

CANADA / JUDGMENT

Cox v. Acapulco

2020 BCSC 1135

COURT

Supreme Court of British Columbia

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2020 BCSC 1135 Cox v. Acapulco

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cox v. Acapulco,

2020 BCSC 1135

Date: 20200805

Docket: M174302

Registry: Vancouver

Between:

Marietta Cox

Plaintiff

And

Mary Acapulco, Renata Acapulco, Toyota Credit Canada Inc., Jacob Walter Meger and Kaitlyn Lindgren

Defendants

And

Insurance Corporation of British Columbia

Third Party

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

June 8-12 & 26, 2020

July 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 5, 2020

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Introduction

- [1] The plaintiff, Ms. Marietta Cox, seeks an award of damages for the injuries she suffered in two motor vehicle accidents. The first accident occurred on May 29, 2015 ("First Accident"); the second occurred on July 9, 2016 ("Second Accident"). Ms. Cox's vehicle was struck from behind in both accidents. When I refer to the First Accident and Second Accident collectively, I do so as the "Accidents".
- [2] The trial concerned the assessment of damages. Liability is admitted for the First Accident. Although liability is not admitted for the Second Accident, it is not contested.
- [3] Unless I refer to competing versions of facts or contested facts, the facts described in these reasons are my findings of fact. When I refer to competing versions of facts or contested facts, I will set out my finding(s) or determination of the factual dispute.
- [4] Ms. Cox seeks an award for non-pecuniary damages, past wage loss, future wage loss (advanced as a loss of capital asset), cost of future care, and special damages. All heads of damages claimed by Ms. Cox are in dispute.

Life and Function Prior to the Accidents

- [5] Ms. Cox is 57 years old. She was born in the Philippines on August 19, 1963. She has lived in Canada for over 36 years. By all accounts, she was, prior to the Accidents, an energetic, physically active, highly organized, gregarious, motivated, well-liked, and cheerful individual who excelled in her career in sales and marketing all while raising four children as a single parent. She has three daughters, aged 32, 27, and 22, and one son aged 24.
- [6] Several lay witnesses testified at trial: Ms. Cox's former boss; a close friend; a former co-worker; and Ms. Cox's two younger daughters. They provided credible and reliable corroborative testimony concerning her life and function pre- and post-Accidents. In their testimony, they provided their own eye witness accounts of Ms. Cox's significant pre-First Accident organizational skills, mental strength, emotional balance, and ability to juggle the many work, family, and social activities in her life without difficulty as well as the significant changes in her life as a result of the Accidents. The one exception concerned Ms. Cox's close friend who was clearly confused about the dates of the Accidents in relation to the adverse impact on Ms. Cox's dancing pursuits.
- [7] Ms. Cox presented as a candid witness, who gave her evidence in a straightforward manner without embellishment, exaggeration, or argument and appeared to do her best to answer the questions put to her in cross-examination in a direct, frank, and honest manner. I found her evidence to be credible. I agree with the defendants' remarks in their closing submissions that Ms. Cox is "honest, hardworking, and does her best to tell the truth" and "by all measures is likeable and trustworthy." I disagree, however, with the defendants' submission that her evidence was unreliable. With the exception of her inability to recall whether a prior motor vehicle accident occurred in 2007 or 2008 ("Prior Motor Vehicle Accident") and some of the details concerning some chiropractic treatments prior to the First Accident, which (I am satisfied) are explained by her ongoing symptoms caused by the injuries she sustained in the Accidents and the passage of time, I found her evidence to be reliable.
- [8] Ms. Cox's subjective reporting of symptoms and functional impairments in her testimony and to the medical experts is supported by objective findings. There is no opinion from any expert suggesting symptom magnification, malingering, or non-organic findings.

Health

- [9] Prior to the Accidents, Ms. Cox was very physically active in her spare time. She attended "boot camps" for physical fitness and conditioning, yoga, and enjoyed running up a 200-step incline near her home on a regular basis. She took salsa dancing classes at least two to three evenings per week in 2013 and 2014. She enjoyed it so much that it and other types of Latin dancing became a major recreational focus. Salsa dancing in particular requires significant flexibility, dexterity, and strength due to its rapid movements, dips, twists, and hip movements. Ms. Cox reached level 7 in salsa in record time, which is one step below the

highest level.

- [10] Ms. Cox was also very active in her church (referred to as "Temple"), which is known for its singing, dancing, and festivals which offer food. Ms. Cox organized many events for her Temple. A notable example is the food booth for the summer festival held each year at Stanley Park. Each year, she, along with some help from her children, prepared and cooked veggie burgers and cuisine from the Philippines, and baked cakes and other deserts for two separate booths (one offering free food and other to raise money for the Temple). Ms. Cox typically spent two weeks preparing the food and booths for the summer festival in addition to working the booths during the festival.
- [11] Ms. Cox suffered soft tissue injuries to her sternum and neck and back in the Prior Motor Vehicle Accident, which occurred in 2007 or 2008. Ms. Cox testified that she fully recovered by 2012 and enjoyed good health with no significant medical issues prior to the First Accident. For reasons I will explain, I accept her evidence that she had recovered from those injuries such that she was able to engage in rigorous physical activities and Latin dancing well prior to the First Accident.
- [12] In terms of other symptoms and medical treatments prior to the Accidents, Ms. Cox received chiropractic treatments (since 1989) and some massage therapy treatments from time to time up to and after the First Accident. Ms. Cox testified that apart from treatments she received for a time for injuries sustained in the Prior Motor Vehicle Accident, she received chiropractic treatments on an as-needed basis to maintain flexibility and to feel good (and not for any ongoing medical condition), particularly as her salsa and some of her other Latin dancing required a great deal of flexibility and dexterity. Ms. Cox readily acknowledged that she reported episodic neck and back stiffness during some of her chiropractic visits prior to the Accidents and also reported some neck and low back pain to her family doctor on a visit on April 13, 2015 (just prior to the First Accident). However, her testimony, which I accept, is that she was not restricted from performing her job duties or in any of her physical and social pursuits once she recovered from the Prior Motor Vehicle Accident in 2012.
- [13] The defendants argue that Ms. Cox's chiropractic treatments demonstrate that she had not fully recovered from the Prior Motor Vehicle Accident or was suffering from some other pre-existing medical condition prior to the First Accident. They argue this engages a "crumbling skull" analysis. My reasons rejecting the defendants' argument are contained in the section dealing with the opinion evidence of the medical experts who testified at trial.

Education and Employment

- [14] In addition to high school education, Ms. Cox obtained a diploma in business from Trent College in Vancouver in 1998 and attended Corporate Communications Private College for Business Management and Communications in 2004.

- [15] Ms. Cox worked for Canadian Linen & Uniform Sales ("Canadian Linen") in the Lower Mainland when the Accidents occurred. Canadian Linen manufactures and supplies uniforms for all manner of businesses through rental programs and direct sales. Ms. Cox was hired by Canadian Linen in 2005 to work as its direct sales representative. Canadian Linen created the position for Ms. Cox. She worked for the company until mid-February 2018.
- [16] Ms. Cox was always "on" in her job in sales, taking phone calls from customers or potential customers at home at night or while out at dinner with her family, and during those limited times she took vacation (including vacations with her children). In addition to seeking out and maintaining business with proposals carefully worked up for each customer, Ms. Cox was responsible for all administrative aspects of direct sales, e.g., placing orders with suppliers, attending to the details and design issues for customers' uniforms, packing and delivering uniforms, attending to correspondence, creating spreadsheets with client information (including costing and other financial data), invoicing, and all other aspects of record keeping. She met with customers at their facilities and was well liked. It is an understatement to say that direct uniform sales is a highly competitive, detail-oriented job. As a testament to her success, Ms. Cox increased Canadian Linen's direct sales nearly ten-fold over time, from \$60,000 in her first year to direct sales close to \$600,000 in the year that she left the company.
- [17] Ms. Cox worked well over 40 hours per week. She was paid a base salary of \$18.10 per hour plus commission based on a tiered profit margin ranging from 5 to 10%. She gave an example that if she sold a \$10 item for \$15, she was paid 5% commission but if she sold it for \$20, she was paid 10%. Her clients included the City of Vancouver, Canada Line, City of Richmond, Cargill, West Coast Reduction, and Rocky Mountaineer. Her annual earnings ranged from approximately \$80,000 to \$110,000.

The Accidents

First Accident

- [18] The First Accident occurred after Ms. Cox was forced to stop in heavy traffic on the Queensborough Bridge near New Westminster, B.C. Moments after she stopped, she heard an explosion and the sensation of a loud bang at the rear of her new Ford F150 pickup truck. She was hit from behind by the defendant, Mary Acapulco, who was driving a vehicle owned by the defendants, Renato Acapulco and Toyota Credit Canada Inc. Ms. Acapulco was not able to move the vehicle after the collision due to the damage and she was forced to exit through her driver's window. Police, firefighters, ambulance medics, and a tow truck driver attended the scene shortly after the collision.
- [19] Photographs of vehicle damage show the front of Ms. Acapulco's vehicle was badly damaged with significant crumpling and indentation. The rear bumper to Ms. Cox's F150 pickup was damaged, knocked loose, and warped.

- [20] I accept Ms. Cox's evidence that she was in shock following the collision. She felt "quite shaky". She also felt tenderness in her neck, and as the shock wore off she began to experience significant pain on both sides of her neck, in her upper back between her shoulder blades, lower back, and arms. The lower back pain resolved a few months later.
- [21] Ms. Cox consulted with her family doctor, Dr. Webb, for her injuries. With his direction and concurrence, she received some relief with prescribed pain medication (Celebrex), passive therapy treatments (chiropractic adjustments and massage therapy), and ongoing assistance as a result of Dr. Webb's referral to a kinesiologist.

Second Accident

- [22] Although her symptoms were somewhat improved when the Second Accident occurred, Ms. Cox was still suffering ongoing pain in her neck, upper back, and arms from her injuries from the First Accident, so much so that she asked her friend to drive her in her repaired F150 pickup to lunch in Delta. She was still seeing Dr. Webb for her injuries and receiving medical treatment (help from a kinesiologist and passive therapy).
- [23] Ms. Cox's vehicle was rear-ended by the vehicle driven by the defendant, Jacob Meger and owned by the defendant, Kaitlin Lindgren while Ms. Cox was stopped at a red light. She felt a jolt when her vehicle was struck. Another driver pulled alongside Ms. Cox and told her that she was hit from behind by a driver (Mr. Meger) who had previously struck a barricade. Mr. Meger fled the scene in his vehicle. Ms. Cox's friend was able to follow him for a time before losing sight of him, while Ms. Cox telephoned 911 for help. The police later found Mr. Meger after he had abandoned his vehicle.
- [24] The impact of Mr. Meger's vehicle aggravated Ms. Cox's injuries caused by the First Accident. She felt increased pain behind her ears and in her neck, upper back, shoulders, and arms, as well as "a little bit" of renewed pain in her lower back. She was quite distraught at having been struck again and to be now suffering with increased intensity in her symptoms.

Life and Function after the Accidents

Health

- [25] Ms. Cox's symptoms have improved since the Second Accident, especially now that she is working part-time hours with no administrative duties (I discuss the change in her work below). She is able to manage her pain three days per week, but finds it difficult if not impossible to manage her pain on the other four days. Her pain persists on the upper right of her neck and left shoulder with occasional right arm numbness, especially from sleeping. She suffers from tenderness every day. Ms. Cox takes steps to manage her pain with medication (over-the-counter medication such as Advil or Tylenol as well as prescription medications such as Celebrex when the pain becomes unmanageable) and passive therapy such as massage therapy, acupuncture, and chiropractic adjustments. Her symptoms are aggravated by desk and computer work, lifting, driving, and sitting for long periods. She

found the kinesiology sessions recommended by Dr. Webb helpful, and attended further sessions starting in March 2020 when she received funding on behalf of the defendants. Unfortunately, she still wakes up many times at night during the week because, she said, her arms "freeze up" (mostly on the right side), causing her to wake up with painful hands (mostly her right hand). She has to open and close either or both hands repeatedly to alleviate the pain. Sometimes the pain will radiate up her head and cause a headache (which she tries to manage with pain medication).

- [26] Her recreational and social life are impaired by her injuries as well. She no longer engages in any form of dancing (when she tried, she felt an electric shock down her back), no longer runs or walks the stairs near her home, no longer participates in boot camps, and cannot tolerate the four-hour drive to her recreational property in Ashcroft (even as a passenger). Ms. Cox is only able to cope with driving up to two hours, otherwise, as is the case with lifting, her pain flares and worsens. She no longer makes meals for her family or Temple and finds grocery shopping and cooking for herself tiring. She often gives money to her daughters (who no longer live with her) to buy her groceries. They also help her with housework when they can). She is reticent to discuss her pain with friends and engages in fewer social activities. Her upbeat happy personality has changed. Ms. Cox often finds herself feeling sad, tired, and sometimes irritable. She also suffers from reduced energy.
- [27] The defendants do not contend that two subsequent minor motor vehicle accidents or a minor soft tissue injury to Ms. Cox's rib in February 2017 (when she reached into a compost bin) have any connection to or bearing upon her injuries and symptoms.

