

CANADA / JUDGMENT

Dhanji v. Contorines

2021 BCSC 2457

COURT

Supreme Court of British Columbia

DECIDED

17 December 2021

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2021 BCSC 2457 Dhanji v. Contorines

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhanji v. Contorines,

2021 BCSC 2457

Date: 20211217

Docket: M184838

Registry: Vancouver

Between:

Nafeesa Dhanji

Plaintiff

And

Yianni Contorines and Chantal Branson

Defendants

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Plaintiff:

H.M. MacDonald

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Counsel for the Defendants:

J. Kandola Dhami

K. Buecker

Place and Dates of Trial:

Vancouver, B.C.

February 22-26, March 1-5, 8-12, and April 9, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 17, 2021

Table of Contents

1. introduction. 3
2. the accident. 3
3. background. 5
4. plaintiff's burden. 10
5. credibility and reliability. 11
6. plaintiff's pre-accident condition. 14
7. medical evidence. 15
 - a) Generally. 15
 - b) Somatic Symptom Disorder - Dr. K. Fung. 16
 - c) MTBI/Concussion - Dr. D. Cameron and Dr. R. Grosch. 19
 - d) Other Medical Opinion Evidence. 23
 - e) Otolaryngologist - Dr. V. Tsai and Dr. E. David. 25
 - f) Neuropsychology - Dr. M. Kaushansky and Dr. H. Lysak. 26
 - g) Treating Physicians. 29
8. findings on causation. 31
9. findings on the plaintiff's medical condition. 31
10. Was there an intervening event?. 32
11. mitigation. 33
12. assessment of award. 34

- a) Non-Pecuniary Damages. 34
- b) Past Loss of Earning Capacity. 39
- c) Future Loss of Earning Capacity. 41
- d) Cost of Future Care. 50
- e) Special Damages. 56
- 13. conclusion. 58
- 14. costs. 59

Schedule "A" The Plaintiff's Schedule of Special Damages. 60

- 1. introduction
- [1] The plaintiff claims damages related to the injuries she suffered in a September 4, 2016 motor vehicle accident.
- [2] At the opening of the defendants' case, the defendants admitted liability.
- [3] The plaintiff seeks the following damages:
 - a) Non-pecuniary damages:
\$180,000
 - b) Past loss of earning capacity:
\$91,106
 - c) Future loss of earning capacity:
\$2,000,000
 - d) Cost of future care:
\$285,000
 - e) Special damages:
\$39,519
- Total:
\$2,595,625
- [4] The defendants say that the plaintiff is not credible or reliable. They also say she had pre-existing conditions, that she has failed to mitigate her damages, and that there was an intervening event subsequent to the accident.
- [5] The defendants say that the appropriate award of damages is:

a) Non-pecuniary damages:

\$55,000 to \$80,000

b) Past loss of earning capacity:

\$8,045

c) Future loss of earning capacity:

\$0

d) Cost of future care:

\$0

e) Special damages:

\$8,090

Total:

\$71,135 to \$96,135

[6] The Court awards the plaintiff the following damages:

a) Non-pecuniary damages:

\$120,000

b) Past loss of earning capacity:

\$91,106

c) Future loss of earning capacity:

\$1,426,600

d) Cost of future care:

\$5,770

e) Special damages:

\$23,082

Total:

\$1,666,558

2. the accident

- [7] On the afternoon of September 4, 2016, the plaintiff was a passenger in a sports utility vehicle (a Porsche Cayenne) driven by her boyfriend (now her spouse). Their vehicle was stopped at Robson Street waiting to turn left (with left turn signal activated) onto Nicola Street when a car driven by the defendant, Mr. Contorines, drove into the rear of the sports utility vehicle in which the plaintiff was the front seat passenger (with seatbelt engaged).
- [8] The plaintiff testified that her boyfriend exclaimed, "Whoa, Whoa" immediately before the car Mr. Contorines was driving hit the sports utility vehicle in which she was seated.
- [9] The plaintiff testified that her body went forward and came back, with her head hitting either the passenger window or panel, and then her headrest. She did not lose consciousness and was aware she had been in an accident. She did not feel confused.
- [10] Immediately after the accident, both drivers pulled over onto Nicola Street and exchanged information. The plaintiff felt rattled and shocked with the feeling of a rush of adrenaline.
- [11] The plaintiff did not vomit or feel nauseous as a result of the accident.
- [12] In neither vehicle did the impact of the collision cause airbags to deploy. A 9-1-1 call was not made. No emergency responders attended the scene.
- [13] Shortly later, the plaintiff and her spouse proceeded to their intended destination, a retail mobile phone store.
- [14] There was approximately \$2,500 in damage to the sports utility vehicle and approximately \$9,000 in damage to Mr. Contorines's vehicle (owned by his sister). Mr. Contorines's vehicle was a 2004 BMW 545i and required expensive replacement parts.
- [15] The following morning the plaintiff had pain in her upper back, shoulders, and neck, and a headache.
- [16] On September 8, 2016, she went to a massage therapist to address her symptoms.

3. background

- [17] The plaintiff is now 32 years old. She is married to Nadeem Kassam. They have known each other since childhood and lived together for about seven years before they were married in September 2020. The plaintiff has a slender build and is approximately 5 feet 2 inches in height.
- [18] The plaintiff testified that she was raised in a loving and supportive environment.
- [19] In 2007, she graduated from York House School in Vancouver. Her spouse graduated from St. George's School in Vancouver in 2006.
- [20] After high school, the plaintiff attended the University of British Columbia (UBC). In 2013, she graduated with a Bachelor of Commerce degree.

