capacity to Earn Income

Legal Principles

- [391] In *Brill v. Forsyth*, 2024 BCSC 124, Justice Warren summarized the principles regarding an assessment of a claim for past loss of capacity to earn income as follows:
- [136] A claim for past loss of income-earning capacity is based on the value of the work the injured plaintiff would have performed but was unable to perform because of their injury: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30.

- [137] A common method of assessing this value is to project the income the plaintiff would have earned in the period between the injury and the trial had the injury not occurred, and to award the difference between the projected income and the actual income the plaintiff did earn or was capable of earning during that period, while taking into account all realistic contingencies.
- [392] The test to be applied was discussed in *Rousta v. MacKay*, 2018 BCCA 29 as follows:
- [14] The test to be applied to hypothetical events, past and future, is whether there is a real and substantial possibility that the events in question would occur.
- [15] In *Grewal v. Naumann*, 2017 BCCA 158, the Court described the principles underlying this approach as follows:
- [42] The trial judge commenced his analysis by setting out the principles that govern awards concerning past loss of opportunity and diminished earning capacity:
- [134] The essential purpose of an award for past loss of opportunity and diminished earning capacity is to provide the plaintiff with full compensation for all of his pecuniary losses, subject to rules of remoteness and mitigation: *Andrews v. Grand & Toy Alberta Ltd.*, (1978), 1978 CanLII 1 (SCC), 83 D.L.R. (3d) 452, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 8 A.R. 182, 3 C.C.L.T. 225, 19 N.R. 50. It is to restore, as best as is possible with a monetary award, an injured plaintiff to the same position he or she would have been in had the negligence not occurred. It is the difference between the plaintiff's original position just before occurrence of the negligent act or omission, and the injured position after and as a result of such act or omission, that comprises the plaintiff's loss: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at paras. 34-35.
- [135] As an initial threshold issue, the plaintiff must demonstrate both impairment to his or her earning capacity and that, in this case, there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. It is not to be an exercise in the abstract though at the same time is described in *Andrews v. Grand & Toy Alberta Ltd.*, as "gazing deeply into the crystal ball". If established, quantification of the loss can be by either an earnings approach or a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [136] In *Brown v. Golaiy*, (1985), 1985 CanLII 149 (BC SC) 26 B.C.L.R. (3d) 353 (S.C.), Finch J. as he then was stated:

The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:

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

2. the plaintiff is less marketable or attractive as an employee to potential employers;
3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
4. the plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.

[137] Under any approach to assessing damages, the court is to make an assessment as opposed to applying a mechanical mathematical or statistical exercise.

[138] Ultimately, the court must base its decision on what is fair and reasonable in all the circumstances: *Parypa v. Wickware*, 1999 BCCA 88.

Plaintiff's Position on Past Loss of Capacity to Earn Income

[393] The plaintiff's evidence about her circumstances before and after the Accident have been outlined in some detail above.

[394] The plaintiff is currently 27 years old. She submits that she has working limitations.

[395] Her tax returns demonstrate the following earnings:

- a) 2016 - \$15,930
- b) 2017 - \$17,834
- c) 2018 - \$21,208
- d) 2019 - \$27,379
- e) 2021 - \$36,561

[396] The plaintiff submits that her capital asset has been impaired. Her post-Accident self has left her:

- a. Less capable overall from earning income from all types of employment;
- b. Less marketable or attractive as an employee to potential employers;
- c. Losing the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and
- d. Less valuable to herself as a person capable of earning income in a competitive labour market.

[397] The plaintiff's written submissions make no claim for past loss of earning capacity, focussing on her future loss of capacity to earn income, submitting that she is presently aged 27, and has 38 years to retirement at age 65, providing the calculation below for a claim for future loss of capacity based on the capital asset approach.

[398] The plaintiff's counsel's oral submissions were that the past lost is not significant.

Defendants Position on Past Loss of Capacity to Earn Income

- [399] The defendant acknowledges that the plaintiff did not work at Legacy for the first two weeks after the Accident, with reference to her payroll records indicating the plaintiff did not work from October 13, 2018 until October 28, 2018.
- [400] The defendant submits it is notable that in the time leading up to the Accident, the majority of the plaintiff's shifts were 4 hours long, but the plaintiff could not recall why this was the case.
- [401] Assuming that the plaintiff would have worked ten shifts during the period from October 13 - 28, 2018, at eight hours per day, the plaintiff missed 40 - 80 hours after the Accident. The plaintiff's wage rate was \$13.50 per hour. As a result, the gross past wage loss is in the range of \$540 to \$1,080.
- [402] The defendant resists any past wage loss award claimed by the plaintiff beyond this initial period off work. The plaintiff's alleged injuries from the Accident have not resulted in any further time off of work from the multiple and various jobs the plaintiff had after the Accident.
- [403] The defendant refers to the plaintiff's income having continued to increase since the Accident as evidenced by her income tax returns.