Employment

- [28] The administrative tasks of Ms. Cox's work in sales, involving paper work, manual entries in spreadsheets, working with a computer, and attending to customer orders, cause her significant pain. After the First Accident, she found she was unable to sit at her desk for more than an hour. At that point, she would have to get up, move about, and massage her shoulders. She was given exercises by her kinesiologist to help manage the symptoms. She worked longer hours in order to get her work done. Over time, she has improved so that she is able to work longer hours on a computer, although no more than four hours before her pain is activated to a point she finds intolerable.
- [29] Ms. Cox asked her employer at Canadian Linen for help with administrative work. In 2016, she asked Canadian Linen to hire an employee to look after her administrative work and went so far as to offer to share her commission with that person. Ms. Cox was better able to cope with her administrative tasks when Canadian Linen brought in an assistant from its rental department to assist her. The assistant was able to access the data on Ms. Cox's computer and relieve her administrative load. Unfortunately, the help was short-lived because the assistant left on maternity leave. Canadian Linen hired Ms. Cox's youngest daughter, who is very proficient with computers, to help her with the administrative work. After approximately two months, Ms. Cox's supervisor told her that they could not afford to

pay her daughter and let her go.

- [30] Ms. Cox testified that without help, she was now regularly working at least 60 hours per week (often late at night until 10:30 or 11:00 pm). She complained regularly to her employer that she needed part-time help from a qualified assistant for three hours per day with the administrative tasks due to her pain. She renewed her previous offer to reduce her income if she was given help. Canadian Linen's response was to ask Ms. Cox to train one of its employees who worked as a seamstress. Ms. Cox was concerned that the employee was not suitable. Unfortunately, the employee had no computer skills and proved to be a hindrance for Ms. Cox since she ended up doing most of the paper and computer work herself and spent extra time to rectify the errors made by the assistant. Ms. Cox objected to the arrangement and renewed her request for appropriate help.
- [31] Ms. Cox saw Dr. Webb for medical advice in August 2017. He wrote a letter to Canadian Linen asking it to provide "adequate staff support" for Ms. Cox in view of her symptoms, explaining that her "Cervical spine, [sic] continues to be a problem" after the Accidents and cautioned that, "Otherwise, I suspect, she is going to need to, [sic] start taking time off."
- [32] Ms. Cox's continued pain affected her ability to cope with her job, causing her significant distress. The defendants point to a comment Ms. Cox made to her employer about her injuries and say this is an example of overstatement in her evidence. I disagree. Overcome with anxiety and fear from her understanding of medical advice that the results of an MRI meant she might require an operation on her cervical spine with possible adverse results of paralysis, she reacted emotively and advised her employer that if she did not receive help she might suffer paralysis. Given the effect of her injuries on her emotional state at the time, I do not take this to be an adverse reflection on her credibility and reliability.
- [33] Ms. Cox's pain worsened to the point that at her employer's urging, she saw Dr. Webb for advice. He recommended she stay away from work to reduce her symptoms. He wrote a letter to Canadian Linen on November 1, 2017, advising that Ms. Cox has been off work for medical reasons since October 26, would be off work until November 15, and would return at that time on a trial basis with a follow-up medical consultation on November 22, 2017. She remained off work for approximately three weeks.
- [34] Canadian Linen terminated Ms. Cox's employment on February 14, 2018. She testified that it was due to her continued requests for assistance due to the injuries caused by the Accidents. According to Ms. Cox, she was let go shortly after Canadian Linen was bought out by a company located in the United States. The initial reason given for her dismissal was said to be due to her declining performance. She was shocked, especially in light of her continued performance. She worked long hours to keep up with her job despite her symptoms. She maintained valued accounts, had secured a new lucrative account with Rocky Mountaineer railroad, and had over \$100,000 in sales orders on her desk to be fulfilled when her employment was terminated. When she was dismissed by a company representative who flew out from Toronto, she was told she should pack up and leave the office immediately.

[35] Ms. Cox brought a lawsuit against Canadian Linen for wrongful dismissal, which was eventually settled. The terms of the settlement, including any amount paid to Ms. Cox, are not in evidence. What is in evidence is a letter of reference signed by Canadian Linen dated July 25, 2018, stating that Ms. Cox was a reliable and valuable employee and was let go as a result of a reorganization within the company:

To whom this may concern:

This letter will serve to confirm that Ms. Cox was employed with Canadian Linen since May 2, 2005 until February 14 of 2018. Her most recent role was as Catalogue Sales Associate for our Vancouver Direct Sales Team.

In her capacity Ms. Cox was responsible for customer relations, developing account leads, e-store account customers, customer retention, new contract installations management as well as securing new business opportunities with current customer accounts.

During her 12+ years of service with Canadian Linen, Ms. Cox proved herself to be a reliable and consistently hard-working and valuable member of the team.

Due to a number of organizational changes, Ms. Cox'[s] position was affected. We sincerely wish her success going forward.

If there are any further questions, please feel free to contact me at your convenience.

Sincerely,

Marilyn D. Johnson

Director Human Resources and Labour Relations

Canadian Operations

(905) 483-1380

[36] Nevertheless, Ms. Cox maintains that she was let go because of her continued requests to be accommodated due to her injuries caused by the Accidents. She denied that there were any organizational changes within Canadian Linen since she was the only employee who was dismissed at that time. Ms. Cox's position is that the cause of her dismissal is relevant because it is a direct consequence of the injuries she sustained in the Accidents and should be taken into account when I assess non-pecuniary damages.

[37] The defendants dispute Ms. Cox's claim. However, they did not call anyone from Canadian Linen to challenge Ms. Cox's evidence concerning her dismissal.

[38] Ms. Cox was a hard working and well-liked employee whose efforts brought about a substantial increase in business for Canadian Linen. As noted at the outset, I found her evidence to be credible and with a few exceptions, reliable throughout. Her income reported on her tax returns (discussed in the future income loss section) demonstrates a sustained level of performance. Her evidence that she was the only individual who was let go at the

time was not challenged. That said, I do not need to make a finding whether she was let go because she complained too much or for other reasons. It will suffice to set out my findings that Ms. Cox genuinely believes it is the reason for her dismissal from Canadian Linen, she could not carry out all of her job duties as a result of the injuries she sustained in the Accidents, required significant accommodation by her employer to perform those duties, and continues to remain emotionally distraught at having lost her job with a company she was devoted to and a job she thought she would work at through to retirement.

- [39] The injuries Ms. Cox sustained in the Accidents not only disrupted her plans to remain with Canadian Linen until retirement, they disrupted her plan to earn enough income from Canadian Linen so that on retirement, she could live part of the year in the Philippines and spend time at her recreational property in Ashcroft.
- [40] Ms. Cox was prohibited from looking for new work due to a six-month non-competition agreement with Canadian Linen. After it expired, she secured a new full-time job selling uniforms with Chefworks in approximately mid-2018, earning a salary of approximately \$80,000 annually (without commission for the first year of employment). Chefworks' office is based in Toronto. Ms. Cox thought she would be able to handle the paperwork and administrative tasks because she could work from home. The work turned out to involve a heavier administrative load than her job at Canadian Linen. She typically spent six hours a day on administrative work before leaving her home to meet with customers. At times, she asked her daughters to help her with the paperwork. Even though Ms. Cox had more freedom to take breaks and move about at home, her physical work environment was not conducive to managing her symptoms. Ms. Cox left her job (on good terms) due to ongoing pain in early January 2019. She earned \$49,272.32.
- [41] Ms. Cox's former supervisor at Canadian Linen, who works for a business called Lykki (also known as Cost Less Express), found out that she was available for employment and sought her out. He knew she had been injured but hired her nonetheless because of his regard for the quality of her work, to work part-time in door-to-door sales, selling office supplies and foodstuffs (e.g., coffee, cookies) to commercial tenants. Ms. Cox did her best with this job as she walked through the downtown core of Vancouver, making cold calls on commercial tenants in numerous high-rises and office buildings. The job was too much for Ms. Cox. She found carrying a back pack with supplies and cookies around with her all day, with no facilities to take a break or rest, too difficult due to her pain. She left her employment at Lykki on good terms on July 5, 2019. She earned \$7,568.05.
- [42] The defendants assert that Ms. Cox's adult son's trouble with the law in 2017 caused much of her pain and mood and distress issues and caused her to leave her jobs at Chefworks and Lykki, especially as his trial and sentencing dates loomed. Her son was charged with serious criminal offences in 2017 and his trial took place in 2018 and 2019. Apart from putting particulars of the charges and timing concerning trial and sentencing dates to Ms. Cox, the defendants did not adduce any evidence to prove their submissions or contradict Ms. Cox's testimony. Ms. Cox's evidence in this respect withstood cross-examination. Her supervisor at

Lykki corroborated her testimony about her physical difficulties in handling the job. Ms. Cox candidly acknowledged she was stressed and "sad" throughout this period but denied it impacted upon her pain and functional issues or affected her work. I accept her evidence.

- [43] After leaving Lykki, Ms. Cox took some time to consider what type of work she could handle in light of her symptoms. When one of her daughters (a professional model and actor) asked for Ms. Cox's assistance in starting up her own business, their collaboration resulted in her daughter's start-up uniform supply business called YOUNiform Market, which opened for business in February 2019. Ms. Cox became the company's director of sales. Some of Canadian Linen's high-profile customers that Ms. Cox worked with heard of her new position and moved their business to YOUNiform Market.
- [44] In her new job, Ms. Cox does not have to carry out any administrative tasks or paperwork (her younger daughter who worked for a short time at Canadian Linen attends to it). Her job is presently considered to be part-time. She works approximately 25 hours per week. Ms. Cox is responsible for maintaining existing clients and helping her older daughter search for new ones.
- [45] YOUNiform Market made a small profit by the end of 2019 and Ms. Cox was paid \$22,000 on advice from the company's external accountant. Ms. Cox's daughter who owns the company testified that she will continue to pay her mother as profits are earned. She could not provide any estimate of potential salary ranges. She testified that she was content for her mother to work part-time for now so that she can focus on getting better.

Expert Medical Evidence

Dr. Joy Wee

- [46] Dr. Joy Wee, a physiatrist, was retained on behalf of Ms. Cox. Dr. Wee examined Ms. Cox on two separate occasions, May 6, 2016 and November 16, 2018, and prepared two medical-legal reports dated the same day of each examination. I refer to them as the "May 6 Report" and "November 16 Report", respectively.
- [47] Physiatry is a medical speciality that seeks to maximize function in an individual suffering from physical or cognitive impairments.
- [48] After graduating from medical school at the University of British Columbia in 1993, Dr. Wee completed her post-graduate degree in physical medicine and rehabilitation at Queen's University in 1997 (where she continues to hold an academic appointment as an adjunct professor in the Department of Physical Medicine and Rehabilitation). The majority of her training in residency was involved in the areas of musculoskeletal medicine, neurological and neuromuscular rehabilitation, and electrodiagnosis. In addition to musculoskeletal disorders, her scope of practice spans the full spectrum of neurorehabilitation including brain injuries, spinal cord injuries, and neuromuscular disorders. For 16 years, Dr. Wee directed interdisciplinary neurorehabilitation teams. In addition to her reports being

tendered in evidence, Dr. Wee was called to testify at the request of the defendants.

[49] Ms. Cox told Dr. Wee she was involved in the Prior Motor Vehicle Accident. From her report, Dr. Wee understood that it took four years for Ms. Cox to make a "complete recovery" from the Prior Motor Vehicle Accident, explaining in cross-examination that in using that term, she understood Ms. Cox was no longer symptomatic and able to engage in activities such as running and dancing without pain.

[50] Ms. Cox also advised Dr. Wee that at the time of her first consultation, she was 50% improved with good mood overall but still suffered from pain and impaired function. She still suffered numbness in both arms, pain in her head including pain on awakening, tingling in her left fourth and fifth fingers during the daytime, impaired sleep due to finger pain, and left shoulder girdle pain near the shoulder blade while at work (rated 8-9/10 in severity).

[51] Dr. Wee described her findings from the May 6, 2016 examination in the May 6 Report:

PHYSICAL EXAMINATION

25. On 6 May 2016, Ms. Cox complained of tingling in her left arm, and was observed to shake it once during the interview.
27. On 6 May 2016, Ms. Cox had full movements at her shoulders and neck, though she reported the left side of her neck as tight.
28. Ms. Cox had tender areas on 6 May 2016, including the back of her head (occipital protuberances), muscles at the back of her neck (which had tender areas that caused pain to spread up the head), shoulder girdle muscles (levator scapulae, rhomboids, upper trapezii), left mre [sic] than right. She was tight and tender over the left-sided muscles in the mid- to low back. Forearm muscles were tight and pain spread down to the hands, causing a tingling feeling.
29. She had reduced feeling to light touch on 6 May 2016, in the ring and little finger of the left hand, in a typical nerve distribution (ulnar nerve). Feeling was normal in her palm. Bending the left wrist caused tingling.

[Bold in original]

[52] Dr. Wee specifically checked for and ruled out pain magnification behaviours.