- [21] Sadly, the plaintiff's mother passed away from cancer in 2012. In 2001, the plaintiff's mother was diagnosed with a brain tumour. At that time, surgery was successful. In 2009, a second tumour appeared. The plaintiff was very involved in her mother's care as she attended UBC.
- [22] In the semester before graduating from UBC, the plaintiff started to work at Telus. She started as a business analyst, then was promoted to a senior business analyst, and then as a senior business consultant, which was her position as of September 4, 2016 (the date of the accident).
- [23] Telus has a standardized system and process to score an employee's performance. Before the accident, the plaintiff received outstanding scores. She was recognized as having the ability to analyze new Telus initiatives and changes, and to communicate and work with others to implement such in a cost effective and pragmatic manner. She was on the "radar" of members of Telus's senior management as having the abilities to succeed at Telus and over time to become a member of Telus's senior management.
- [24] Both before and after the September 4, 2016 accident, Telus has shown itself to be a very supportive employer and particularly accommodating after the accident.
- [25] In the week following the accident, the plaintiff went to work but found that she was in pain and had difficulty concentrating. With Telus's support, she stopped working at that time and then returned on October 17, 2016, on a graduated return to work basis until December 19, 2016, after which she worked on a full-time basis.
- [26] On January 13, 2017, the plaintiff became a "Manager-Field Support" in Port Coquitlam. This position involved managing and supervising approximately 15 technicians who undertook home installations of Telus's products. This new position situated the plaintiff well for future promotions because the new position would allow her to show her managerial skills.
- [27] The technicians were mainly men who were older than the plaintiff. The plaintiff was recognized as having the ability to encourage and teach new ways by which technicians would better serve and respond to customer needs.
- [28] In 2019, the plaintiff transferred to Telus's Burnaby location as a Manager-Field Support.
- [29] The plaintiff last worked for Telus in December 2019. She has been on long-term disability after that time.
- [30] After the accident, the plaintiff's performance reviews were still very good, but not as stellar as the reviews she had received before the accident.
- [31] Before the accident, the plaintiff had received exceptional performance reviews. In 2015, she scored a 19 out of 20 performance score. Mr. R. Aiello, the plaintiff's supervisor, after the plaintiff became a Manager-Field Support in January 2017, described the score as a "unicorn".

- [32] Mr. T. Geheran, Telus's Chief Customer Officer, is accountable for approximately 15,000 team members. He testified that the plaintiff "ticked all the boxes" in connection with Telus's efforts to hiring outstanding individuals while achieving a better gender and ethnic balance at Telus.
- [33] Mr. Geheran described the plaintiff in her early years as a "higher performer", that she was "keen" and "unafraid to speak out", and that her "name kept coming up".
- [34] After the accident, the plaintiff's performance reviews were still very good. Some sample comments are:

2017

Nafeesa is a key influencer and collaborator both across CSD [Customer Solutions Delivery] and TELUS. She has a strong communication style and understanding of our business that allows her to quickly adapt and understand and help others do the same. Naf is a leader in many senses, she has an ability to influence her peers and is seen as a key sounding board and initiator of opportunities across CSD and TELUS. Naf has the ability to recognize problems early and create action around them before they grow to larger issues. She is a leader and initiator, she proactively and without direction jumps in to drive improvements to process and problems.

Key contributor and collaborator. Strong communicator who can help create clean and concise messaging on important items and changes to help drive transparency and clarity for our teams, both technicians and leaders. She was a key leader in CFC [Customer First Champion] nominations and helping others succeed with their CFC nominations.

Naf is a Leader when comes to developing others. She has taken opportunities to create training materials for team members to help them improve their interviewing and resume building skills. She has taken the time to deliver coaching and feedback and seek opportunities for her [team] members and other team members to seek out opportunities across TELUS. She has also learned a great deal on the operational side of our business while sharing and coaching others on the strategy part.

Naf is up for any challenge and often seeks out opportunities to take on difficulties. She is a risk taker when it comes to trying new things and being in front of her teams with different approaches and leading by example. She has a creative mind and approach to solving problems, communicating or rolling out new things. The status quo is something Naf is always looking to change.

2018

Nafeesa has done an excellent job driving key initiatives for CSD and TELUS in 2018. These initiatives include Value Gen, Technician Scheduling, Go Team, and supporting customer interaction awareness. Naf is a cultural and change leader and influencer. She has a great understanding of field technicians and does an excellent job of communicating and explaining to help both technicians and managers adapt. The work she did on both value gen and tech

scheduling have significant impacts on our business in terms of additional revenue and for our customers. Nafeesa's understanding our business and where we are going and her ability to help others understand this are key to driving change across CSD and moving our teams into the trusted solutions advisor culture we want.

With an extensive network across TELUS and the ability to constantly grow that network through her collaboration she helps advance many of the key CSD initiatives or improve process. Naf has a great ability to influence her peers, leadership teams and technicians through her ability to communicate and provide context both in 1 on 1 conversations and in larger group settings. She is a key influencer who supports the changes we are trying to drive across TELUS and CSD. Through her communication and collaboration she helped drive the own the home campaigns across Q3 and Q4 for value gen. These campaigns helped propel the fieldteam and helped drive more than half of the RGUs [Revenue Generating Units] generated in 2018. She also demonstrated key collaboration working closely with a couple of her peers, the enablement teams, and PG referral teams to drive significant improvements in process and outcomes.

Naf set out with a goal in 2018 to drive significant improvement in her team's specific results over 2017. She was able to achieve this and had the 3 highest objective scorecard for field managers across BC/AB in 2018. She did this through coaching and setting the right expectations with her team. She also helped create an understanding and link between the techs and what they do and how that impacts customer and business.