Analysis - Past Loss of Capacity to Earn Income

- [404] The plaintiff's submissions at trial made no claim for past loss of capacity to earn income, other than to the loss as being "not significant."
- [405] The defendant assess the past loss of capacity to earn income at ten shifts for two weeks work, or 40 - 80 hours after the Accident, at \$13.50 per hour for a range of \$540 - \$1080.
- [406] I agree with the defendant's calculations, the net loss being nominally less than the maximum gross wages of \$1,080. Consequently, I consider an award of \$1,000 to be fair and reasonable for the plaintiff's past loss of capacity to earn income.

C. Future Loss of Capacity to Earn Income

Legal Principles

- [407] In *August-Mansfield v. Yun*, 2023 BCSC 1633, Justice Brongers summarized the assessment of a claim for future loss of earning capacity, as follows:
- [68] Assessing a plaintiff's prospective loss of earning capacity requires an examination of two hypothetical futures: one in which a plaintiff is assumed to be living with the aftermath of the injuries caused by a defendant, and another in which a plaintiff is assumed to be living as if these injuries had never been sustained. As stated by our Court of Appeal in *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 32:

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

[69] The Court of Appeal prescribed a three-step test for assessing future loss of earning capacity in a trilogy of cases decided in 2021 indexed as: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421. The questions to be asked at these three steps were summarized in *Rab* at para. 47 as follows:

- 1) Is there a potential future event that could lead to a loss of earning capacity?
- 2) Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
- 3) If there is a such a possibility, what is its value? Included in this step is what is the relative likelihood of the possible future loss occurring? (*Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at paras. 33 and 47-48.

[70] Valuation of the loss can be done using either the "earnings approach" or the "capital asset approach": *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.) [Brown] at para. 7; *Perren v. Lalari*, 2010 BCCA 140 at paras. 11-12. The earnings approach involves a calculation of the present value of a plaintiff's annual loss of income over the remaining years of employment, and is more appropriate when the loss is more easily measurable: *Westbroek v. Brizuela*, 2014 BCCA 48. The capital asset approach involves consideration of a person's lost ability to work in a certain position in their field of work as the loss of an income earning asset, and is more appropriate where the loss is less easily measurable: *Park v. Targonski*, 2017 BCCA 134 at para. 123. Under either approach, the plaintiff must prove that there is a real and substantial possibility of various future events leading to an income loss (*Perren* at para. 33), and damages are assessed, not calculated (*Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18).

[Emphasis added.]

[408] The third state of assessment of the loss includes a determination of the relative likelihood of the future loss occurring and whether any contingencies apply, and whether the award should be reduced to account for the relative likelihood that the future event will not occur, see *Haynes v. Haynes*, 2022 BCSC 1273 at para. 136.

[409] To receive compensation for loss of future earning capacity, a plaintiff must demonstrate impairment to their earning capacity and a real and substantial possibility that the impairment will result in a pecuniary loss in the future. The capital asset approach involves considering the *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) factors such as (a) whether the plaintiff has been rendered less capable overall of earning income from all types of employment, (b) whether the plaintiff is less marketable or attractive as a

potential employee, (c) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open, and (d) whether the plaintiff is less valuable to themselves as a person capable of earning income in a competitive labour market: *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53, 56.

Plaintiff's Position on Future Loss of Earning Capacity

- [410] The plaintiff submits that the capital asset approach is generally preferable for younger plaintiffs as their future trajectory is more difficult to predict. For such cases, the courts have awarded a percentage of future earnings as compensation. For example, in *Khademolhosseini v. Ji*, 2019 BCSC 854 the Court awarded the plaintiff 15% of his earnings over the next 10 years, amounting to \$350,000:
- [411] Her tax returns providing evidence of her income from 2016 to 2021 are set out above, increasing from \$15,930 to \$36,561 over those years.
- [412] Similar to the plaintiff's submissions on the four *Brown* factors for past loss of earning capacity above, the plaintiff submits that her capital asset has been impaired and her post-Accident self has left her: (1) less capable overall from earning income from all types of employment; (2) less marketable or attractive as an employee to potential employers; (3) losing the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and (4) less valuable to herself as a person capable of earning income in a competitive labour market.
- [413] The plaintiff submits that the present value of the plaintiff's loss of earnings is calculable through s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA], and the Law and Equity Regulation, B.C. Reg. 352/81, as amended by B.C. Reg. 74/2014, the discount rate used to calculate the present value of future earnings is 1.5%. Assuming the plaintiff would retire at age 65, she has 20 years of residual employment.
- [414] The multiplier for the period of 38 years at 1.5% is 28.8051 (see Appendix E of CIVJI: Civil Jury Instructions, 2nd ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2009) (loose-leaf 2019 update)).
- [415] The multiplier for the period of 38 years at 1.5% is 28.8051.
- [416] The present value of the plaintiff's lifetime loss of income could thus be calculated as: (Annual Loss of Income) x (38-year multiplier): \$36,000 x 28.8051 = \$1,036,983.
- [417] The plaintiff submits that an appropriate assessment of the plaintiff's diminished earning capacity is 20 percent of \$1,036,983, or \$207,396, rounded down to \$207,000 for the plaintiff's loss of future earning capacity, which is 20% rounded down.
- [418] The plaintiff also submits that this is a conservative estimate of 20% diminished earnings at \$36,000 a year, not taking into account that she may lose out on a lucrative career in independent makeup/tattoo work.