[53] Dr. Wee diagnosed Ms. Cox with myofascial pain syndrome including right arm symptoms, tension headaches, and poor sleep. Dr. Wee found objective evidence of injury during both assessments. She was unsure whether the nerve issues in Ms. Cox's left arm were caused by the First Accident, but gave the following diagnosis in her May 6 Report:

Evidence and Opinion as follows:

1. My diagnosis and prognosis of Ms. Cox's injuries and whether these were likely caused, directly or indirectly, by the collision.
 - a) Signs of muscular strain, or myofascial pain syndrome were present on examination; this diagnosis is consistent with her story (3, 4, 11, 28). These were likely directly caused by the collision. Tight muscles at the back of her neck and in her forearms cause spreading of symptoms up into her head, and down the forearms to the hands, respectively.
 - b) She has signs suggesting that a nerve in her left arm being affected (ulnar neuropathy - 26, 30). It remains uncertain if this was caused directly by the injury.
2. Whether Ms. Cox would likely have sustained these injuries if she had not been involved in the collision.

Given the mechanism of injury, forces involved, and onset of symptoms, it is my opinion that Ms. Cox would not likely have sustained muscular strain when she did, had she not been involved in the collision.

[Bold and underlining in original]

- [54] At that time, Dr. Wee opined that Ms. Cox was not expected to be permanently disabled (Dr. Wee changed her opinion when she wrote the November 16 Report, concluding that Ms. Cox was permanently disabled). In the May 6 Report, Dr. Wee opined that Ms. Cox should take stretch breaks and change her position at work to manage her symptoms:
3. Whether Ms. Cox will likely be permanently disabled. If not, my estimate as to the length of any temporary disability.

Ms. Cox is not expected to be permanently disabled. Temporary disability would be expected to last 6-8 months with appropriate management. She is expected to fare better in warmer climes.

4. Any restrictions in Ms. Cox's work and employability (such as reduced hours, limitation or elimination of workplace activities such as bending, lifting, etc. or elimination of certain job types) or leisure activities).

At present, Ms. Cox reports symptoms when doing office work. She manages them with an electrical unit and self-massager, as well as taking breaks. Such stretch breaks would continue to be required, and frequent changes in position would be advised while at her desk. At home, she should employ good ergonomic principles.

[Bold in original]

- [55] Dr. Wee also recommended in the May 6 Report that Ms. Cox undergo a further nerve conduction test to determine appropriate future treatment. In the meantime, she suggested a stretching and massage program:

5. Any recommendations with respect to future treatment, care, or therapy (i.e. equipment aids, physiotherapy, massage therapy, chiropractic treatments, a personal training program, swimming, surgery, etc.) and the duration of this treatment. If Ms. Cox requires surgery, the amount of time from work that she will likely miss.

I would advise that a nerve conduction test be repeated on Ms. Cox, and that results be compared with the previous studies to document any nerve problems, and if they are worsening over time, to guide treatment recommendations, including whether surgery would be advised, depending on results. If requiring surgery, estimated time for recovery is deferred to the appropriate surgical speciality (eg. plastic surgery).

She would be advised to engage in a stretching and massage program for all affected muscles, particularly those at the back of her neck and her forearms. Registered massage therapy for 2 months may help speed up the improvements. If necessary for guidance, 4-6 sessions with a physiotherapist may be helpful to review specific stretch techniques for each of the muscles identified, to be followed by massage therapy. If she changes her position more frequently, she would likely be less symptomatic.

[Bold in original]

- [56] In the November 16 Report, Dr. Wee found objective evidence of ongoing muscular tenderness and functional impairment:
61. This woman reported a tight feeling at the right neck and shoulder girdle (upper trapezius) on 16 November 2018 when standing. Shoulder girdle symptoms on both sides were reported when leaning backwards and turning to the left (with symptoms on the right). Tight and tender right neck (cervical paraspinals), chest (pectorals), arm (lateral deltoid) and forearm (extensor digitorum communis) muscles were found, with the forearm muscle containing a particularly tight muscle band (trigger point) causing tingling in the hand when pressed. Pain at the right shoulder girdle was noted when trying to resist bringing her elbow up to the side (pain inhibition).
 63. On 16 November 2018, she was unable to look up as would normally be expected.
- [57] Dr. Wee's neurological examination of the arms was normal with no sign of nerve irritation.
- [58] In her diagnosis, Dr. Wee said that Ms. Cox continued to suffer from myofascial pain syndrome with new right arm symptoms, plus tension headaches related to the muscular strain:

Evidence and Opinion as follows:

1. My diagnosis and prognosis of Ms. Cox's injuries and whether these were likely caused, directly or indirectly, by the collision.

- a) Signs of strained muscles (myofascial pain syndrome) were present on examination after the MVCs (6-10, 55-58, 60, 61), with more involvement after the second MVC (12-14) from history, including new right arm symptoms. Tension headaches (15, 16) were likely related to the muscular strain. The forearm muscle tightness is likely contributing to the tingling she feels in her hand (61). These were likely aggravated by the subject MVCs. Prognosis of the arm tingling is good with adequate and appropriate daily stretching and self-massage of the forearm muscle, for resolution over several months. However, prognosis of the neck and upper back muscular symptoms is guarded, given the presence of a curve in her upper back (see c, below).
- b) She may have incurred inflammation at a right shoulder tendon, or tendonitis (8) after the first MVC, but this had resolved by the time of my assessments.
- c) Initial poor sleep was reported (8,9, 15, 21), indirectly related to the muscular strain aggravated by the subject MVCs. This seems to be continuing due to right arm symptoms, and would be expected to improve as the muscular tension is released (see a above). However, she did have some previously documented right carpal tunnel syndrome (36) which seemed to have resolved by the second set of nerve tests. This could possible re-aggravate in future.
- e) She had limited neck movements (3,6,7) and signs of arthritis (35,39, 63). Limited neck movements could have been contributed to by the two MVCs which likely caused whiplash injury and soft tissue injury through rear-ending mechanisms (6, 7, 10, 11, 13, 14). Whiplash injury is sometimes associated with faster progression of arthritic changes in the neck.

[Bold in original; underlining added]

[59] In the extract above, Dr. Wee commented on a thoracic curvature in Ms. Cox's spine in the November 16 Report. As was the case with pre-existing arthritic changes in the cervical spine, Dr. Wee said in her testimony that she could not say with certainty that the thoracic curvature was caused by the Accidents. However, she said the curvature prolonged and limited recovery from Ms. Cox's ongoing myofascial pain. In terms of prognosis, she opined that Ms. Cox's current disabilities were expected to be permanent:

1.

- d) She had a curve in her spine (thoracic scoliosis, 62), not necessarily caused by the subject MVCs, though seemingly developing sometime between April 2017 and the date of assessment (13), likely significantly prolonging and limiting recovery from ongoing muscular strain. Prognosis of this is not good, given the prominence of the curve.
3. Whether Ms. Cox will likely be permanently disabled. If not, my estimate as to the length of any temporary disability.

As she has a curve in her upper back (62), she would be less able to stretch the affected right-sided muscles completely, and would be expected to continue with symptoms long-term, though further improvements would be anticipated with longer-duration stretching. Current disability relates to running, salsa dancing, and heavier household activities, along with prolonged periods of sitting. These would be expected to continue long-term and permanently.

[Bold in original; underlining added]

[60] Dr. Wee remained of the opinion that Ms. Cox will continue to have difficulties sustaining stationary postures for lengthy periods. She recommended frequent position changes and stretch breaks while Ms. Cox was at work. She also recommended that Ms. Cox avoid activities that require looking upward:

4. Any restrictions in Ms. Cox's work and employability (such as reduced work hours, limitation or elimination of workplace activities such as bending, lifting, etc. or elimination of certain job types) or leisure activities.

At present, Ms. Cox is working full-time. She would have difficulty sustaining stationary postures for long, and frequent position changes and stretch breaks would be advised. She would be advised to avoid work activities that require looking up for prolonged durations or repetitively. A slouched position would not be advised. Supported sitting with good posture would be encouraged.

5.

She would be advised to avoid looking up repeatedly or in a sustained fashion, and avoid quick turning neck movements. High impact activities would best be avoided. She is wise to avoid the quick movements of salsa dancing. Similar dancing such as tango or ballroom dancing with quick neck movements should also be avoided. Activities that could put her at risk of whiplash injury would best be avoided.

[Bold in original; underlining added]

[61] For future treatment and care, Dr. Wee recommended follow up x-rays, work with a physiotherapist, daily home stretching and self-massage, an ergonomic assessment, and massage therapy as required for flares:

5. Any recommendations with respect to future treatment, care, or therapy (i.e. equipment aids, physiotherapy, massage therapy, chiropractic treatments, a personal training program, swimming, surgery, etc.) and the duration of this treatment. If Ms. Cox requires surgery, the amount of time from work that she will likely miss.

...

X-rays of her upper back (thoracic spine) would be advised to measure the curve (standing scoliosis views) in her spine, for future reference. Repeat scoliosis views would be advised between 6 months and a year after the baseline views, and if worsening is documented, bracing may be required. In rare circumstances, surgery may be advised if the curve progresses rapidly.

She may benefit from working with a physiotherapist familiar with scoliosis, to try to release all her tight muscles, as well as to strengthen her back muscles. A daily home stretching and self-massage regime would be advised. Also, for her work station, an ergonomic assessment by occupational therapy would be advised. Registered massage therapy involvement for exacerbations may be required from time to time well into the future. I would advise that quick, high-amplitude chiropractic adjustments of the neck be avoided. Isometric neck strengthening exercises followed by stretching would be encouraged.

Regarding surgery, if in future a nerve is pinched in her neck, surgery may be advised, depending upon neurological problems caused, pain severity, and nerve test results. I would defer comment regarding time from work to be missed to the relevant surgeon involved in that case.

[Bold in original, underlining added]

[62] In her testimony, Dr. Wee confirmed her opinion that Ms. Cox's injuries from the Accidents do not prevent her from carrying out her job duties in direct sales for uniforms so long as she has accommodations for breaks and position changes, and an appropriate ergonomic work environment (in particular, one that allows Ms. Cox to look straight ahead and not up when typing or working on a computer).

[63] Dr. Wee's opinion concerning causation is also important in light of the defendants' position that a note in Dr. Webb's records that Ms. Cox was suffering from pre-existing neck and back stiffness prior to the First Accident supports a crumbling skull analysis. When Dr. Wee examined Ms. Cox on November 16, 2018, she had many more clinical records at hand (including updated records from Dr. Webb, an MRI report concerning Ms. Cox's cervical spine dated February 14, 2017, left rib x-rays, and kinesiology and chiropractor records). Following her review of these records, Dr. Wee discussed causation in the November 16 Report, noting that Ms. Cox's would not have suffered an aggravation of neck and back stiffness nor any arm symptoms absent the Accidents:

2. Whether Ms. Cox would likely have sustained these injuries if she had not been involved in the collision.

Ms. Cox had pre-existing neck stiffness and low back pain (1-4). Based upon symptom onset and aggravation, she would not likely have experienced aggravation of neck and back symptoms when she did, had she not been involved in the subject MVCs. Arm symptoms would also not likely have occurred when they did (8, 10, 12, 19) had she not been involved in the subject MVC.

[Bold in original, underling added]

Dr. Kahn

[64] Dr. Mohammed Kahn, a physiatrist, was retained by the defendants. He examined Ms. Cox on February 20, 2020. His practice experience is not as lengthy as Dr. Wee's as he graduated from medical school in 2012 and completed his post-graduate training in physical medicine and rehabilitation in 2017. Dr. Kahn works at three outpatient clinics in Mississauga, Ontario and consults with one medical service assessment provider in Toronto and another in Vancouver. His medical-legal report is dated March 10, 2020. Many of his findings and opinions are consistent with Dr. Wee. Ms. Cox served the report on defence counsel, such that it formed part of her case. Dr. Khan was not called to give viva voce evidence.

[65] Dr. Kahn found objective signs of injury, such as:

- Tenderness on palpation of cervical paraspinal, trapezius, rhomboid, infraspinatus, and upper latissimus dorsi musculature, all on the right side.
- Tenderness on palpation of left trapezius and rhomboid musculature on left side.
- Limited cervical forward flexion and extension with reports of pain at base of neck and trapezius region bilaterally and reports of pain in right trapezius and rhomboid muscles on internal rotation to the right.
- Tenderness on palpation of right posterior deltoid region.

[66] In his report, Dr. Kahn said that Ms. Cox was continuing to suffer from an unresolved cervical spine sprain and strain and bilateral trapezius, posterior shoulder girdle strain (right worse than left). He also diagnosed a thoracolumbar spine sprain/strain as resolved.

[67] His prognosis for complete resolution was guarded:

Given the amount of time that has passed since the subject accidents, without complete resolution in Ms. Cox's current pain symptoms to date, the prognosis from a physical perspective for a complete resolution is guarded (regarding her cervical spine and bilateral trapezius/bilateral shoulder girdles).

[Emphasis added]

[68] Like Dr. Wee, he found no evidence of pain magnification. His findings were consistent with Ms. Cox's subjective reporting:

There were no perceived differences in findings with respect to Ms. Cox's subjective complaints and the objective findings of today's assessment.