Naf was fully involved with the introduction of customer interaction awareness. She utilized her understanding and influence and awareness of what resonates with the field and managers to help draft a communications style and message that had a meaningful impact. The feedback from managers and technicians was that customer interaction awareness comms were very well done and easy to understand.

2019

Naf has shown great resilience and improvement in 2019. She has taken her team on a journey using goal setting which has driven tremendous improvement in [the] year. Naf used ambitious goal setting to help her team climb from 5 to 55 RGUs in a month. She has developed a strong team, even with many of them being brand new to [role] and TELUS, Her work on improving her team through goal setting and constant coaching was an example of what can be achieved when you practice these important tactics. She is a true leader and leader in our business.

Naf is a critical team player, innovator, and leader of change and growth. Her strategic and business mindset coupled with her strong coaching and EQ position her as extraordinary leader.

Goals Category Strong Performance

TELUS Values Category Extraordinary Performance

- [35] In 2017 and 2018, the plaintiff scored 16 out of 20 both years (as opposed to 19 out of 20 in 2015). In 2019, Telus's performance review format changed and did not include an out of 20 score.
- [36] In 2017, the plaintiff was also noted for "100+ out of work hours dedicated to interview prep and career development for team members".
- [37] The plaintiff testified that she has upper back and shoulder tenderness, and neck pain and is sensitive to light and sounds. She suffers from headaches. She has difficulty looking at a computer screen for more than a short time. She often wears a cap, dark glasses, and noise cancelling headphones, to help address these sensitivities. She also finds it more difficult and tiring to drive a car, especially when it is dark or raining. She says she finds it difficult to learn new matters. She also experiences imbalance from time to time.
- [38] Throughout, Telus and the plaintiff's co-workers have been helpful and accommodating. For example, the plaintiff was provided with a separate room where she would be less affected by sounds and many of the lights were removed. Co-workers would cover some of her driving duties and help with respect to technical installation aspects.
- [39] In late 2019, the plaintiff went to India for five weeks in order to receive ayurveda treatment. On her return to Canada, she had planned to continue to work for Telus. She did not realize that upon her return to Canada, the ayurveda regime required her to treat herself for a further three months. The ayurveda regime requires limited external stimuli.
- [40] In cross-examination, the plaintiff explained:

Q And so, from your discussions with these individuals at the Ayurveda treatment centre, it was your understanding that work-related activities may be too much while you were administering the at-home treatment?

A Yes, but they also did say that, like, they don't -- like, there's a difference between being in India and being in Vancouver, back at home; right? So, they didn't want me to shut things off completely and that would have been detrimental, so I would still have been encouraged to see my doctors and work with them over here, cause they'd be the ones overseeing me.

Q Okay. And you haven't gone back to work, because Doctors Alex and Dhawan haven't signed off on it; correct?

A That's correct. I'm not in a position at the moment to be able to go back without getting back into the same cycle that I was in before, where it was -- I wasn't able to progress forward with my healing.

Q And so, you left the guidance to them, with respect to how they interpret your symptoms and your condition and when they think you're in a position to go back to work?

A Well, whenever I talk to them and see them, we talk about how am I feeling and have things changed, and am I still affected by this -- the same issues that were triggering me and led to me going off of work and continuing to seek treatment all along the way, and those triggers and the challenges that I have are still in place and are not currently showing signs of much improvement. That's the same and I keep getting flared up.

So, their guidance is I continue focussing on my health right now.

[41] Throughout, the plaintiff's spouse has been supportive and loving. He manages a digital marketing business which provides him with some degree of flexibility.

[42] The plaintiff and her spouse had planned to have children, but are now worried as to whether the plaintiff will be able to have the energy and, otherwise, be able to handle all the dynamic aspects of motherhood.

[43] The plaintiff has consulted various doctors in search of treatment and relief. She has had massages, physiotherapy, NUCCA chiropractic treatment, neurofeedback, and Botox injections (and other similar injections) on a frequent basis.

4. plaintiff's burden

[44] The plaintiff's burden is to prove her injuries on a balance of probabilities. The plaintiff must provide "sufficiently clear, convincing and cogent [evidence] to satisfy the balance of probabilities test": *F.H. v. McDougall*, 2008 SCC 53 at para. 46.

[45] Where the alleged injuries are continuing soft tissue injuries, the Court must be particularly careful in making its findings. In this regard, Chief Justice McEachern (as he then was) in *Butler v. Blaylock Estate*, [1981] B.C.J. No. 31 (S.C.) stated:

[15] I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and these complaints of pain persist for long periods extending beyond the normal or usual recovery.

[16] An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence -which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[46] A plaintiff does not need to show objective evidence of continuing injury in order to recover damages: *Butler v. Blaylock Estate*, [1983] B.C.J. No. 1490 (C.A.), at paras. 12-13. Mental injury is compensable: *Saadati v. Moorhead*, 2017 SCC 28.

5. credibility and reliability

[47] Justice O'Halloran, in writing for our Court of Appeal in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (C.A.) at 356-357, described the trial judge's task of the finding of credibility:

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

[48] The defendants say that the plaintiff was not credible. They say that the plaintiff was "incredibly crafty on the stand".

[49] I found the plaintiff to be credible in the sense that she honestly believes that to which she testified was true. She was not trying to deceive the Court with fabrication. In particular, she believed that she was accurately describing her physical symptoms and conditions, and that these had a contemporaneous physical source of physical injury caused by the accident.