[419] Finally, to ensure fairness and reasonableness of the award, she considers contingencies, submitting that the positive and negative contingencies may counterbalance each other as the case was in *Dabu v. Schwab*, 2016 BCSC 613 at para. 86, the contingencies and other factors here including:

- a) Ms. Bryan may see improvements in her physical and psychological condition and potentially engage in some form of part-time employment at some unknown time in the future.
- b) Alternatively, Ms. Bryan's condition could worsen resulting in her becoming totally unemployable for the rest of her life.
- c) Ms. Bryan may suffer further accidental injury to her shoulders, neck, or back.
- d) Ms. Bryan may become sick or ill due to other causes (e.g. cancer, heart attack).

[420] Ms. Bryan may die before age 70, due to natural causes or suicide.

[421] Ms. Bryan may well have worked into her mid-70s had the Accident not occurred, thereby increasing her income loss but-for the Accident.

Defendant's Position on Future Loss of Earning Capacity

[422] The defendant submits that the plaintiff's future loss of earning capacity claim is extremely speculative, relying on too many contingencies and speculative assumptions. In summary, the defendant submits that the plaintiff has not met the test for an award for a loss of future earning capacity.

[423] The defendant also submits it is notable that the plaintiff may move to Kosovo. She has had plans to move to Europe for many years predating the Accident. She obtained her dual Croatian citizenship in December of 2023. She had only worked full-time at MisMack from September 2021 to mid-January 2022. She went to Kosovo despite knowing she was going to lose her job with MisMack. In addition, the plaintiff gave evidence on the longevity of makeup artists and provided that most people bow out of the industry in their 40s. She said the industry was all about who you know. She had worked hard to promote herself but was not seeing results of her efforts. She speculated that she would need to do something else when she is older. Her experts do not provide any contraindications for her to continue working at any of her jobs.

[424] She also gave evidence that makeup related work was "slim pickings" in Victoria. Apart from an employment opportunity at Sephora, a makeup and beauty store, which she stated she was not interested in pursuing because it only offered part-time work, there was no other company for her to apply to in Victoria.

[425] Of particular importance to the plaintiff's claim for future loss of earning capacity is the plaintiff's own testimony about her intended path.

- [426] The plaintiff has been able to continue working and as indicated in Ms. Lane's report, she manages her symptoms with going to the hot tub.
- [427] The Court has previously agreed that no loss of earning capacity existed in similar circumstances, citing *Fennell v. Mikulasik*, 2021 BCSC 2102 in which the plaintiff was 25 years old at the time of her accident. She had "hoped" to work as an electrician, but instead found an office-based job. The plaintiff, after her accident, attempted to become an electrician. The Court found this was not a well-thought-out career and the plaintiff did not appreciate the reality of the career:
- [428] In this action, the plaintiff excels at her many roles. There is no real and substantial possibility that the plaintiff's injuries will cause a loss of income in the future.
- [429] The plaintiff's future earning capacity has not been limited by the Accident. Any limitations placed on the plaintiff are due to the harsh realities of the makeup world and the lack of customers seeking services in Victoria. The plaintiff's calendar relating to the Batwing Beauty Bar indicates that the plaintiff has not been busy since she opened her doors. She also testified that she does not turn down clients. Thus, the calendar represents the customers who have wanted to and have booked with her. The plaintiff's slowest months were October 2023 and January and February of 2024. The plaintiff also agreed that some clients had cancelled their services-it is difficult to make out the crossed line through their names but at least some appointments were cancelled as well.
- [430] The plaintiff's fear that she may not be able to work as a makeup artist in the future is speculative. It is not a real and substantial possibility.
- [431] The plaintiff is still able to work, and exceeds expectations, with IDA/Forbes Pharmacy. She is no longer with MisMack and does not have a studio space for Batwing Beauty Bar. The loss of the latter two positions is unrelated to the Accident.
- [432] The defendant strongly urges the Court to resist making an award for loss of future earning capacity to the plaintiff in the circumstance of this case.