[69] In discussing his diagnosis and prognosis, Dr. Kahn said although the normal length of time for sprain and strain injuries is up to six to eight months, predicting the future in Ms. Cox's case was difficult. Nonetheless, when he was asked whether Ms. Cox's "continuing symptoms are of a permanent or temporary nature" and whether he agreed with the opinions expressed by Dr. Webb, he said in his report that Ms. Cox's symptoms "will likely continue to persist into the future":

Dr. Webb documented in the November 12, 2019 report that, "Marietta Cox was rear-ended while in her vehicle, an F150 truck, on Friday May 29 2015 and was diagnosed with grade 2 soft tissue injuries of the cervical spine and grade 1 injuries of the lumbar spine." I am in agreement with these diagnoses of soft tissue injury.

With respect to prognosis, Dr. Webb documents that, "While these flare ups may become more intermittent, and less severe in nature over the ensuing years, Dr. Webb's opinion is they are likely to persist for the rest of her life."

Given the duration of time that has passed, I am in agreement that Ms. Cox's symptoms will likely continue to persist into the future. However, the severity of this partial disability is likely to be manageable with ergonomic modifications, appropriate medical therapy, and an active exercise program that focuses on neck, shoulders, and core strengthening exercises.

[Italics in original; underlining added]

[70] In terms of causation, like Dr. Wee, Dr. Kahn had the clinical records before him that the defendants assert establish Ms. Cox was symptomatic in her neck and back prior to the First Accident. Yet, Dr. Kahn did not say in his report that Ms. Cox was suffering any ongoing effects of the Prior Motor Vehicle Accident by the time of the First Accident or any other relevant pre-existing medical issues.

[71] Instead, and in answer to specific questions put to him by defence counsel in the instruction letter, Dr. Kahn opined that Ms. Cox was not suffering from any prior or existing "contributory" problems at the time of the First Accident. From my review of the whole of his report, I conclude that based on his examination, Dr. Kahn accepted the veracity of Ms. Cox's history:

2. Whether the Plaintiff had any prior or existing problems - patent or latent - at the time of the first accident and whether there are any contributory causes to her current injuries. When providing your opinion in this regard, we ask that you comment on whether the Plaintiff was experiencing any physical problems, whether continuous or intermittent, as of the date of the first accident.

Ms. Cox reported that she was involved in a previous motor vehicle accident in 2008. She stated that she attended a course of facility-based rehabilitation and her injuries eventually resolved completely "after a few years".

She denied any ongoing musculoskeletal issues at the time of the May 2015 accident. She stated that she was asymptomatic and "felt awesome" at the time of the May 2015 accident. She stated that she was attending chiropractic treatment on occasion prior to the May 2015 accident for "general maintenance".

Therefore, from a physical perspective, there were no prior or existing problems at the time of the first accident that are contributory to Ms. Cox's current injuries.

[Bold in original; underlining added]

[72] The most Dr. Kahn could say is that absent the Accidents, Ms. Cox may have complained of neck pain at some point in the future given her age and occupation history. As part of his discussion regarding diagnosis and prognosis, and also when answering the question, "[W]hether there was a measurable risk of [Ms. Cox] developing similar symptoms being alleged as a result of the accidents, in the absence of them occurring", Dr. Kahn said:

Given her age and occupational history of prolonged computer use and sustained head postures, it is possible that Ms. Cox may have complained of neck pain at some point in the future, in the absence of the accidents, and that these factors may be hampering her recovery. However, the future likelihood of her having neck pain, its severity, duration, and disabling effect is difficult to accurately predict.

[Emphasis added]

[73] Dr. Kahn's opinion regarding restrictions in Ms. Cox's ability to work are similar to those expressed by Dr. Wee:

At the present time and in the future, Ms. Cox may have difficulties in her position, such as missing days from work, needing to take frequent breaks, requiring assistance with heavy tasks, etc. due to ongoing soft tissue pain. However, the severity of this partial disability is likely to be manageable with ergonomic modifications, appropriate medical therapy, and an active exercise program that focuses on neck, shoulders, and core strengthening exercises.

Considering the above, there is no accident-related medical diagnosis or impairment for which I would restrict or prevent Ms. Cox from independently performing her vocational functions or obtain other occupations as she has following the accidents. I recommend that she continue to work full duties and full hours as she has following the accidents and find no contraindications (as they relate to the subject accident) to her doing so.

There were no other causes or conditions identified for which I would restrict or prevent Ms. Cox from performing her vocational functions.

[Emphasis added]

[74] As for current and future treatments, instead of individualized passive therapy (such as physiotherapy and massage therapy), Dr. Kahn recommended that Ms. Cox be referred to a pain clinic by her family doctor and undergo a trial of trigger point injections and/or oral

pharmacological treatment (such as anti-inflammatories, oral/injectable muscle relaxants, anticonvulsants) to better tolerate pain symptoms and return to "her pre-accident pace of performing her daily activities, and would also her to better tolerate strengthening exercises and prevent physical deconditioning." He did not find any reason for surgical intervention at the present time.

- [75] Dr. Kahn also said Ms. Cox should continue with her active rehabilitation program, but once it is completed, he encouraged her to engage in a self-directed active exercise program that focuses on neck, shoulder, and core strengthening exercises.
- [76] Dr. Kahn's evidence also supports Ms. Cox's claim for housekeeping assistance. According to Dr. Kahn, Ms. Cox may have difficulties with certain housekeeping tasks (e.g., carrying groceries, vacuuming, and scrubbing the bathtub). In his report, he said she may need to take frequent breaks and "require occasional assistance with heavy tasks due to ongoing soft tissue pain." Otherwise, in his opinion, "the severity of this partial disability is likely to be manageable with appropriate medical therapy and an active exercise program" of the nature and type described in the preceding paragraph.

Dr. Webb

- [77] Dr. Webb has been Ms. Cox's family doctor since at least 2007. He treated her for injuries from and following the Prior Motor Vehicle Accident and prepared a medical-legal report dated November 12, 2019.
- [78] Dr. Webb has extensive clinical experience in his 25 years as a general practitioner, in addition to his residency training (in South Africa) in orthopedics.
- [79] Dr. Webb's findings on examination following the Accidents are described in his report.
- [80] He saw Ms. Cox on June 3, 2015 following the First Accident. He found a 90% loss of lordosis in her lumbar spine, a 30% restriction in lumbar extension, bilateral spasm of the iliocostalis muscles, decreased cervical spine flexion (2 cm short of the sternum) and extension (he said in his testimony, by 20%) with pain at both ends, 60 degree reduced lateral flexion on the left side and 45 degrees on the right, and marked spasm of the mid to upper trapezius muscles. He concluded Ms. Cox displayed minor spasm of the central paraspinal muscles and diagnosed grade 2 soft tissue injuries to the cervical and lumbar spines and grade 1 to the thoracic spine. He prescribed Celebrex and referred Ms. Cox to a kinesiologist.
- [81] Dr. Webb reported ongoing objective findings of injury and restricted function in follow-up examinations of Ms. Cox. He found her emotionally anxious at times, noted her reports of pain and fatigue, and found ongoing significant restriction in function (at several points he recommended Ms. Cox stay away from work and obtain assistance with household tasks).

[82] When her neck pain worsened with a significant flare in early November 2015, Dr. Webb ordered x-rays, which revealed a degenerative disc process. In his report, Dr. Webb wrote (albeit at times in the third person):

45 Dr Webb in commentary noted Ms. Cox had a significantly degenerative cervical spine. Dr. Webb stated in his notes:

"Ms. Cox demonstrates degeneration of the cervical spine which was, more likely than not, present, prior to the motor vehicle accident, (and) would more likely than not explain, the slow nature of her recovery. In terms of the soft tissue cervical spine injuries." Dr. Webb went on to state: "In this case, it would appear, that this accident more likely than not, will have been the last straw that broke the camel's back, in terms of flaring up her neck condition, and her protracted and difficult recovery."

[83] Throughout, Dr. Webb recommended to Ms. Cox that she continue her work with a kinesiologist.

[84] Dr. Webb also referred Ms. Cox to a neurologist in light of her bilateral upper limb numbness to determine whether she suffered from cervical radiculopathy. The results reported April 20, 2016 show bilateral carpal tunnel syndrome but no evidence of radiculopathy.

[85] Dr. Webb's findings on examination on July 16, 2016 (the day of the Second Accident) are also contained in his report. Cervical extension was 80% of normal, left and right lateral rotation were reduced to 75 and 85 degrees respectively. He found marked spasm in the right upper trapezius and levator scapulae muscles. Dr. Webb diagnosed grade 2 soft tissue injuries of the lumbar spine and grade 2/3 injuries of the cervical spine aggravated from the First Accident. He recommended physiotherapy and focus on movement and rehabilitation as opposed to relying solely on passive therapy, and prescribed Celebrex.

[86] Dr. Webb noted that in subsequent visits, Ms. Cox reported ongoing pain radiating down her neck into her upper thorax and right shoulder and difficulty sitting for more than four hours at her desk when doing computer work. His report also discussed continued objective findings of restricted function.

[87] Dr. Webb's diagnosis as at the date of his report was Ms. Cox had yet to fully recover from her pain and functional limitations in her cervical spine. For prognosis, he expected Ms. Cox will never regain a full range of motion in her cervical spine, she will continue to suffer intermittent flares of pain (less frequently over time), and is susceptible to further injury of her cervical and lumbar spines:

Discussion:

Marietta Cox was rear-ended while in her vehicle, an F150 truck, on Friday May 29 2015 and was diagnosed with grade 2 soft tissue injuries of the cervical spine and grade 1 injuries of the lumbar spine.

On Saturday 9 July 2016 Ms Cox was again involved in a motor vehicle accident and was diagnosed with mildly aggravated grade 2 soft tissue injuries of the cervical spine and grade 1 injuries of the lumbar spine.

Her progress was impeded by her preceding degenerative cervical spine condition confirmed on X-Ray and MRI.

With 4 years elapsed since the first accident Ms Cox is much better but still not fully recovered especially as related pain and limitations in left and right lateral rotation of her cervical spine.

Prognosis:

With 4 years elapsed since the first accident Ms. Cox grade 2 cervical spine soft tissue injuries are in Dr. Webb's opinion permanent. Dr. Webb expects she will never regain a full range of motion in left and right lateral rotation of the cervical spine. Dr. Webb expects her to have intermittent painful flare ups albeit less frequently over time for the rest of her life. In addition she will be more susceptible to injury of both C and L spines had these 2 accidents not taken place.

[Emphasis added]

- [88] In his testimony, Dr. Webb explained his findings of the emotional toll the injuries took on Ms. Cox. He said he had always found her to be a very resilient person but by March 8, 2018, when she attended at his office for an out-of-the-ordinary 90-minute consultation, it was clear the pain and restriction in function had become too much for her. Unusual for Ms. Cox, Dr. Webb found she had gone into a "state of general decline". He suspected that she was "decompensating emotionally and becoming dysfunctional on the basis of the multitude of factors that presented"; "the biggest factor of all was the underlying pain and inability to recover from the accident."
- [89] Fully aware of Ms. Cox's medical history prior to the Accidents, Dr. Webb opined that Ms. Cox's cervical and lumbar injuries sustained were "more likely than not in greater or lesser proportion directly caused as a direct result of the two referenced MVA's." In his evidence-in-chief, he testified that he did not believe that the Accidents had anything to do with the degenerative changes in her cervical spine shown in the x-rays. In cross-examination, he admitted it was possible that Ms. Cox suffered from a pre-existing, asymptomatic degenerative condition that was unmasked by the Accidents. But he would not agree with the proposition that it would have become symptomatic in any event.
- [90] Dr. Webb was challenged with a notation in Pharmanet records on January 14, 2014, recording that Ms. Cox had filled a prescription for painkillers, Celebrex, Ratio-Lenolteck No. 3 (Tylenol 3 without caffeine), and Diazepam 5mg tablets. The thrust of the questioning was to challenge Dr. Webb's opinion that Ms. Cox was fully recovered from her injuries from the Prior Motor Vehicle Accident by the time of the First Accident. Dr. Webb carried out a thorough search of his clinical notes to find when and why he issued the prescription. He found notes in his records showing that on August 8, 2013, Ms. Cox attended with a severe flare-up on both sides of her neck on the weekend. Dr. Webb did not agree with defence

counsel's proposition that the flare was the result of the Prior Motor Vehicle Accident or a degenerative process in the cervical spine that had become symptomatic. In reviewing his clinical notes, he found his diagnosis of torticollis, which is a wry neck (a condition where the muscles lock in a sustained direction, and not necessarily related to a flexion-extension whiplash-type of injury from a car crash). He said a wry neck can occur spontaneously from sleeping awkwardly on the pillow. As for why the Pharmanet records showed the prescription filled in January 2014, Dr. Webb said those records are "utterly unreliable" and in his practice he does not rely upon them for their accuracy.