- [50] The matter is one of perception related to a mental injury caused by the accident. As discussed below, I find the plaintiff still has some lingering physical injuries associated with a whiplash type of accident, including upper back and shoulder tenderness, neck pain, and associated headaches. However, the accident also caused a mental injury. Dr. K. Fung, a psychiatrist, categorized the plaintiff's mental injury as a "somatic symptom disorder ["SSD"], moderate, persistent".
- [51] The plaintiff described light sensitivity, sound sensitivity, and balance difficulties. Each has little or no etiological basis. She also explained that she had limited energy ("low battery") and the need to pace herself and plan for such. The plaintiff's spouse's description of day-to-day living with the plaintiff was consistent with the plaintiff's description of shoulder and upper back tenderness, neck pain, and symptoms such as sensitivity to light and sound, and limited energy.
- [52] I do not find that the plaintiff is deliberately exaggerating the symptoms for financial gain. It was also not squarely put to the plaintiff that she was deliberately exaggerating for financial gain.
- [53] If the plaintiff were deliberately exaggerating her symptoms for financial gain, I do not find such would be possible without her spouse being part of the scheme.
- [54] It was readily apparent that the plaintiff and her spouse are a loving couple. I cannot accept that either would jeopardize their relationship for financial gain. An honest person will only wish to be in a relationship with another honest person. A scheme of financial gain was also not squarely put to the plaintiff's spouse.
- [55] Near the end of his examination-in-chief, the plaintiff's spouse testified:

Q Okay. When you think about the future for Ms. Dhanji and the two of you, what goes through your mind?

A I'm extremely nervous about the future. I'm very much worried about her pain levels and her health. I'm nervous that we won't have a family, when we can't string together days of her doing things and not getting migraines and headaches. I'm worried that she'll have to go off of her medications before trying to get pregnant and during her pregnancy she won't be able to have a lot of her medications. I'm worried that when we have children, that it's going to trigger her, that she's going to have a hard time with the crying and the early mornings, and the late nights.

I'm worried that she won't be able to handle this, if I have to go to a trade show, or if I have to be out of town for work. I could talk for hours about what I'm worried about.

Q Right.

A But to me, I think the most alarming or what I'm most concerned about is that we're more than four years, like, after the accident and the amount of hope that we have that she's going to recover from this is getting less and less, and that's, I think what's the scary part for me. Because we certainly -- I mean, we've been dating since 2006 and when we pictured our lives together and

when we thought about our families and we thought about all the fun things that we were going to do together, we didn't know that we were going to have a timer on every activity that we were doing.

And it's -- I think it's just challenging for me, personally, because it's not really how I pictured my life and it's also -- it makes me a bit sad and teary when I see somebody who has so much life in them and who had such a bright future, not be able to live up to their full potential.

[56] The plaintiff's spouse's testimony was controlled but with welling emotion.

6. plaintiff's pre-accident condition

[57] Before the accident, the plaintiff enjoyed good health. She was not on any medications of note. She had experienced migraines, with often associated light and sound sensitivity characteristics which could last longer than a day.

[58] The plaintiff had also some history of low blood pressure and feeling faint or fainting on occasion.

[59] The plaintiff had also past episodes of benign positional vertigo and a prior astigmatism. The benign positional vertigo was addressed by the "Epley maneuver". This procedure helps to dislodge crystals that may be present in the inner ear.

[60] She also had experienced neck and shoulder tension. In November 2013, x-rays of her cervical and thoracic spine were taken. The results were unremarkable.

[61] The defendants submit that many of the plaintiff's current symptoms can be explained by her pre-existing conditions.

[62] During the years prior to the accident, the plaintiff was attending UBC, caring for her ill and dying mother, and becoming a Telus employee where she excelled. She first started with Telus while she was completing her last semester at UBC. In short, the plaintiff was in an environment of pressure, emotion, and tension. It is not surprising and it is unremarkable that she experienced neck and shoulder tension and other passing physical conditions.

[63] I add that if the plaintiff had not been in good health before the accident, in my view, she would not have been able to handle the various challenges she faced as well as she did, and perform so remarkably well at Telus.

[64] As the plaintiff's spouse's testimony serves to confirm, the plaintiff is now a much different person than she was before the accident.

[65] The defendants say that many of the plaintiff's current complaints could be explained by "low blood pressure and/or iron deficiency including light-headedness, fatigue, headaches, and diminished energy". If such were the case, I am satisfied that one or more of her many medical doctors would have identified such, followed by recommended treatment (e.g., iron supplements) with follow-up blood tests.

7. medical evidence

a) Generally

[66] I heard a great deal of direct medical evidence from treating practitioners and opinion medical evidence. These included:

Treating

- Dr. E. Alex (general physician); and
- Dr. P. Dhawan (physiatrist).

Opinion

- Dr. D. Cameron (neurologist);
- Dr. E. David (otolaryngologist);
- Dr. K. Fung (psychiatrist);
- Dr. R. Grosch (neurologist);
- Dr. M. Kaushansky (neuropsychologist);
- Dr. H. Lysak (neuropsychologist);
- Dr. V. Tsai (otolaryngologist); and
- Dr. J. Wee (physiatrist).

[67] A key issue of controversy was whether the plaintiff suffered a mild traumatic brain injury (MTBI) or, in lay terms, a concussion.