Analysis - Future Loss of Earning Capacity

- [433] An award for future loss of earning capacity represents compensation for a pecuniary loss. The analysis is an assessment, not a mathematical calculation. Nevertheless, the award involves a comparison between the likely future of the plaintiff if the Accident had not happened and her likely future after the Accident happened, which necessarily involves an assessment of the plaintiff's potential earning but for the Accident.
- [434] The three-step test for assessing future loss of earning capacity is:
1. Is there a potential future event that could lead to a loss of earning capacity?

2. Is there a real and substantial possibility that the future event in question will cause a pecuniary loss?
3. If there is a such a possibility, what is its value? At this stage consideration must also include the relative likelihood of the future loss occurring and whether any contingencies apply.

Rab v. Prescott, 2021 BCCA 345 at para. 47

- [435] Here, the plaintiff's submissions on loss of earning capacity are somewhat inconsistent in not making a claim for past loss of earning capacity and stating that her past loss of earning capacity is not significant, while then claiming for an award for future loss of earning capacity.
- [436] I consider it appropriate to assess the plaintiff's future loss of earning capacity using the capital asset approach, which is useful to quantify future earning capacity where there is no clear loss of income, such as here where the plaintiff's earnings have increased since the time of the Accident, but the plaintiff's injuries from the Accident expose her to potential future problems: Rab at paras. 30, 34;
- [437] The quantification of a future loss of earning capacity in Pascuas v. Leung, 2022 BCSC 1469 is instructive regarding the principles applicable in the use of the capital asset approach, as follows:
- [107] This section assesses the plaintiff's future loss of earning capacity, post trial, using a capital asset approach. In contrast with the earnings approach, a capital asset approach to quantifying future earning capacity lends itself in cases where there is no clear loss of income, such as where the plaintiff's earnings at the time of Accident is the same at her earnings at time of trial, but her injuries from the Accident expose the plaintiff to future problems: Rab at paras. 30, 34; Ploskon at para. 17. It is particularly applicable where, as here, due to her relatively young age and early stage of her business at the time of Accident, the plaintiff has demonstrated potential but "has yet to establish a settled career path": Ploskon at para. 17; Dunn at para. 34. The capital asset approach has also been applied in cases where, as here, the plaintiff has changed employment which has increased the plaintiff's income above pre-accident income: Kim at paras. 99-100; Rab at para. 30.
- [108] A real and substantial possibility analysis under the capital asset approach asks: (a) is there a loss of a capital asset? If so, (b) is there a real and substantial possibility of that impairment or diminishment leading to a loss of income (Rab at para. 37)? I have above discussed why I find the answer to both questions to be: yes.

[111] In cases using the capital asset approach, such as where the plaintiff continues to earn income at or near pre-accident levels, the loss of capacity in the future may be valued through various methods, including the use of one or more years of the plaintiff's pre-accident income as a tool: Kim at para 91; Rab at para. 72; Pallos v. Insurance Corporation of British Columbia (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260 (C.A.), at para. 43; Mackie v. Gruber, 2010 BCCA 464 at paras. 18-20.

[112] In Rab, the plaintiff could not devote the same amount of time to her entrepreneurial ventures (para. 62), and it was found she had a real and substantial possibility of a future loss of earning capacity (para. 63). The Court of Appeal approved of the use of the capital asset approach to quantify the plaintiff's losses in that case. Here, as in Rab (para 65-66, 75), it is challenging for this court to make an estimate of the plaintiff's earnings in the future given the insufficient evidence of the specific books the plaintiff would have published over her working life, the capacity of the market or markets the plaintiff would seek to target, and the relatively short history of the plaintiff's book publication before the Accident. As in Rab, the plaintiff has not suffered an income loss at the time of trial but she has suffered an impairment that may limit her ability to continue to do so at some point in the future: para. 72. For these reasons, I find that the "rougher and readier" capital asset approach is the appropriate approach and adopt it here.

[Emphasis added.]

[438] The plaintiff continues to experience back pain. To date she has been able to work full time at a number of different jobs, with no appreciable past income loss, or inability to work; however, for more physical aspects of her employment since the Accident, she has finished her shifts in pain. She is stoic and a hard worker. That continuing back pain may limit her ability to continue to work at the same level she has to the date of trial. She has suffered an impairment that may limit her ability to continue to do so at some point in the future.