- [91] Dr. Webb was also asked in cross-examination to comment (I agree with Ms. Cox's submission that he was asked to speculate) upon a note in a chiropractor's pre-Accidents clinical records which included the word "osteoarthritis". This was part of a series of questions in respect of the defendants' position that Ms. Cox had not fully recovered from the Prior Motor Vehicle Accident before the First Accident and even if she had, she was suffering from other neck and back issues.
- [92] The chiropractor was not called to explain the note. Nor was the note put to Ms. Cox in cross-examination.
- [93] Dr. Webb rejected the defence's assertion that the note could be construed as a diagnosis of a pre-existing health issue. He said it could be indicative of many things including a wry neck or a flare of a prior injury, or a question the chiropractor raised to himself to consider that was premised on intuition as opposed to formal testing. Nonetheless, although Dr. Webb deferred to the physiatrists for their opinions, he, like the physiatrists, maintained his diagnosis that the Accidents were the direct cause of Ms. Webb's injuries, symptoms, and functional impairments. For Dr. Webb, a key indicator of recovery from injury is a patient's ability to return to pre-injury activities. In Ms. Cox's case, she had fully returned to her activities well before the First Accident.
- [94] Defence counsel also suggested Dr. Webb relied on the veracity of Ms. Cox's subjective reporting in reaching his opinion concerning causation. Dr. Webb acknowledged that as a family doctor he tends to believe what his patients tell him in terms of symptoms, unless he has reason to question it. In Ms. Cox's case, there was no reason to doubt or question her reporting.
- [95] Dr. Webb was questioned about the effects of the Prior Motor Vehicle Accident. Initially, when answering, Dr. Webb drew in part from his recollection when he explained that Ms. Cox's "symptom complex was near but not completely burned out in the two year period" following the Prior Motor Vehicle Accident:

Q Now, her accident -- before this accident, whether it be 2007 and 2008, or the different numbers that you have said in here, those symptoms went longer than two years, did they not?

A I can't recall specifically. I'd have to check my notes and we'd have to go through that and determine the two-year piece, if you like. But in the grand scheme, I think she had [indiscernible] gradually improved and was exacerbating less frequently to the point where the symptom complex as she was experiencing it was near but not completely burned out.

[96] After he looked through his clinical notes, Dr. Webb testified it took approximately "four years plus" for the injuries and symptoms from the Prior Motor Vehicle Accident to resolve. When he was asked to explain what he means by the term "completely resolved", he explained, "No further exacerbations of pain and spasm, and a return to full range of motion in all modalities of that particular part of the spine."

Conclusion

[97] The Accidents caused the following injuries to Ms. Cox:

- (a) grade 2 soft tissue injuries of the cervical spine (First Accident) and aggravated grade 2 soft tissue injuries of the cervical spine (Second Accident), with pain extending down her arms, particularly her right arm;
- (b) grade 1 soft tissue injuries of the lumbar spine;
- (c) myofasical pain syndrome;
- (d) tension headaches;
- (e) tendonitis at right shoulder - now resolved;
- (f) impaired sleep; and
- (g) right carpal tunnel syndrome - resolved by September 2016;

[98] Ms. Cox will never regain full range of motion in the left and right lateral rotation of her cervical spine. She can manage her pain three days of the week but suffers tenderness every day. She is expected to suffer intermittent flares of pain for the rest of her life, albeit less frequently if properly managed. She felt pain every day she worked full-time following the Accidents. She also wakes up with numbness in her right arm and in one or both hands from time to time. She still suffers from pain working part-time when required to sit for prolonged periods or look up while doing paperwork and other administrative tasks. She is also more susceptible to injury. Surgery is not anticipated, but may be necessary if Ms. Cox suffers a pinched nerve in her neck. Nerve root testing is recommended.

[99] Ms. Cox's mood is also affected. She is no longer the gregarious person described by her co-workers, friend, and daughters. She tires easily, and is no longer able to engage in the physical and church-related activities she did prior to the Accidents. She continues to suffer significant distress and emotional upset at the loss of her job with Canadian Linen and in her inability to carry out all of her job duties for Chefworks and Lykki.

- [100] The defendants argue that this is a crumbling skull case because Ms. Cox suffered from pre-existing cervical spine symptoms at the time of the First Accident. The defendants rely on chiropractic clinical notes, some pre-First Accident entries in Dr. Webb's clinical records, and evidence from Ms. Cox's friend concerning when they stopped salsa dancing. The defendants also submit that the opinions of the medical experts should be given little to no weight because they relied solely on Ms. Cox's subjective reporting. They ask me to evaluate the contents of the clinical records and make my own independent assessment of Ms. Cox's condition at the time of the First Accident.
- [101] I will begin with the chiropractic clinical records. The impugned information contained in them does not on its own establish a relevant prior medical history. No clinical records were admitted into evidence as business records or for the proof of truth of their contents. All medical clinical records were admitted into evidence on the basis that: (a) the healthcare professional saw Ms. Cox on the dates recorded in the notes; (b) examination findings, medication prescribed, medical procedures, and treatments provided were as recorded; and (c) any medical procedures or test documents occurred as documented.
- [102] The chiropractic records would be of limited assistance even if they had been admitted as business records. Many of the notes are difficult to read and some are illegible. The only reliable evidence to take from them would be the dates on which Ms. Cox received treatments. They show that Ms. Cox attended chiropractic treatments with decreasing frequency after 2012. She received nine chiropractic treatments in the first half of 2012 (four of them were in January) and received two treatments in the latter half of that year. She received six treatments in 2013 and four in 2014 (April 14, September 19, and December 12 and 15). In the months leading up to the First Accident in 2015, she received treatments only twice, on March 2 and April 27, 2015.
- [103] Further, in the absence of evidence of the chiropractors who made the notes, the records would be of limited probative value because it is not possible to determine that they record complaints or diagnoses of injuries and symptoms Ms. Cox is currently suffering from.
- [104] I will now discuss the defendants' assertion that the opinions of the medical experts should be given little to no weight because they relied solely on the veracity of Ms. Cox's subjective reporting.
- [105] This is not a case, as the defendants suggest, where the physiatrists refrained from determining which conflicting facts to accept. Dr. Wee and Dr. Kahn reviewed the information contained in the various clinical records identified as important by the defendants, including the chiropractic clinical records. Dr. Wee and Dr. Kahn did not identify any conflicting facts or information that could affect their opinions. They confirmed that the Accidents were the cause of Ms. Cox's injuries and that there were no prior "contributory" (to quote Dr. Kahn) medical issues. Dr. Wee was clear in cross-examination that she will point out any inconsistency she finds between a patient's oral history and her review of clinical records (in this case, there was nothing to remark upon).

- [106] Ms. Cox served Dr. Kahn's report on the defendants. The defendants did not ask for him to be called for cross-examination. He was not presented with the opportunity to answer the defendants' assertion that he unreasonably accepted Ms. Cox's history at face value and ignored clinical records or other facts. The proposition was not put to Dr. Wee in cross-examination.
- [107] Dr. Webb reviewed his pre-First Accident clinical records during the course of cross-examination. He carefully explained the meaning of his notes and stuck by his opinion concerning causation. He did not change his opinion.
- [108] The defendants' attempted to rely on a note in Dr. Webb's records made two weeks before the First Accident. This note does not establish Ms. Cox was suffering from pre-existing arthritis in her cervical spine. The note records that Ms. Cox was concerned about arthritis in her elbows. It states:

Other Review of Symptoms otherwise unremarkable. She is concerned that she may be developing arthritis, in the elbows. Otherwise, no other no joints involved.

- [109] The defendants also have not proven their submission that the additional note immediately following - "She is also having some troubles with her neck. She did settle an ICBC case years ago on that" - establishes a relevant pre-existing condition. From my observations of Dr. Webb, I am satisfied that in the course of his evidence, including cross-examination where he looked through his clinical notes in detail, he demonstrated a clear memory (albeit at times refreshed from his records) of Ms. Cox's medical history and her various complaints over time. He did not change his opinion that the Accidents caused Ms. Cox's injuries and present symptoms. I was satisfied that Dr. Webb was appropriately objective and did not act as an advocate or appear biased.
- [110] The defendants argued that the evidence from Ms. Cox's friend establishes that Ms. Cox stopped salsa dancing due to pain in 2014, well before the First Accident and as a result, Ms. Cox's evidence is unreliable. I disagree. The evidence from Ms. Cox's friend in this respect was unreliable because she was clearly confused about the date of the First Accident.
- [111] Thus, there is no evidence to establish the defendants' theory that Ms. Cox suffered from pre-existing injuries or symptoms at the time of the First Accident that engage a crumbling skull analysis.
- [112] There is also no evidence to establish a measurable risk or a real and substantial possibility (as opposed to speculation) that any of Ms. Cox's pre-First Accident neck or back stiffness would have manifested as an injury in future absent the Accidents. Nor is there any evidence to establish that the injuries she sustained in the Prior Motor Vehicle Accident were aggravated or contributed to the injuries she sustained in the Accidents.

- [113] At most, the opinion of Dr. Kahn suggests that Ms. Cox may have had issues with her neck due to her job duties working with a computer. Dr. Webb testified in cross-examination that it is possible that Ms. Cox had a symptomatic degenerative condition that was unmasked by the Accidents (but he would not agree that it would have become symptomatic absent the Accidents). This is insufficient to establish measurable risk or real and substantial possibility. The submission does not rise above the level of speculation.
- [114] While not established as caused by the Accidents, Ms. Cox's thoracic curvature, which has made her recovery more difficult, may be a pre-existing condition. However, if it was, it was an asymptomatic condition. Further, there is no evidence to establish that it was likely or even possible to become symptomatic if the Accidents had not occurred. There is also no evidence that her thoracic curvature will worsen.
- [115] I agree with Ms. Cox's submission that a thin skull analysis is appropriate to her case. The evidence as a whole establishes that Ms. Cox's injuries as claimed were caused by the negligence of the defendant drivers: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13-17, 32-35; *Filsinger v. ICBC*, 2009 BCSC 232 at paras. 24-26; *Rabiee v. Rendleman*, 2015 BCSC 595 at paras. 64-66.
- [116] The defendants have also not established that any of Ms. Cox's symptoms or impact on her work are the result of her son's criminal offences. The defendants' assertion is based on speculation: *Quezada v. Quezada*, 2019 BCSC 1732 at paras. 104-107, 109. I accept Ms. Cox's evidence that her ongoing symptoms made it more difficult to deal with her son's circumstances.
- [117] There is thus no basis to reduce any of the awards conditions or circumstances pre- or post-Accidents.

Expert Vocational Evidence

- [118] Ms. Joanne Beattie carried out functional capacity and future care assessments for Ms. Cox on December 11 and 16, 2019 respectively. Her findings and opinions are contained in her report dated February 6, 2020.
- [119] In addition to reviewing the medical-legal reports, as part of her assessment, Ms. Beattie put Ms. Cox through a series of tests to evaluate her function. She found restrictions in sitting, standing, lifting, and moving objects over 20 pounds. She also found the physical aspects of some of the tests aggravated Ms. Cox's symptoms. There was no evidence of malingering or pain magnification. According to Ms. Beattie, Ms. Cox displayed a consistently high degree of effort throughout. Ms. Cox's perceived function was consistent with the test results.
- [120] In this section, I discuss Ms. Beattie's opinion concerning work capacity. Her recommendations concerning future care are discussed later.

[121] In Ms. Beattie's opinion, Ms. Cox's general work capacity is restricted in the following respects :

- g. General work capacity: Ms. Cox is best suited for work in the sedentary to light ranges of strength (up to 20 pounds occasionally). She is capable of work that involves sitting on a frequent basis and standing on an occasional to frequent basis. She would benefit from opportunities to alternate between sitting and standing, in order to best manage her pain. She is capable of work involving gross and fine dexterity between chest and waist level on a frequent to constant basis. She should avoid work that involves prolonged periods of awkward or repetitive movements of the cervical spine, as these were noted to increase neck and shoulder pain.

[Emphasis added]

[122] In her report, she said that Ms. Cox is currently able to competitively meet the physical demands of a sales representative provided her working environment is appropriately adapted following an ergonomic assessment and she is not required to lift more than 20 pounds. However, after receiving and reading Dr. Kahn's report and his opinion that Ms. Cox may have difficulties in her work (e.g., missing days from work and requiring frequent breaks and assistance with heavy tasks), Ms. Beattie qualified her opinion. She explained in cross-examination that even where Ms. Cox is able to manage her symptoms, she is likely not competitive for full-time work she is qualified to do.