[68] In written submissions, plaintiff's counsel states:

Dr. Cameron (and Dr. Wee) and Dr. Grosch disagree regarding the diagnosis of concussion/MTBI. Dr. Cameron elicited a history of an incomplete recall of the impact. There was also incomplete recall of the events of the evening after the Collision. Based on a more comprehensive history it is submitted Dr. Cameron and Dr. Wee's opinions should be preferred. In sum however the disagreement is not material to the final assessment, as Dr. Grosch concludes that [the plaintiff's] current symptoms have a psychological cause (confirming the opinion of Dr. Fung), that her headaches and pain and psychological issues were caused by the Collision, and that the prognosis is poor. [Emphasis added.]

[69] As discussed below, I find that the plaintiff's condition reflects primarily a SSD and not a MTBI. She also has soft tissue upper back and shoulder tenderness, and neck pain (common in a whiplash injury) which the plaintiff's SSD exaggerates. While a full recovery may not be likely, I do not find that the plaintiff's prognosis is "poor". Dr. Fung does not say it is poor.

b) Somatic Symptom Disorder - Dr. K. Fung

[70] Dr. K. Fung is a medical doctor specializing in psychiatry. She was qualified to provide opinion evidence with respect to psychiatry.

[71] On November 6, 2020, Dr. Fung, at the request of plaintiff's counsel, undertook an independent medical examination ("IME") of the plaintiff. Dr. Fung's report is dated November 12, 2020. Dr. Fung diagnoses the plaintiff as suffering from a SSD, using the internationally recognized Diagnostic and Statistical Manual of Mental Disorders published by the American Psychiatric Association, now in its fifth edition ("DSM-5").

[72] The DSM-5 criteria of somatic symptom disorder were set forth in Appendix III to Dr. Fung's report:

A. One or more somatic symptoms that are distressing or result in significant disruption of daily life.

B. Excessive thoughts, feelings, or behaviors related to the somatic symptoms or associated health concerns as manifested by at least one of the following:

1. Disproportionate and persistent thoughts about the seriousness of one's symptoms.
2. Persistently high level of anxiety about health or symptoms.
3. Excessive time and energy devoted to these symptoms or health concerns.

C. Although any one somatic symptom may not be continuously present, the state of being symptomatic is persistent (typically more than 6 months).

Specify if:

· With predominant pain (previously pain disorder): This specifier is for individuals whose somatic symptoms predominantly involve pain.

Specify if:

· Persistent: A persistent course is characterized by severe symptoms, marked impairment, and long duration (more than 6 months).

Specify current severity:

- Mild: Only one of the symptoms specified in Criterion B is fulfilled.
- Moderate: Two or more of the symptoms specified in Criterion B are fulfilled.
- Severe: Two or more of the symptoms specified in Criterion B are fulfilled, plus there are multiple somatic complaints (or one very severe somatic symptom).

[73] In her report, Dr. Fung recounts the plaintiff's then typical day as of the date of assessment:

In a typical day, she wakes up at 7:00 a.m. and gets out of bed between 7:30 a.m. and 8:00 a.m. Her sleep quality varies depending on whether or not she has used cyclobenzaprine the night before. Usually she feels rested. She brushes her teeth and goes back to bed. She puts on noise

cancellation headphones and Tiger Balm and does 10-20 minutes of meditation. She has warm water with lemon and tidies her room. She makes a decaf coffee and goes for a walk around the seawall. She then has breakfast. She tidies up and walks downstairs for 5 minutes. Her grandfather sends her a word scramble and she works on this. She exercises for 20 minutes. She then does physiotherapy stretches for 30-60 minutes. She then has lunch and tidies up. In the afternoon, her husband picks her up for her appointments. She does not nap. After that, she returns home and rests or meditates. She prepares dinner and walks with her husband after dinner. Her walks are 30-40 minutes in duration. They go for a short drive or watch TV. She watches a podcast. She goes to bed at 10:00 p.m. She rarely has sleeping difficulties. If she has more pain during the day, she can have initial insomnia.

[74] In her November 12, 2020 report, Dr. Fung's diagnosis of a SSD reads:

DSM-5 DIAGNOSIS

- Somatic symptom disorder, moderate, persistent

Medical diagnoses:

- Pre-MVA: premenstrual migraines and benign positional vertigo
- Post-MVA:
 - Probable concussion (contemporaneous medical records, Drs. Cameron and Wee)
 - Posttraumatic musculoskeletal, cervicogenic, and posttraumatic common migraine (Dr. Cameron)
 - Whiplash/myofascial pain syndrome, post-concussive symptoms, increased migraines and headaches, dizziness (Dr. Wee)

Social stressors: ongoing litigation, not working

Her Somatic Symptom Scale - 8 (SSS-8) score is 10.5, suggesting a medium level of self-reported somatic burden. The SSS-8 measures the perceived burden of common somatic symptoms. Her score is lower than what is expected based on the records and her clinical assessment. It is my opinion that Ms. Dhanji probably has a somatic symptom disorder, moderate, persistent. She presents with a combination of somatic symptoms (pain, headaches, light and sound sensitivity, dizziness) that have resulted in a significant disruption of her daily life. No organic etiology has been found. She spends an excessive amount of time and energy devoted to these symptoms and has disproportionate and persistent thoughts about the seriousness of her symptoms. These symptoms have been present for years. Factitious disorder and malingering are possible differential diagnoses.

[75] With respect to prognosis, Dr. Fung, in her report, states:

PROGNOSIS

Ms. Dhanji has not yet reached maximal medical improvement for her somatic symptom disorder as she has only received medical intervention, not psychiatric intervention. It is my opinion that her symptoms have been over-medicalized and over-investigated. There is a psychiatric component to her symptoms, particularly given the absence of any organic findings. Limiting factors to her recovery are symptom chronicity and uncertainty if she will accept this diagnosis. The natural history of somatic symptom disorder is to wax and wane; full recovery is unlikely, even if appropriate treatment is initiated at this time.