[439] In Pallos v. Insurance Corporation of British Columbia, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 (C.A.), the Court of Appeal emphasizes the claim for a future loss of earning capacity is not a loss of earnings, but an impairment to the plaintiff's capital asset resulting in a loss of earning capacity to a degree by the plaintiff's injuries, as follows.

26 In Earnshaw v. Despina (supra) Madam Justice Southin said (at p. 399):

In my opinion, the true questions the jury must address in a claim such as this are:

1. Has the plaintiff's earning capacity been impaired to any degree by his injuries?
2. If so, what amount in the light of all the evidence should be awarded for that impairment?

As Dickson J., as he then was, said in Andrews v. Grand & Toy (Alta.) Ltd., 1978 CanLII 1 (SCC), [1978] 2 S.C.R. 229 at 251 ...

It is not loss of earnings but rather, loss of earning capacity for which compensation must be made ... A capital asset has been lost: what was its value?

In catastrophic injury cases, the whole of the capital asset is lost. But there may be much less serious injuries which cause permanent impairment although the loss cannot be determined with any degree of exactitude.

The learned judge ought to have addressed the question as one of impairment and pointed out that there was evidence of a limitation on earning ability. The jury might well have rejected the plaintiff's inordinate claim but appreciated that there are jobs now closed to the plaintiff which, as he grew older, he might have chosen and given him something more for that and future care than slightly under \$12,000.

As I have said, this difficulty with the charge was not raised by counsel for the plaintiff with the learned trial judge. Indeed, he did not raise it before us.

[Emphasis added.]

[440] Here, I consider that the plaintiff has lost a capital asset in that she has an impaired or diminished capacity, to an apparently small degree, and there is a real and substantial possibility of that impairment or diminishment leading to a loss of income.

[441] I base these conclusions on the following:

- a) The plaintiff continues to experience back pain and neck pain.
- b) She continues to experience migraine headaches.
- c) She struggles with back pain and is concerned that her back pain could limit her ability to work in makeup long term.
- d) I accept Dr. Waseem's opinion that:
 - i. She sustained sprain/strain soft tissue injuries of the cervical, thoracic and lumbar spine as a result of the Accident;
 - ii. These injuries have resulted in chronic myofascial pain and aggravated pre-existing migraine headaches;
 - iii. The prognosis for a full symptomatic recovery is poor;
 - iv. She is not currently disabled from work;
 - v. She works with back pain;
 - vi. As she ages there is a risk she may lose resilience and stamina causing her to potentially change careers, reduce normal work hours or transition to sedentary work.

- [442] I note that Dr. Waseem also opines that there is no risk of the plaintiff developing other medical conditions or health problems in the future as a result of the injuries she sustained in the Accident.
- [443] Here, I am satisfied, on the Brown factors, that the plaintiff is less capable overall of earning income from all types of employment as her back pain imposes some limitation on physical work; she is less marketable or attractive as an employee to potential employers, as evidenced by some of the accommodations Ms. Hosseini has granted to the plaintiff; she has lost the ability to take advantage of all job opportunities open to her, and is less valuable to herself as a person capable of earning income in a competitive labour market, as evidenced by her concern about her ability to continue with the physical aspects of makeup and associated work.
- [444] Mackie v. Gruber, 2010 BCCA 464 provides some guidance. Similar to the case here, the plaintiff in Mackie had a history of occasional migraine and stress headaches, the accident caused soft tissue injuries to her neck, shoulders and upper back, and anxiety and depression. It exacerbated the severity and frequency of her headaches. By the trial, the plaintiff's injuries had resolved except for the headaches and neck pain. She was having periodic Botox injections, which improved her neck and migraine symptoms. The trial judge was impressed by her stoicism, fortitude and commitment to get on with her life despite her ongoing pain.
- [445] The plaintiff returned to work within two weeks of the accident and was able to work full-time about five to seven months later; however, she had to modify her home office to accommodate her injuries, and had to extend her work day by two to four hours so she could take breaks to reduce her pain. The trial judge accepted the evidence of a physiatrist that she was unlikely to fully recover, that eight-hour shifts aggravated her pain, and that it would be better for her to work four to six hour shifts with a mid-day break.
- [446] The trial judge accordingly found that Ms. Mackie's pre-accident capacity had a value of \$65,000 a year, and awarded her \$130,000, representing two years' earnings, with reference to Pallos at para. 43 that one acceptable approach to the assessment of loss of future capacity is "to award the plaintiff's entire annual income for one or more years."
- [447] Here, Ms. Bryan's circumstances are similar to the plaintiff in Mackie, but in that case the degree to which the plaintiff's impaired capacity had manifested itself in limitations on her ability to work appear to be greater than in Ms. Bryan's case. For that reason, I consider an appropriate award for future loss of earning capacity to be at the low end of the range of awards, or one year of Ms. Bryan's present income, for a total of \$36,561.
- [448] As a result, I find that \$36,561 is a fair and reasonable award to compensate the plaintiff for her loss of future earning capacity.
- [449] I make no deduction in this award on account of her pre-existing condition of headaches, as I consider her back pain to be primary limiting factor in her impaired capacity.