Non-Pecuniary Damages

[123] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal set out a non-exhaustive list of common factors which influence an award of non-pecuniary damages:

[46] The inexhaustive list of common factors cited in *Boyd* that influence an award of non-pecuniary damages includes:

- (a) age of the plaintiff;
- (b) nature of the injury;
- (c) severity and duration of pain;
- (d) disability;
- (e) emotional suffering; and
- (f) loss or impairment of life;

I would add the following factors, although they may arguably be subsumed in the above list:

- (g) impairment of family, marital and social relationships;
- (h) impairment of physical and mental abilities;

- (i) loss of lifestyle; and
 - (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).
- [124] The cases cited by the parties in their written submissions provide useful guidance of an appropriate range for the award under this head of damage.
- [125] Ms. Cox referred to five authorities with the following synopsis, which I have extracted from her written submissions (the additions in brackets are mine) in support of her submission that \$90,000 is an appropriate award for this head of damage:
96. In *Bucholtz v Zhang*, 2020 BCSC 571 the plaintiff was 49 years old at the time of trial. He did not miss work following the accident and continued full time employment up to the time of trial. He worked through pain, with cost to his personal and social life. He could not participate in the activities he once did due to his Accident-related pain, but his functional capacity was expected to improve with a program of active rehabilitation [due to soft tissue injuries to shoulder, upper back, and neck presenting as chronic lower back pain]. The plaintiff was awarded \$85,000 for his non-pecuniary damages. [T]he plaintiff reported pain from "sun up to sun down." However, the plaintiff had also not taken time off of work, and was continuing to work in his labour intensive job, albeit with some modifications (para 22). Similarly, the Plaintiff in the case at bar testified that when she was working full time, she was in constant pain. The case is not distinguishable on this basis.
97. In *Tang v Duong*, 2020 BCSC 85 the plaintiff was 52 years old at the time of trial. He worked in the financial services injuries and suffered soft tissue injuries to his neck and back [with no pre-existing conditions], attended by sleep disturbance, low mood, and anxiety. He attained a fairly good recovery, although he had some residual pain, stiffness, and anxiety. The prognosis for a full recovery was guarded. The Plaintiff was awarded \$80,000 for his non-pecuniary damages. [T]he plaintiff did have psychological issues which were noted to complicate his recovery, his overall prognosis and limitations are similar to that of the Plaintiff in the case at bar. The court accepted the evidence of Dr. Letcher, noting the following:
- [13] Dr. Letcher's opinion is that Mr. Tang's depressed mood, anxiety, and sleep disturbance complicate the prognosis, which Dr. Letcher describes as "guarded given the chronicity of his symptoms." His neck and back pain will most likely persist into the foreseeable future, with some improvement with treatment strategies. Although Mr. Tan is not disabled from work, Dr. Letcher emphasized that he would need to "work around his symptoms as best as possible."

98. In *Jiang v. Pappas*, 2016 BCSC 1015 the plaintiff was 54 years old at the time of trial. The plaintiff suffered neck pain, low back pain and left shoulder pain. [There was evidence of a disc protrusion in the lumbar spine and a shoulder impingement]]. He also had insomnia and headaches, and was diagnosed with mood and anxiety symptoms [including depression]. The plaintiff was awarded \$75,000 for his non-pecuniary damages (\$79,000 adjusted for inflation).
99. In *Abraha v Suri*, 2019 BCSC 1855 the plaintiff was 51 years old at the time of trial. Prior to the accident, she enjoyed dancing, cooking and socializing with no pre-accident issues. She was heavily involved in her church community. She suffered soft tissue injuries to her neck, shoulder, and low back; sleep issues related to pain and stress, anxiety and depression, memory loss, and low mood. Her prognosis was guarded. The plaintiff became disorganized, forgetful, and withdrawn after the accident. Her pain and psychological symptoms plateaued in 2018. She was frustrated that her depression and anxiety prevented her from being positive, and encouraging others to follow her faith. She was awarded \$70,000 in non-pecuniary damage.
100. In *Harris v Teo*, 2019 BCSC 1631: Plaintiff was 59 years old at the time of trial. He suffered soft tissue injuries to the neck, right shoulder, and upper back, headaches, right knee pain, chest pain, and an aggravation of pre-existing (but asymptomatic) degenerative spondylosis. He had chronic neck, shoulder, and upper back pain, and still suffered intermittent headaches. The chest pain was extreme for about a month, but resolved. The plaintiff plead anxiety, but the judge was not satisfied that this resulted from the accident. He was able to return to his work normally, but it takes him longer and he has some pain. The plaintiff was awarded \$110,000 in non-pecuniary damages.
- [126] The defendants cited four cases in support of their submission that the range is between \$30,000 and \$40,000. I have extracted their description of the case authorities below:
- [135] In *Ryan v. Klakowich*, 2011 BCSC 835, the plaintiff, 54 at the time of trial, was awarded \$25,000 in non-pecuniary damages (approximately \$28,200 in present value). Before the subject accident, the plaintiff suffered from severe scoliosis and pain from several prior accidents in her back and neck. Although she testified that she was asymptomatic before the accident, she routinely attended chiropractic treatments leading up to the accident [at para 3]. The plaintiff's collateral witnesses were not aware of the plaintiff's pre-accident medical conditions and their evidence about the plaintiff's apparent absence of symptoms in the years before the subject accident was at odds with the clinical records [at para 76]. The court concluded that the plaintiff suffered mild to moderate soft tissue injuries to her neck and shoulder girdle as a result of the subject accident and that her symptoms had lingered because of her pre-existing condition .
- [136] In *Mothe v. Silva*, 2015 BCSC 140, the plaintiff was awarded \$40,000 in non-pecuniary damages (approximately \$43,000 in present value). The plaintiff, 48 at the time of trial, did not have any pre-existing injuries to his neck or shoulders before the subject accident,

though he suffered unrelated injuries in a prior workplace incident. As a result of the accident, he sustained myofascial injuries to his neck, interscapular region, and left shoulders, causing pain in his neck, left shoulder, and headaches. His condition plateaued and his condition was chronic. The injuries did not prevent the plaintiff from working, but he did so in pain [at paras 104 and 106].

- [137] In *Dennis v. Fothergill*, 2012 BCSC 1510, the plaintiff, 42 at the time of the accident and 47 at the time of trial, was awarded \$40,000 in non-pecuniary damages (approximately \$44,400 in present value). As a result of the accident, the plaintiff suffered an aggravation of pre-existing neck, shoulder, and back injuries, but the plaintiff returned to her pre-accident within 12 months of the accident [at para 91]. After the accident, the plaintiff, a hair dresser, appeared to have worked reduced hours for the month after the accident but did not miss any work days. Although she alleged that she left her job due to her injuries, the court noted that none of the plaintiff's treatment providers recommended that she leave work [at para 22]. Her subjective assessment that she could no longer handle the duties of the job did not align with her income earned and the loyalty of her clients [at para 85]. At paragraphs 81 and 84, the Court noted that the Plaintiff's post-accident income before she left her job was greater than her pre-accident income, and further noted that her ability to maintain her level of earnings for over one year after the accident is inconsistent with a decline in functional capacity.
- [138] In *Cameron v. Hsu*, 2012 BCSC 56, the plaintiff was awarded \$40,000 in non-pecuniary damages (approximately \$44,400 in present value). The plaintiff, 37 at the time of trial, worked as a civil engineer technologist. A neurologist determined the plaintiff was prone to myofascial pain in the neck and upper shoulder, which was aggravated by a prior accident. As a result of the subject accident, the plaintiff sustained whiplash disorder to the neck and shoulder beyond his pre-existing condition [at para 85 and 87]. This caused tightness in the neck and shoulder, which made the plaintiff prone to intermittent numbness in the arm. He was recommended to engage in an exercise program and the neurologist believed the plaintiff was capable of doing all his job activities [at para 77]. The plaintiff did not miss time off work but had difficulty with his neck and shoulder when doing office work [at para 99].
- [127] In *Stapley*, Madam Justice Kirkpatrick cautioned against engaging solely in a comparative analysis of the injuries suffered by plaintiffs in prior decisions to those suffered by the plaintiff in the case at bar when assessing an appropriate award. The award must take into account the specific circumstances of the individual: paras. 44-45. Those comments are echoed throughout the case authorities. For example, in *Morrison v. Koschzek*, 2019 BCSC 945 at para. 50, Mr. Justice Thompson said at para. 60 that referring to awards made in similar cases can be of assistance but each case must be decided on its own facts. "An individualized assessment," he added, "is called for, and it is neither possible nor desirable to develop a tariff: *Lindal v. Lindal*, [1981] 2 S.C.R. 629 at 637; *Diello v. Montgomery*, 2005 BCCA 56 at paras. 39-43." I have considered the cases cited by the parties for guidance with

those cautions in mind.

- [128] Nearly four years have elapsed since the Second Accident. Although Dr. Wee specifically refrained from making a diagnosis of chronic pain, the medical experts agree that Ms. Cox is left with permanent functional impairments that restrict her enjoyment of her prior physical activities as well as her work capacity. She suffered significant emotional upset of being let go from her much loved job at Canadian Linen. Her plans for retirement have been disrupted. Ms. Cox is no longer able to carry out all of her job duties in the same manner and extent she did because of the injuries she sustained in the Accidents. She is able to work in sales so long as she can be accommodated. Ms. Cox suffers from impaired sleep. Her pain and functional impairments have and will continue to affect her lifestyle for the remainder of her life. She is restricted from the many social activities she enjoyed before the Accidents. Her injuries and symptoms adversely affect her mood and cause her to tire easily. With appropriate management Ms. Cox's symptoms are expected to improve, but will not resolve. She remains subject to intermittent although decreasing flares of pain and is vulnerable to further injury to her spine.
- [129] In my opinion, the lower end of the range of cases cited by Ms. Cox are apposite.
- [130] The cases cited by the defendants are less helpful. I agree with Ms. Cox's submission that the plaintiff in Ryan had a significantly more complicated pre-accident medical history, including significant loss of bone mineral density, osteoporosis, severe scoliosis and back pain from two prior motor vehicle accidents, and a fall that led to a back injury. In Mothe, the plaintiff was able to continue with his recreational activities (at a reduced rate), gave differing accounts of his symptoms to various doctors, with serious disagreement in the medical evidence concerning the cause of his most significant injury, left-sided radiculopathy. Likewise, in Dennis, the plaintiff gave different accounts of symptoms to different doctors and at trial, calling into question his credibility and the true extent of his pre-accident medical history of neck, shoulder, and back pain. The plaintiff was found to have returned to her pre-accident state within 12 months of the accident. As well, two years after the accident, the plaintiff was engaged in physical activity, attending the gym three times per week and cycling. Lastly, in Cameron, the plaintiff's pre-existing medical condition was a factor in the assessment as was failure to mitigate. The plaintiff also did not miss any time from work.
- [131] I assess the award for non-pecuniary damages at \$75,000.

Past Wage Loss

- [132] Canadian Linen provided two different reports to the defendants concerning Ms. Cox's lost wages. The latter contradicts the former in respect of the quantum of lost wages. The first document, prepared by an individual working in Canadian Linen's payroll department in Vancouver dated July 27, 2015, reports Ms. Cox's loss to be \$6,223.20 (gross), premised on a lost 20 days of annual income of \$80,900.72. The second document, signed on January 8,

2019 by an individual described as an operations specialist working in Canadian Linen's Toronto office (it is not clear if this was before or after the litigation between it and Ms. Cox resolved) reports the loss to be \$2,751.20 premised on 19 days, and states annual earnings to be \$107,386.95.

- [133] Ms. Cox testified that she thought the first document was more accurate despite the lower income amount because she thought it was based on commissions whereas the second document is clearly based only on salary. Neither document was tendered into evidence for proof of truth of its contents. The defendants did not call any evidence to prove the truth of the second document.
- [134] The second document is a more accurate reflection of Ms. Cox's earnings as reported on her income tax returns (which I discuss in the future income loss section). It is also accurate in reporting lost days from work. Employment records coupled with Ms. Cox's testimony, establishes that she missed 19 days of work at Canadian Linen due to the injuries she sustained in the First Accident. However, although the second document records lost salary (at \$18.10 per hour), it does not reflect actual or potential loss of commission.
- [135] As Ms. Cox testified, the first document attempts to reflect lost commission, although on gross earnings lower than she actual had earned in prior years. Ms. Cox also acknowledged the first document is in error in reporting 20 missed days and said her income loss should be predicated on 19 days, in the amount of \$5,909.
- [136] The defendants assert that Ms. Cox did not prove that she lost commission. They go further and say that a comparative analysis of Ms. Cox's earnings in 2014 (\$94,673) and 2015 (\$92,064.85) demonstrates an actual past income loss of \$2,608.15.
- [137] The defendants approach is unfair to Ms. Cox because she lost her opportunity to earn commission. Their approach also overlooks the following facts.
- [138] First, Ms. Cox has a well established history of earned substantial commissions working at Canadian Linen. For example, her pre-Accidents commission earnings since 2010 were \$55,000 (2010), \$41,706 (2011), \$37,324 (2012), \$46,276 (2013), and \$43,536 (2014).
- [139] Second, by its very nature, Ms. Cox's job required her to seek out new contracts from existing and potential clients. She was unable to do that for 19 days. It is unfair to say that in spite of her history of earned commissions, she should not recover any loss since she could not say what contracts she could have obtained and commission earned if she had been at work.
- [140] Third, her 2015 income level is the result of her extraordinary work effort in spite of her pain. Ms. Cox's unchallenged testimony, which I accept, is that she had to work, in significant pain, even longer hours than the long hours she normally worked prior to the Accidents to get her work done because of her injuries and at times, lack of appropriate assistance.