Her prognosis will improve if there is less medicalization of her symptoms. She will benefit from consistent and graded exposures to "normal" environments, rather than continuing to modify or avoid normal surroundings.

She is at increased risk of concussion if she sustains another head injury again in the future. She is probably at increased risk of pain or prolonged healing given her slow soft tissue injury healing. I will defer to those with expertise in physical medicine if she is at increased risk of degenerative changes.

[76] In her report, Dr. Fung also addresses a specific question plaintiff's counsel had asked Dr. Fung to address in the preparation of her report. Plaintiff's counsel's question and Dr. Fung's answer read:

Can you please comment on the relationship between chronic pain and mental health? Given the time since the subject accident and our client's ongoing symptoms, what can you say about the risk of chronic pain as a factor predisposing them to a more protracted recovery and the attendant risk of developing mental health issues in relation to their chronic pain?

There is a reciprocal relationship between chronic pain and depression. In general, there is no further soft tissue healing expected after two years post-injury. If chronic pain or other somatic symptoms become entrenched, such as causing excessive thoughts, feelings, or behaviours related to the somatic symptoms or associated health concerns, then prognosis becomes more guarded. At that point, the somatic symptoms start to have a psychiatric overlay and develop into a somatic symptom disorder. Somatic symptom disorders are generally chronic with waxing and waning symptoms. Full recovery is unlikely. Although Ms. Dhanji does not have a depressive disorder at this time, she is at increased risk of developing a depressive disorder given her chronic somatic symptoms (i.e. pain, headaches, light and sound sensitivity).

[77] In answering a further specific question in advance from plaintiff's counsel, Dr. Fung states (in part):

Although chronic pain is an aspect of her somatic symptom disorder, a significant portion of this diagnosis is due to symptoms such as light and sound sensitivity, for which no organic etiology has been found. It is the combination of her somatic symptoms that has resulted in reduced function, decreased concentration, and work impairment.

- c) MTBI/Concussion - Dr. D. Cameron and Dr. R. Grosch
- [78] Dr. D. Cameron is a medical doctor with a specialty in neurology. He was qualified to provide opinion evidence with respect to neurology.
- [79] The plaintiff asked Dr. Cameron to conduct an IME.
- [80] Dr. Cameron assessed the plaintiff on September 19, 2017 and prepared a report dated November 25, 2017. Dr. Cameron conducted a follow-up assessment on November 5, 2020 and prepared a further report dated November 15, 2020. The plaintiff called Dr. Cameron as a witness.
- [81] Dr. R. Grosch is like Dr. Cameron, a medical doctor with a specialty in neurology. He was qualified to provide opinion evidence at trial.
- [82] The defendants asked Dr. Grosch to conduct an IME of the plaintiff. Dr. Grosch assessed the plaintiff on November 17, 2020 and prepared a report dated November 23, 2020.
- [83] The plaintiff did not require Dr. Grosch to attend at trial. His November 23, 2020 report was entered into evidence by consent.
- [84] Dr. Cameron and Dr. Grosch each accepted that the relevant CT and MRI head scans showed no abnormalities (other than an unrelated sinus matter).
- [85] It is possible that there may be a physical injury to the brain even though CT and MRI scans do not show such. In his second report, Dr. Cameron states:
33. It is important to emphasize that the type of injury that occurs at the time of a mild traumatic brain injury is microscopic in nature and involves axonal disruption and disruption of intracellular and intercellular neuronal membranes. This in turn results in a cascade effect involving extravasation of excitatory neurotransmitters and transfer of ions across these disrupted membranes. This results in permanent damage of dendrites and axons which normally carry messages between different nerve cell populations within the brain. These changes are also associated with neuronal cell death. All of these pathological changes occur at the microscopic level, not the macroscopic level. CT brain scans and MRI brain scans are only able to visualize residual change following focal macroscopic injury, not microscopic injury. Therefore, normal CT brain scans and normal MRI brain scans that have been performed in the case of Ms. Dhanji following the accident do not alter my opinion regarding the diagnosis of a mild traumatic brain injury which she probably sustained at the time of the accident on September 4, 2016.
- [86] Dr. Cameron understood that the plaintiff had "an incomplete recall of the impact" and probably suffered "a brief altered state of consciousness or loss of consciousness at the time of the accident".
- [87] In his report, Dr. Grosch states:

Historically, I do not believe she had sustained a concussion. She does not satisfy the generally accepted criteria for concussion, including transient neurological deficits, loss of consciousness, inability to recall events immediately before and after the injury, and inability to establish new memories for minutes to hours after injury.

[88] As noted, the plaintiff did not require Dr. Grosch to attend trial. I have no basis to find that Dr. Grosch's interview techniques are not at least equal to those of Dr. Cameron.

[89] The Court is left with the plaintiff describing her sensations related to the accident impact differently to Dr. Cameron and Dr. Grosch. At trial, the plaintiff testified that she did not lose consciousness, and although she was rattled and shocked, she was not confused. The plaintiff's testimony aligns more closely with Dr. Grosch's understanding of her sensations than that of Dr. Cameron.

[90] It is generally recognized that most MTBIs will resolve favourably within approximately one year.

[91] Assuming that the plaintiff suffered a MTBI as a result of the accident, the plaintiff has not established on a balance of probabilities that her brain suffered permanent damage.

[92] If there were permanent damage to the dendrites and axons (as Dr. Cameron describes) of the plaintiff's brain, I would expect the plaintiff's symptoms would be consistent under similar conditions and to have a general impact on her activities. Contrary to a general impact on activities, since the accident, the plaintiff has been able to travel to Italy, California, India, and Hawaii.