D. Future Care Costs

Introduction

[450] The plaintiff claims an award for the future cost of care for Botox injections, psychological assessment and counselling, rehabilitation support; lawn and garden care, and house maintenance.

Legal Principles

[451] The legal principles applicable to an assessment of a cost of future care claim are summarized in Justice Adair's judgment in *Golkar-Karimabadi v. Bush*, 2021 BCSC 990, as follows:

[107] An award for cost of care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant. The award must (1) have medical justification, and (2) be reasonable. The medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability and recommended treatment, and the health care professional's recommended care item. See *Gao v. Dietrich*, 2018 BCCA 372, at paras. 69-70. No award is appropriate for costs that a plaintiff would have incurred in any event: *Shapiro v. Dailey*, 2012 BCCA 128, at paras. 51-55. Moreover, future care costs must be likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services: see *Lo v. Matsumoto*, 2015 BCCA 84, at para. 20.

[Emphasis added.]

[452] In considering a cost of future claim, the Court is concerned in ensuring that the plaintiff is provided with adequate future care for which the plaintiff has objectively demonstrated need based on the evidence tendered: *Andrews* 2012 at 261; and *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at para. 39.

[453] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. 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 falls to be determined on its particular facts: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 253.

[454] An assessment of damages for cost of future care is not a precise accounting exercise. Courts fix the damages for future care as best they can, making an adjustment for the contingency that the future may differ from what the evidence at trial indicates: *Krangle* at para. 21.

Plaintiff's Position on Future Care Costs

[455] The plaintiff seeks an award of \$120,000 as a rounded figure based on the following:

- a) Botox injections - 4 per year at \$2,000 annually to age 65 totalling \$76,000 based on the report of Dr. Waseem, for headache prophylaxis, the cost assessed by Jennifer Lane, occupational therapist;
- b) Psychologist - fixed cost of \$2,585 for one assessment and 10 sessions at \$235 per session;
- c) Kinesiologist - fixed cost of \$2,816 for rehabilitation support services at \$88 per session for two sessions per week for 12 weeks;
- d) Lawn and garden care - \$1,138.50 annual cost for lawn and garden care for 20 years for a total of 22,770, while conceding that this may not be needed until age 80 because she does not have to do this work at her parents' home.
- e) House maintenance - \$1,012 annual cost for house maintenance, for 20 years for a total of 20,240, expressed as conservative and adequate given the evidence, conceding this may not be necessary because she lives with her parents.

Defendant's Position on Future Care Costs

[456] The defendant resists an award for future care for the plaintiff.

[457] The defendant submits that at most a nominal award should be made to the plaintiff if the Court accepts the patient still has ongoing complaints that could be further relieved with treatment such as an active rehabilitation program.

[458] The defendant submits that Ms. Lane's recommendation for housekeeping is extreme and unnecessary.

[459] The defendant submits that the plaintiff has not proven Botox to be a medically necessary treatment related to the Accident as the plaintiff manages her symptoms through stretching and going to the hot tub.

[460] The defendant submits that in the event the Court finds that the plaintiff is entitled to an award for future care in order to address her physical deconditioning, a nominal award of \$1,500 should be extended to the plaintiff for the active rehabilitation program, with no need for ongoing six sessions on an annual basis thereafter.

Analysis

[461] As a general comment, I agree with the defendant's submission that the occupational therapist, Ms. Lane, does appear to veer into advocacy for the plaintiff when making her recommendations, rather than providing an independent assessment of the cost of the plaintiff's needs based on the evidence; for example, Ms. Lane agreed in cross-examination that the plaintiff is reported to be independent in personal care including housecleaning, without reference to information from the plaintiff regarding any specific heavier tasks

with which she may be experiencing any difficulty, thus bringing into question her recommendation for housecleaning costs. Similarly, Ms. Lane's recommendations for interior and exterior home maintenance and lawn and garden care appear to be more speculative than based on Ms. Lane's testing and opinion.

[462] Also in cross-examination, Ms. Lane's answers regarding her comparative analysis of activities comparing job demand and job match for the plaintiff's pharmacy delivery work, MisMack and Batwing employment appear at times to be inconsistent, as one example her assessment of the walking activity for the plaintiff's pharmacy job is reported to be "constant" and she does not meet the job requirements when the plaintiff's evidence is that she does her deliveries by car, getting in and out of the car, and in and out of buildings, with no evidence she is unable to do the walking related to her pharmacy deliveries.