- [141] In my opinion, Ms. Cox's past wage loss claim must include an amount for commissions. One possible way to assess the loss is to determine a global past wage loss by pro-rating the gross earnings figure of \$107,386.96 shown on the second document. If the calculation is based on the number of working days in 2015 i.e., 251, the loss is \$8,127.53 (\$427.76 per day).
- [142] Another approach is one suggested by the defendants in oral submissions, which is to include in the assessment of the award for non-pecuniary damages the burden Ms. Cox underwent in working much longer hours to do her job and maintain her income level to close to 2014, while in pain. What she endured to work through her symptoms to achieve income is certainly a factor to consider in evaluating the impact on her life and loss of amenities. In my opinion, it is not a principled basis in which to assess a past wage loss claim.
- [143] Ms. Cox is unable to explain an entry in her post-Second Accident payroll documents showing she was paid 48 hours instead of 4 hours. Ms. Cox does not have any other records to prove her lost time away from work following the Second Accident and cannot say whether the entry is a clerical error or if she was in fact wholly reimbursed for her lost time. In keeping with her honest and candid nature, she elected not to pursue a claim for her lost wages following the Second Accident in the circumstances.
- [144] The award is an assessment and not always determined on a mathematical calculation. The amount claimed by Ms. Cox - \$5,909 - is, I find, an appropriately conservative amount that is justified by the evidence and I award her that amount.

Future Income Loss

- [145] To be entitled to an award, Ms. Cox must establish that there is a real and substantial possibility of a future event leading to an income loss: *Perren v. Lalari*, 2010 BCCA 140. In *Perren*, the Court of Appeal discussed the test as follows:
- [30] Having reviewed all of these cases, I conclude that none of them are inconsistent with the basic principles articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458, and *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229. These principles are:
1. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation [*Athey* at para. 27], and
 2. It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made [*Andrews* at 251].
- [31] Furthermore, I conclude that there is no conflict between *Steward* and the earlier judgment in *Pallos*. As mentioned earlier, *Pallos* is not authority for the proposition that mere speculation of future loss of earning capacity is sufficient to justify an award for damages for loss of future earning capacity.

[132] A plaintiff must always prove, as was noted by Donald J.A. in *Steward*, by Bauman J. in *Chang*, and by Tysoe J.A. in *Romanchych*, that there is a real and substantial possibility of a future event leading to an income loss. If the plaintiff discharges that burden of proof, then depending upon the facts of the case, the plaintiff may prove the quantification of that loss of earning capacity, either on an earnings approach, as in *Steenblok*, or a capital asset approach, as in *Brown*. The former approach will be more useful when the loss is more easily measurable, as it was in *Steenblok*. The latter approach will be more useful when the loss is not as easily measurable, as in *Pallos* and *Romanchych*. A plaintiff may indeed be able to prove that there is a substantial possibility of a future loss of income despite having returned to his or her usual employment. That was the case in both *Pallos* and *Parypa*. But, as Donald J.A. said in *Steward*, an inability to perform an occupation that is not a realistic alternative occupation is not proof of a future loss.

[Emphasis in original]

[146] Ms. Cox submits that her future income loss should be assessed on a loss of capital asset approach as opposed to an earnings approach. In assessing an appropriate award under this approach, I must consider, at a minimum, the four factors discussed in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.):

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

[147] Mr. Cox's injuries, current status, and prognosis engage each of those factors.

[148] Ms. Cox has established an entitlement to an award under this head of damage. The expert medical evidence and the test results from Ms. Beattie's assessment clearly establish that the permanent nature of Ms. Cox's injuries caused by the Accidents adversely impact her ability to earn income. Specifically, she is restricted in her ability to carry out administrative tasks involving lengthy periods of sitting, completing paperwork, and working with computers. To minimize and hopefully avoid symptoms or triggering flares, Ms. Cox needs a work environment where she can avoid awkward or repetitive movements, take breaks, move about, and look straight ahead when sitting at a desk. She is therefore limited in the types of tasks she can carry out as a sales representative and moreover, is less competitive. She needs to find an employer willing to accommodate her in the competitive field of sales. She is also vulnerable to future injury and consequential time away from work due to her injuries.

[149] In spite of her limitations and needed accommodations, the expert evidence is clear: Ms. Cox is capable of working full-time in sales. Yet, she has chosen to work part-time hours for her daughter's company and has not made any further efforts to find full-time work that could accommodate her. Income loss from her choice to work part-time should not be visited upon the defendants.

[150] Ms. Cox's combined salary and commission earnings from Canadian Linen since the Accidents show that until 2018 (when she was dismissed), her earnings (reported on her tax returns) were within a consistent range:

2010

\$102,314.00

2011

\$91,777.00

2012

\$88,966.00

2013

\$95,238.00

2014

\$94,673.00

2015

\$92,064.85

2016

\$98,624.55

2017

\$101,907.65

2018

\$44,930.83

[151] I am satisfied that Ms. Cox would have continued working to at least 65 years old, and likely beyond so long as she was physically capable of handling the job requirements of a sales representative. At 56 years old, Ms. Cox had at least nine more years to work full-time in sales absent the Accidents. I am satisfied from the expert evidence and find that even if Ms. Cox was currently working full-time in sales, she would be less productive and suffer reduced earnings over time due to her identified need for accommodation and symptom

management. Even without taking into account her age, Ms. Cox is less competitive and marketable to prospective employers.

- [152] Ms. Cox's choice to work part-time should not be visited upon the defendants.
- [153] As an example in assessing the loss, an income decrease of \$20,000 per year, which is what Ms. Cox suffered when she started at Chefworks, over nine years alone results in a loss (not present valued) of \$180,000.
- [154] In my opinion, an appropriate award is one that presumes diminished capacity of 20% that results in diminished earnings of at least \$20,000 per year from a conservatively viewed average annual income of \$100,000.
- [155] I agree with Ms. Cox's submission that the award should include the two years after her employment was terminated at Canadian Linen. There is no double recovery because this amount is not included in her past wage loss claim.
- [156] I would not assess the award based on an assumed retirement age of 65 because I am satisfied that Ms. Cox would have continued to work well past that age so long as she was able to. Ms. Cox suggests I should assess the loss based on a retirement age of 67. I agree that it reflects the evidence.
- [157] On that basis, Ms. Cox says that when the economist's economic multiplier is applied to a loss of \$20,000 per year to age 67, the loss is \$162,700.
- [158] I agree that this is a sensible approach, although it is one that reflects an assessment based on an earnings approach. An earnings approach is appropriate where the loss is more easily measurable: *Morrison v. Koschzek*, 2019 BCSC 945 at para. 76, citing *Westbroek v. Vrizuella*, 2014 BCCA 48 at para. 64. I view the earnings approach to be appropriate in Ms. Cox's case.
- [159] Although a future loss of income award is not "calculated", economic analysis and arithmetic assistance provide guidance in which to assess a fair and appropriate award regardless of whether the earnings approach or the loss of capital asset approach is used. In *Morrison*, Mr. Justice Thompson said, at para. 77, that in assessing the award, "real and substantial possibilities of loss are weighed according to their relative likelihood while making allowances for the chance that the assumptions upon which an award is based may prove to be wrong." In the case at bar, there are contingencies that I should take into account beyond those identified by the economist in his discussion of the economic multiplier (which takes into account labour market contingencies).
- [160] It is appropriate to take into account the possibility that Ms. Cox would have chosen not to, or been physically unable to, work at her job at Canadian Linen for reasons unrelated to the Accidents before age 67 and that her job at Canadian Linen, or a job with like pay, may not be available to Ms. Cox through to retirement age.

[161] In my opinion, an appropriate award for future income loss is \$150,000.

[162] Had I chosen to assess the award based solely on loss of a capital asset, where the award is assessed as a temporal multiplier of the lost capacity to earn income (see, e.g., Morrison at paras. 78-90), I would have arrived at the same point with an award of one and one-half years of an annual income of \$100,000.

Special Damages

[163] Ms. Cox is entitled to recover her reasonable out-of-pocket expenses incurred as a result of the Accidents and to be restored to the position she would have been had the Accidents not occurred: *Lensu v. Victorio*, 2019 BCSC 59 at para. 245.

[164] Ms. Cox presents a claim in the amount of \$9,461.32 for massage therapy, acupuncture, kinesiology, chiropractic therapy, and physiotherapy expenses plus costs paid to obtain doctors' notes, to rent a vehicle while her F150 pickup was being repaired, and over-the-counter pain medication. Included in the claim is \$1,233.20 for mileage incurred to attend appointments with medical professionals and the experts.

[165] The defendants agree to special damages in the amount of \$7,955.22 as follows: physiotherapy treatments (\$150); kinesiology treatments (\$1,856.65); 15 massage therapy treatments from July 6, 2015 to December 29, 2015 (\$803.50); 34 chiropractic treatments from November 2015 to March 20, 2017 (\$2,034); acupuncture treatments (\$1,070); mileage to attend medical treatments (\$976); and miscellaneous costs (\$1,159.67).

[166] The defendants contest Ms. Cox's claim for certain chiropractic treatments for two reasons. First, Ms. Cox was seeing a chiropractor before the Accidents and would likely have continued absent the Accidents. Second, Dr. Webb advised that Ms. Cox should cease chiropractic treatments for a short period of time following the Accidents. They also dispute Ms. Cox's claim for massage therapy services provided by a non-registered massage therapist.

[167] I agree with the defendants that absent the Accidents Ms. Cox would have in all probability continued to receive chiropractic treatments for maintenance. The evidence satisfies me and I find that she would have received two to three such treatments per year. Ms. Cox's claim for chiropractic treatments spans a four-year period from November 5, 2015 to December 19, 2019 and is in the amount of \$4,130. The costs of each treatment ranged between \$40 and \$50 per treatment (this does not take into account initial consultation fees, x-rays, and specialized traction). Taking the mid-point of \$45 at three visits per year (\$135) for four years, the claim is reduced by \$540. In terms of any further reduction in light of Dr. Webb's evidence, I note it was a short-term recommendation but otherwise it is unclear whether his recommendation spanned more than a brief time. As a result, it is my opinion that the claim is appropriately reduced by the cost of a further three treatments, i.e., \$135. The total reduction is \$675.

- [168] The claim for mileage should be reduced to account for these deductions. The mileage claim in evidence shows a range of costs per visit (depending on the location of the chiropractor) between approximately \$4.20 and \$15.11 per visit (8.4 km to 30.2 km at \$0.50 per km), with the majority in the higher range. I have reduced Ms. Cox's claim by 15 visits and for the purpose of the mileage deduction, I will reduce it by the same amount at \$15 per visit, for a total reduction of \$225.
- [169] I do not agree with the defendants that the massage therapy claim should be reduced because the therapist was not registered. Ms. Cox appropriately relies on *Leach v. Jesson*, 2017 BCSC 577 at para. 116, where the claim was allowed because, as in the case at bar, they provided temporary relief. Dr. Webb confirmed in his testimony that passive treatment modalities can be of significant assistance in providing temporary relief. Ms. Cox attended treatments provided by a non-registered practitioner for a period of time because she could not afford the higher cost of a registered therapist. I agree that in the circumstances she should not be penalized as a result.
- [170] Taking into account the reduction in the claim for chiropractic visits (\$675) and associated mileage (\$225), I assess the award for special damages at \$8,561.32.

Cost of Future Care

- [171] In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, the Supreme Court of Canada said that the purpose of an award for the costs of future care is to sustain or improve the mental or physical health of the injured person. The award is objectively assessed. The costs must be reasonable and medically justified (as opposed to medically necessary) as established by the evidence. A medical opinion is not required for every aspect of a claim. Evidence in support may also come from rehabilitation consultants or clinical records. The standard of proof is "substantial risk" of pecuniary loss: *Milna v. Bartsch*, (1985) 49 B.C.L.R. (2d) 33, 1985 (S.C.) at 79; *Brennan v. Singh*, 1999 CanLII 484 (B.C.S.C.) at paras. 80, 85-89; *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 45-47; *Jacobsen v. Nike Canada Ltd.*, 1996 CanLII 3429 (B.C.S.C.) at para. 182. In *Gregory* at para. 39, Madam Justice Garson said, "there must be some evidentiary link drawn between the physician's assessment of pain, disability, and recommended treatment and the care recommended by a qualified health care professional." The assessment for this head of damage is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21. The plaintiff making the claim must also establish that he or she will utilize the recommended treatments: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74.
- [172] Ms. Beattie made a number of recommendations for future care covering medications, imaging, active and passive therapy, and ergonomic assistance (including a light weight vacuum for ease of use), as follows:
- medications - Advil or Tylenol, 2x month, annual cost of \$2.64-\$5.28; Celebrex, 2x month, annual cost of \$36.48.

- x-ray thoracic spine - covered by Medical Services Plan;
- ergonomic assessment - two hours at \$116.70 per hour, one-time cost of \$233.40;
- ergonomic equipment - ergonomic office chair for home and work, \$939.00 per chair, total one-time cost of \$1,878.00; laptop riser, one-time cost of \$146.00; wireless keyboard, one-time cost of \$50.00; lightweight vacuum, one-time cost of \$300.00;
- kinesiology - initial course of 16 sessions, \$85.20 per session, total cost of \$1,363.20; follow up treatments, 12-24 per year for two years, total cost ranges between \$2,044.80 and \$4,089.60;
- physiotherapy - 12 sessions to start with, \$85 per session, total cost is \$1,020.00;
- massage therapy - 12-24 hour long sessions per year, \$111.00 per hour, total ongoing annual cost ranges between \$1,332.00 and \$2,664.00;
- restorative yoga pass - 1 class per week for a 48-week year, \$17 per class, total ongoing annual cost is \$816.00; and
- home-making assistance for seasonal heavier task cleaning - 12 hours annually, \$39.75 per hour, total ongoing annual cost of \$477.00.