[93] Any travel involves many sounds and busyness. Italy, California, India, and Hawaii are all sunny climes.

[94] With willpower, the plaintiff is apparently able to tolerate the light and sound sensitivity associated with travel. With respect to her trip to India, the purpose was to seek treatment. The other three destinations involved vacations. The plaintiff's symptoms are not consistent, which should otherwise be the case, if there were a permanent physical injury to the plaintiff's brain.

[95] With respect to Hawaii, the plaintiff and her spouse went as part of an annual family vacation. None of the plaintiff's other family members were called as witnesses.

[96] In sum, the plaintiff has not provided "sufficiently clear, convincing and cogent [evidence] to satisfy on a balance of probabilities" that she suffered a MTBI and, if she did, that it had a permanent effect.

[97] The DSM-5 describes SSD under the heading "Diagnostic Features", which reads (in part):

Individuals with somatic symptom disorder typically have multiple, current, somatic symptoms that are distressing or result in significant disruption of daily life (Criterion A), although sometimes only one severe symptom, most commonly pain, is present. Symptoms may be

specific (e.g., localized pain) or relatively nonspecific (e.g., fatigue). The symptoms sometimes represent normal bodily sensations or discomfort that does not generally signify serious disease. Somatic symptoms without an evident medical explanation are not sufficient to make this diagnosis. The individual's suffering is authentic, whether or not it is medically explained.

The symptoms may or may not be associated with another medical condition. The diagnoses of somatic symptom disorder and a concurrent medical illness are not mutually exclusive, and these frequently occur together. For example, an individual may become seriously disabled by symptoms of somatic symptom disorder after an uncomplicated myocardial infarction even if the myocardial infarction itself did not result in any disability. If another medical condition or high risk for developing one is present (e.g., strong family history), the thoughts, feelings, and behaviors associated with this condition are excessive (Criterion B).

Individuals with somatic symptom disorder tend to have very high levels of worry about illness (Criterion B). They appraise their bodily symptoms as unduly threatening, harmful, or troublesome and often think the worst about their health. Even when there is evidence to the contrary, some patients still fear the medical seriousness of their symptoms. In severe somatic symptom disorder, health concerns may assume a central role in individual's life, becoming a feature of his or her identity and dominating interpersonal relationships.

[98] I also find that the accident caused the plaintiff's SSD. She is a changed person from before the accident. There is no other event that may explain the triggering of the disorder.

d) Other Medical Opinion Evidence

[99] Dr. J. Wee is a medical doctor with a specialty in physical medicine and rehabilitation and was qualified to provide opinion evidence with respect to physical medicine and rehabilitation.

[100] Dr. Wee conducted an IME of the plaintiff. She prepared two reports. The first report is dated November 2, 2017 and was based on an October 27, 2017 assessment. The second report is dated July 19, 2020 and is based on a further assessment on July 10, 2020.

[101] For several reasons, I have given Dr. Wee's reports and evidence at trial little weight.

[102] First, Dr. Wee incorrectly scored one of the two Montreal Cognitive Assessment tests she had the plaintiff perform. Dr. Wee calculated the plaintiff's score to be 27 out of 30 when it should have been scored as 29 out of 30.

[103] Second, Dr. Wee's second report was based on a format of stating the "Initial Opinion" and then the "Final Opinion" in response to several questions posed, in order to organize a description of the various aspects of the plaintiff's conditions with respect to diagnosis, prognosis, and recommendations.

[104] In the cross-examination of Dr. Wee, a number of inconsistencies were shown between that which was stated as the "Initial Opinion" in the second report, and that which had been actually stated in the first report.

[105] As an example, in Dr. Wee's first report, she states:

In insurance parlance, Ms. Dhanji was totally disabled from her usual employment for at least 1½ months, likely longer.

[106] In Dr. Wee's second report, she states:

In insurance parlance, Ms. Dhanji seemed to have been totally disabled from her usual employment for at least 1½ months, and likely longer.

[107] The changes were first explained as possibly from using a working copy of the first report. She testified:

Q So it reads there [as read in]:

In insurance parlance, Ms. Dhanji seemed to have been totally disabled from her usual employment for at least one and a half months and likely longer.

Your first report was a lot more concrete. It says "was disabled". Did you change the strength of your opinion because there are suggestions in this case that Ms. Dhanji's claims may have been exaggerated and nobody really knows --

A I cannot --

Q -- whether she was or seemed to have been disabled in that time period.

A So I only know that the most plausible thing is that I was cutting and pasting from a working copy.

[108] Later in her cross-examination, Dr. Wee testified:

Q Okay. Doctor, do you know if this report that's been submitted is your final report, or is this a draft product? Is there any way you -- sitting here today can you guarantee to me that even the information contained under "Final Opinion" are actually your final opinion.

A Yes. This is the final product.

Q Okay, but -- but your initial opinion is different in ways to -- to what you originally opined one. [sic]

A So this particular change that you're talking about probably was done to be more accurate.

Q So now you're saying probably done to be more accurate. Initially you said it could have been a draft. The point is you don't know, right? Sitting here today, you don't know.

A I don't know, but I'm thinking that I wanted to reflect the reality more accurately.

[109] Third, Dr. Wee opines that the plaintiff sustained a MTBI as a result of the accident in her second report but not her first report. In considering whether the plaintiff suffered a MTBI, in my view, it is better to consider the expert opinions of the neurologists, Dr. Cameron and Dr. Grosch, which I have addressed above.