[463] For these reasons, I consider Ms. Lane's recommendations with some caution.

Botox injections

[464] The plaintiff claims \$76,000 for the cost of Botox injections to treat her migraine headaches. The plaintiff calculates \$76,000 based on an annual cost of \$2,000 for 38 years, that length of time being the number of years from the present to age 65.

[465] The \$2,000 annual cost is taken from the range given by Ms. Long at \$700 - \$4,300, the plaintiff submitting that \$2,000 is "on the lower side of the range".

[466] Ms. Lane agreed on cross-examination that she was providing the cost for Botox injections based on Dr. Waseem's recommendations.

[467] Dr. Waseem's report provides some support for the continued use of Botox to improve the plaintiff's migraine headaches, he noted the headaches have been much improved since starting Botox, but they have plateaued in their recovery.

[468] Ms. Long's report refers to an annual cost for Botox of \$700 based on \$175 per injection, four times each year, with the Botox covered by a program recommended to the plaintiff by the physician who has been administering the injections - Dr. Benloulou.

[469] There was no evidence at trial regarding to what extent the present program may continue to pay for the Botox, the plaintiff's evidence being that she would continue with the Botox as long as there was coverage through the third party that Dr. Benloulou referred her to for coverage, or until she receives her own benefits from another job with coverage, or she would pay for it herself.

[470] If the plaintiff is required to pay for the Botox, the cost of the Botox is \$900 for each injection, plus the injection fee, for an annual total of \$4,300 for four injections.

- [471] The \$76,000 claimed amount is not for the present value of a future stream of periodic payments, it is a lump sum, which is a rough measure of assessing damages, but overstates the claim compared to a present value analysis of the annual cost for a number of years.
- [472] As discussed in the causation section above, as a percentage of the plaintiff's headache symptoms that are attributable to the Accident, I found that a range of 40 - 60 percent of the plaintiff's headache symptoms is a reasonable estimate as the basis for an assessment of an award, the average of that range being 50 percent.
- [473] In my view, an award to provide for some of the cost of Botox injections for the aggravation of the plaintiff's migraine headaches arising from the Accident is medically justified.
- [474] Given the uncertainty of the period of time for which such treatments will be needed, and the amount the plaintiff may need to pay for such treatments, in my view an award for the cost of the injections to age 65, at \$700 annually, will provide the plaintiff with funds to pay for the injections if the Botox is covered by the present program or by an employment benefits plan. If the plaintiff is required to pay for the Botox itself, then the award will cover the injections for the full period of time contemplated, or the injections and Botox for a shorter period or time. I consider this a reasonable result given the uncertainty of the contingencies including but not limited to what she may need to pay in the future, and also the possibility of improvement in her symptoms.
- [475] The present value of \$700 for 38 years is \$18,508.42 based on a 2 percent discount rate pursuant to s. 56 of the LEA and the Law and Equity Regulation.
- [476] 50 percent of \$18,508.42 is \$9,254.21, rounded to \$9,250.00.
- [477] As a result, I consider an award of \$9,250.00 to be fair and reasonable for the future cost of Botox for the plaintiff's migraine headaches attributable to the Accident.

Psychologist

- [478] The claim for a psychological assessment and ten sessions is based on Ms. Lane's report of the plaintiff having told her she is experiencing symptoms of anxiety and panic attacks. Ms. Lane recommends that the plaintiff speak to a doctor regarding an assessment with a psychologist.
- [479] Ms. Lane is not qualified to provide an expert opinion on the plaintiff's mental state and the need for a psychological assessment and treatment, nor is there any expert opinion regarding the need for an assessment.
- [480] As a result, the claim is not medically justified, and I find that the plaintiff has not proven on a balance of probabilities the claim for the cost of a psychologist assessment and treatment.

Rehabilitation - Kinesiologist

- [481] Ms. Lane refers to Dr. Waseem's recommendation for self-directed exercise and a course of active rehabilitation for three months. Ms. Lane recommends 24 sessions, twice a week for 12 weeks at \$88 per session for a total of \$2,816.
- [482] The plaintiff's evidence is that she attended a gym in Victoria when she was younger, but stopped after high school because she was busy with work and did not have enough time, but she did start again after she had completed a halfway round of physiotherapy. She gave evidence that she is still going to the gym and has exercised her back and shoulders to attempt to get her mobility back, and she has been doing leg presses and squats. Ms. Lane reports the plaintiff told her she is attending the gym 1-2 times per week.
- [483] In my view, to allow for the plaintiff to be doing exercises that are most beneficial to her, and to potentially increase her functional capacity, some training is appropriate. As the plaintiff is already familiar with the gym and exercises she has been doing, including physiotherapy, something less than that recommended by Ms. Lane is warranted, 12 sessions would provide for one session a week for three months, which at \$88 equals \$1,056, rounded to \$1,100, which I consider to be a fair and reasonable award for the cost of training for ongoing self-directed exercise.