[173] The defendants deny that any cost of future care expenses are necessary. I disagree. The evidence establishes that many, but not all of the anticipated expenses claimed by Ms. Cox are medically justified and reasonable. Moreover, I am satisfied that Ms. Cox will utilize the various care items she has claimed. In most instances, the dollar value of the claims discussed below are expressed at present value.

Medications

[174] The claim for Advil/Tylenol is \$92 and \$803 for Celebrex.

[175] I agree with the defendants' submission that the claim for ongoing supply of Celebrex for the remainder of Ms. Cox's life is not justified on the evidence. Ms. Cox has filled prescriptions for Celebrex twice since the Accidents, and both within weeks of each accident: 30 tablets on June 6, 2015 and 30 tablets on July 29, 2016. There is no record of refills since those dates and there is none disclosed on the list of special damages. I am also mindful of Dr. Webb's evidence that he does not expect Ms. Cox will need to use narcotics to any degree for pain management. At the same time, in view of the medical evidence concerning the realistic possibility of future flares of pain and vulnerability to future injury, and evidence demonstrating the assistance Celebrex provides to Ms. Cox to manage pain (e.g., from Dr. Webb and Ms. Cox), an award to allow for its use from time to time over her life time must be allowed. In my opinion, the amount should be reduced by one-half to \$401.50.

[176] The defendants say there is no basis for an award for Tylenol 3s but as I understand the claim it is for extra-strength Tylenol or Advil. If a claim for Tylenol 3s had been advanced, I would not have allowed it in addition to Celebrex on account of duplication.

[177] The total claim for medication is \$493.50.

Ergonomic Assessment

[178] I accept Ms. Beattie's evidence that an ergonomic assessment is appropriate for Ms. Cox given her pain and functional limitations, especially in light of her inability to look upward. The claim of \$233.40 is supported by the evidence of the physiatrists and the economist.

Ergonomic Aids

[179] The claim is justified by the expert medical evidence. I accept Ms. Beattie's recommendation that the following ergonomic aids are justified in this case and the costs are reasonable to assist her with work: chair for office and home office (both should be allowed on the basis that she is able to work in sales, albeit with accommodation, which would allow her to work at an office and from home), laptop riser, and wireless keyboard. I also accept her recommendation for a lightweight vacuum as it will allow Ms. Cox to do more housecleaning and reduce the cost of housekeeping assistance. I allow the total cost of the claim at \$4,252.

Physiotherapy

[180] Ms. Beattie's recommendation is based on her own experience and Dr. Wee's recommendation for 12 physiotherapy sessions to release Ms. Cox's tight muscles and to strengthen her back muscles. It is not a valid reason to deny the claim, as the defendants assert, because Dr. Wee recommended a physiotherapist with a specialty in dealing with scoliosis in circumstances where Ms. Cox has not established that her thoracic curvature was caused by the Accidents. Ms. Cox's spinal curvature is one of the factors complicating her recovery. In that respect, she presents as a thin skull plaintiff whom the defendants must take as they find her. The claim is medically justified and the cost is supported by the evidence of Ms. Beattie.

Kinesiology

[181] Ms. Cox's claim for active rehabilitation with assistance from a kinesiologist is supported by the medical evidence. Active rehabilitation will build her endurance, flexibility, and strength, boost confidence, and reduce symptoms.

[182] I accept Ms. Beattie's recommendation that Ms. Cox attend an initial 16 sessions followed by 12 to 24 sessions over two years.

- [183] The defendants oppose the claim on the basis that they are currently funding kinesiology and any award would amount to double recovery. However, there is no evidence concerning the length of their funding commitment. Further, the defendants have not said they will waive their statutory right to argue for a deduction of any award that falls under Part 7 benefits.
- [184] The defendants also oppose the claim on the basis that Ms. Cox ought to be able to carry out her exercise program created by a kinesiologist on a self-guided basis. They say this accords with the opinion of the physiatrists. With respect, their submission overlooks the recommendations of the physiatrists concerning the importance of active rehabilitation and Ms. Beattie's evidence that instruction over the next two years is necessary to ensure that Ms. Cox is appropriately following her exercise regime and to allow for modifications to the program as necessary. Active rehabilitation is essential to Ms. Cox's management of pain and will be promoted by a program developed, implemented, reviewed, and modified, if necessary, by a kinesiologist.
- [185] The initial cost of kinesiology is \$1,415. Based on the economist's evidence of the mid-range of 12 to 24 ongoing sessions, or 16 sessions at \$3,148, the claim is presented at \$4,563. Given the uncertainty over the extent of current funding of kinesiology and the prospect that the amount funded would be deducted from her award, the claim as presented is appropriate.

Massage Therapy

- [186] The claim is presented on the basis that massage therapy provides symptom relief for Ms. Cox, and is necessary to maintain work durability in light of Dr. Webb's opinion that she will suffer ongoing flares of pain and is vulnerable to further injury. The claim is in the amount of \$46,177 for 12 to 24 sessions annually, with the cost chosen at the mid-point (between \$1,332 and \$2,664 annually). Ms. Cox chose the mid-point in light of Ms. Beattie's evidence in cross-examination that although her recommendation is based on her experience as a case manager for individuals injured in motor vehicle accidents, it is difficult to predict the number of massage therapy treatments that will be required to treat Ms. Cox. In choosing the mid-point, Ms. Cox was alive to the medical opinions; Dr. Webb and Dr. Wee expect further improvement but Dr. Khan does not comment either way.
- [187] In my opinion, the claim in the amount presented is not supported by the whole of the evidence. The medical evidence is focused on active rehabilitation as opposed to passive modalities as the mainstay for symptom recovery and relief. That is the basis on which I assessed the award for kinesiology in the amount claimed. In addition, Ms. Cox's symptoms are expected to improve. As well, at the moment, Ms. Cox is by her own choice working part-time for her daughter without any administrative tasks. If she continues in that vein, she should have a reduced need for massage therapy for flares and symptom relief.

[188] While I am satisfied that Ms. Cox is entitled to future care costs for massage therapy to alleviate symptoms, especially from flares of pain and for possible future injury in light of her vulnerability, it should be premised at the low end of the range of 12 visits per year for 3 years declining to 6 visits per year until anticipated retirement, and thereafter 3 visits per year. After reviewing the economist's evidence concerning future care cost multipliers, it is my opinion that an appropriate award is \$10,000 and I assess it at that amount.

Restorative Yoga

[189] The claim is founded on Ms. Beattie's evidence that a gentle structured exercise regime would benefit Ms. Cox and upon the expert medical evidence concerning the benefits of active rehabilitation.

[190] The defendants' primary opposition to the claim is that yoga was one of Ms. Cox's recreational activities prior to the Accidents. The defendants' position is that if Ms. Cox needs instruction for yoga, she can revert back to her recreational yoga classes or take instruction from online videos on YouTube.

[191] Ms. Cox submits that restorative yoga is an active treatment modality and different from recreational yoga. She submits that yoga is commonly awarded for future care expenses and points to the awards in *McColl v. Sullivan*, 2020 BCSC 137, *Lensu v. Victorio*, 2019 BCSC 59, and the dicta in *Sharpe v. Koomson*, 2019 BCSC 558. She says the claim should be allowed because it is medically justified to help restore her to her pre-Accident state and she should not be denied compensation on the basis that she participated in recreational yoga prior to the Accidents.

[192] However, I disagree that the amount claimed of \$18,859 (the present value of the annual cost of weekly sessions at \$816) is justified. I view restorative yoga as an adjunct to the kinesiology sessions, which I have allowed over a course of three years based on Ms. Beattie's recommendation. In my opinion, the claim for yoga should be assessed on the same basis. The economist's evidence provides present value multipliers for each \$1,000 but not for any lesser amounts. Extrapolating from his evidence that the present value of \$1,000 for three years is \$2,899, I assess an appropriate award to be \$2,500.

Seasonal Household Cleaning

[193] I agree with Ms. Cox that an award for seasonal household cleaning is justified on the medical expert evidence in addition to her evidence and that of her daughters. It takes her longer to perform household tasks. Scrubbing bathroom fixtures, cleaning dishes, and vacuuming are difficult for her and cause pain. She is unable to move furniture and heavier items for thorough cleaning. Ms. Cox hired a housekeeper to assist her on a few occasions. Her daughters testified that they help their mother with cleaning two to three times per week. It upsets Ms. Cox that she is not able to keep her home as clean and tidy as she did before the Accidents.

[194] I accept Ms. Beattie's recommendation that Ms. Cox will benefit from assistance with heavier household tasks such as cleaning under furniture, thorough cleaning of bathrooms and shelves, and moving seasonal boxes. Ms. Beattie's recommendation for three hours of cleaning four times per year is, I find, justified and reasonable even though Ms. Cox is expected to enjoy improvement in symptoms. I am satisfied that without this assistance, Ms. Cox will in all probability suffer increased incidents of flares with increased intensity. The present value of the expense is \$8,677 and I award it in that amount.

Summary

[195] The cost of future care claim in the total amount of \$31,738.90 is awarded to Ms. Cox, and is broken down as follows:

- (a) medications - \$493.50;
- (b) ergonomic assessment - \$233.40;
- (c) ergonomic aids - \$4,252;
- (d) physiotherapy - \$1,020;
- (e) kinesiology - \$4,563;
- (f) massage therapy - \$10,000;
- (g) restorative yoga - \$2,500; and
- (h) seasonal household cleaning - \$8,677.

Loss of Housekeeping Capacity

[196] An award for loss of housekeeping capacity may be assessed as a stand-alone item or factored in the award for non-pecuniary damages. Separate from a claim for the cost of future care for housekeeping assistance, in appropriate circumstances an award for loss of housekeeping capacity is warranted to compensate the injured plaintiff for the loss of the value of work that they would have rendered to their family unit as a whole. It is considered a lost asset. The loss may be considered as part of the award for non-pecuniary damages, particularly where the plaintiff is able to carry out his or her former tasks, albeit with more difficulty due to pain or restricted function. It may also be made as a discrete pecuniary award where, as in the case at bar, the plaintiff is also not able to carry out all of his or her pre-accident housekeeping tasks and requires the aid of family members: *Kim v. Lin*, 2018 BCCA 77 at paras. 28-33; *Anssari v. Alborzpour*, 2019 BCSC 512 at paras. 147-163; *Gabert v. Krist*, 2018 BCSC 2109 at para. 146; *Lensu v. Victorio*, 2019 BCSC 59 at paras. 222-224; *Sharpe v. Koomson*, 2019 BCSC 558 at paras. 374-377. Where a pecuniary award is made, the Court of Appeal in *Kim* confirmed at para. 32 that it is not appropriate to take into account the contingency that the plaintiff will not hire replacement services.

- [197] Ms. Cox is able to carry out limited household chores (such as washing dishes, light vacuuming, and dusting), albeit in pain. She relies on her adult daughters for help keeping her house clean and attending to other tasks such as laundry, cooking, and grocery shopping. To her distress, her home is no longer maintained to the same ongoing standard it was prior to the Accidents. Her claim is appropriately assessed as a lost asset and should be considered as a pecuniary award.
- [198] In the cases noted above, the awards ranged between \$20,000 and \$418,000. In some cases, evidence of the cost to replace the housekeeping tasks carried out by a plaintiff was adduced to assist in assessing the value of the lost asset: e.g., Anssari at paras. 147-148. In Lensu, Madam Justice DeWitt-Van Oosten (as she then was) was assisted with photographic evidence depicting the interior of the home: para. 225.
- [199] In the case at bar, there is evidence of an hourly rate for housekeeping assistance of \$39.75 (which is higher than the \$15 per hour amount discussed in Kim). There is also evidence that heavy duty cleaning assistance requires 12 hours annually for a total annual cost of \$477.00. As noted in the cost of future care section, the present value of the future housekeeping services award is \$8,677. Although there are no photographs of her home in evidence, I have sufficient information from Ms. Cox and the evidence of her two daughters concerning the size and layout of her home from which I can be satisfied that the value of the loss to Ms. Cox at this time exceeds the present value of the future care cost claim for housekeeping assistance.
- [200] However, with anticipated improvement in symptoms following recommended treatment modalities, Ms. Cox should be able to do more, although likely not all of the household tasks she carried out prior to the Accidents.
- [201] Taking her expected improved capacity into account, I am of the opinion that an award of \$10,000 for loss of housekeeping capacity is appropriately conservative in this case and I award her that amount.

Summary

[202] I have assessed the award to Ms. Cox in the total amount of \$281,209.22, as follows:

- (a) non-pecuniary damages: \$75,000;
- (b) past wage loss: \$5,909;
- (c) future income loss: \$150,000;
- (d) special damages: \$8,561.32;
- (e) cost of future care: \$31,738.90; and
- (f) loss of housekeeping capacity: \$10,000.

[203] The parties agreed that they will address the issue of tax gross up following release of these reasons. If they are unable to reach agreement, they may arrange a further appearance with Vancouver Trial Scheduling.

[204] Unless there an issue about which I am unaware, Ms. Cox is entitled to her costs.

"Walker J."

The Honourable Mr. Justice Walker

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