Housecleaning

- [484] Ms. Lane recommends an award of \$2,080 annually starting at age 39 for housecleaning for two hours every two weeks.
- [485] The plaintiff reported to Dr. Waseem that she is largely able to perform her usual housekeeping activities normally, but takes breaks when cleaning involves repetitive bending making her lower back pain worse.
- [486] Ms. Lane reports that the plaintiff advised her she can complete cleaning tasks, with some pain and flare-ups, such that she has to pace herself during heavier cleaning tasks and lower level work.
- [487] In my view, Ms. Lane's ability to do housecleaning with some discomfort is not a medical justification for an award to be made for housecleaning.
- [488] As a result, I find that the plaintiff has not proven on a balance of probabilities the claim for an award for housecleaning costs.

Lawn and garden care

- [489] Ms. Lane recommends \$1,138.50 annually for lawn care and garden care for 24 hours per year, to be started at an age to be determined until age 80.

- [490] The plaintiff is reported to have advised Ms. Lane that she lives at home, her father takes care of the home maintenance, and her parents have gardeners to assist with lawn and garden tasks.
- [491] Ms. Lane does not assess the plaintiff's lawn and garden care needs or abilities, other than to report that the plaintiff may require assistance with gardening and lawn care, and assuming that the plaintiff is not able to participate as long as her physical limitations and pain are present.
- [492] As a result, an award for the cost of lawn and garden care is speculative and not supported by the evidence. I find that the plaintiff has not proven on a balance of probabilities the claim for lawn and garden care.

Interior and Exterior Home Maintenance

- [493] Ms. Lane recommends \$1,012 as an annual cost for 16 hours per year for home maintenance, from an age to be determined to age 80, decreasing by 20 percent annually from age 75 to 80.
- [494] Similar to Ms. Lane's recommendation for lawn and garden care, Ms. Lane does not assess the plaintiff's physical limitations with respect to specific future home maintenance tasks, other than to report that the plaintiff may require assistance with such tasks.
- [495] As a result, I find that the plaintiff has not proven on a balance of probabilities the claim for interior and exterior home maintenance.

E. Special Damages

- [496] The plaintiff claims \$1,385.74 for special damages according to a list of special damages with receipts in evidence. The list totals \$1,459.30, but concedes the single entry for \$73.56 should be deducted.
- [497] The defendant submits that the plaintiff's claim for special damages were not her out of pocket expenses, and the claim should be limited to \$49.09 for a doctor's note (\$20.00) and medication purchased on October 17, 2018 (\$29.09).
- [498] The defendant submits that the plaintiff's mother paid for her physiotherapy totalling \$619.25 and does not require it be paid back.
- [499] The plaintiff's mother's evidence was that she paid it because the plaintiff did not have enough money to pay for those treatments.
- [500] The plaintiff's special damages were in evidence as incurred for or on behalf of the plaintiff for the items listed totalling \$1,385.74, as follows: doctor's note (\$20.00); physiotherapy for the plaintiff's attendance on various dates in 2018 through 2021, for many of which there was no charge, the total charged being \$619.25; medication (\$29.09); a taxi receipt (\$17.40); and four Botox injections (\$700).

[501] Based on the reasoning above on causation relating to Botox treatments, the \$700 claim for Botox injections is reduced by 65 percent to \$245.

[502] As a result, in my view the plaintiff has proven her claim for special damages on a balance of probabilities as out of pocket expenses in the amounts noted above totalling \$930.74.

IX. Conclusion

[503] In summary, I have found the plaintiff to be wholly responsible for the Accident. As a result, no damages are awarded to the plaintiff.

[504] However, if I am wrong, the damages I would assess if the defendant were found to be liable for the Accident are as follows:

a) Non-pecuniary damages:

\$85,500.00

b) Past loss of earning capacity:

\$1,000.00

c) Future loss of earning capacity:

\$36,561.00

d) Future care costs:

\$10,350.00

e) Special damages:

\$930.74

Total

\$134,292.74

X. Costs

[505] If the parties are unable to agree on the appropriate order, including in relation to costs, they may arrange to make submissions on the matter before me between 9:00 and 10:00 on a date to be scheduled by the parties within 60 days of the issuance of these reasons, with written submissions to be submitted by the plaintiff no later than 10 days before the date of the hearing, and the defendants' response no later than 3 days before the hearing.

"Jones J."

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