[110] Finally, Dr. Wee did not have the benefit of Dr. Fung's report at the time she prepared her reports. Specifically, although Dr. Wee recommended that the plaintiff should work with a psychologist, she did not have the benefit of Dr. Fung's diagnosis of the plaintiff's SSD. In this regard, the plaintiff's description to Dr. Wee of her post-accident return to work at Telus was more negative than that which her performance reviews show.

e) Otolaryngologist - Dr. V. Tsai and Dr. E. David

[111] Dr. V. Tsai and Dr. E. David are each medical doctors who specialize in otolaryngology and each was qualified to provide opinion evidence respecting otolaryngology.

[112] Each doctor conducted an IME of the plaintiff. Dr. Tsai and Dr. David were retained by the plaintiff and the defendants respectively.

[113] In his IME report dated November 27, 2020 (date of assessment October 16, 2020), Dr. Tsai states (in part):

Ms. Dhanji reported a mechanism of injury that can be plausibly correlated to causation of traumatic inner ear pathology and associated imbalance. Ms. Dhanji declared no imbalance concerns for several years prior to the collision in question. She reported new onset imbalance directly after the collision in question. She has strong documentation in her medical record congruent with this assertion. She attests that the imbalance that developed after the collision was an entirely different sensation than the prior episodes of imbalance. She did not report to me any activity that would be incongruent or anomalous for someone with genuine balance complaints. Given this context, I would opine that this injury more likely than not has caused this new dizziness. I would not have projected her current dizziness in the absence of this injury.

It is acknowledged that often, despite appropriate and sometimes exhaustive investigations, specific causation for genuine imbalance cannot be confidently identified. There is insufficient evidence to confidently implicate inner ear pathology as the primary cause of her imbalance. There is also insufficient evidence to eliminate this possibility. Causation for dizziness is frequently multifactorial or elusive. Her dizziness can also be multifactorial given potential soft tissue injury, head injury or psychiatric concerns among other possibilities. These concerns can produce imbalance symptoms that may mimic or overlap with inner ear imbalance. I will defer further commentary from these perspectives to other experts in these areas.

[114] In Dr. Tsai's testing of the plaintiff, no inner ear damage or irregularities were found. However, Dr. Tsai noted that this does not necessarily mean that the inner ear is healthy. In sum, as may be seen in the above portion from Dr. Tsai's report, much of the basis for Dr. Tsai's attributing the cause of the plaintiff's imbalance to the accident is the plaintiff's description of matters.

[115] Dr. David prepared an IME report dated November 19, 2020 (date of assessment October 5, 2020) and a further report dated January 6, 2021.

[116] In Dr. David's testing of the plaintiff's inner ear, he also did not find physical damage or irregularities. In his January 6, 2021 report, Dr. David states (in part):

In a patient such as Ms. Dhanji in whom her disproportionate symptoms have not been supported by clinical or objective test results the evaluation of self reported symptoms is problematic. A prudent review of her medical record, and a psychiatric diagnosis of somatic symptom disorder (Dr. K. Fung) are not in keeping with an inner ear injury cause for her complaints. The self-report of dizziness is common, and multifactorial. In the case of Ms. Dhanji, the mechanism of injury, nature and course of her symptoms, and the absence of corroborating physical findings pointing to an inner ear cause are factors that suggest that no inner ear injury was sustained during the MVA.

[117] I find that the opinion evidence of Dr. Tsai and Dr. David do not provide sufficiently clear, convincing, and cogent evidence of a physical injury to the plaintiff's inner ear.

[118] If there were an actual physical injury to the plaintiff's inner ear, travel would have been particularly uncomfortable and difficult. As noted, the plaintiff has taken various vacations since the accident. I find that the plaintiff's experienced imbalance symptoms relate to the SSD Dr. Fung describes.

f) Neuropsychology - Dr. M. Kaushansky and Dr. H. Lysak

[119] Dr. M. Kaushansky is a neuropsychologist and was qualified to provide opinion evidence with respect to neuropsychology.

[120] Dr. Kaushansky conducted an IME and prepared a report dated November 19, 2020. In the fall of 2020, he met with the plaintiff (and her spouse) several times. Tests were conducted on September 8, 2020.

[121] Dr. H. Lysak is also a neuropsychologist and was qualified to provide opinion evidence with respect to neuropsychology.

[122] Dr. Lysak was not asked to examine the plaintiff. Her instructions were to review "Dr. Kaushansky's report together with his clinical file and raw test data, and to comment on the failed or questionable validity tests".

[123] In his examination-in-chief, Dr. Kaushansky explained the distinction between "crystallized" and "fluid" intelligence. In his view, the plaintiff has good crystallized intelligence and weak fluid intelligence.

[124] Dr. Kaushansky testified:

I'm also going to spend a moment, My Lord, speaking about a very critical issue in neuropsychological testing called crystallized and fluid intelligence. And I've spoken about this in my report. Crystallized intelligence is the intelligence been, like a crystal, long-hardened. What's the main fish that's caught off the B.C. coast? Name the 10 provinces? Who's Jean Chretien? All of these crystallized. We would know them.

Then, that's juxtaposed with fluid intelligence, "Quick, solve this problem." And it does not help at all to know who Jean Chretien is or the 10 provinces. You have to think on your feet, right away. And with this patient population, those who had injury or pain or psychological issues, there is typically a split, as was the case here. The split is she did fine on crystallized intelligence. Her scores on crystallized intelligence are typically in the above average range, consistent with her intelligence.

Q You may --

A On -- on --

Q I'm sorry.

A -- fluid intelligence, this is where she had the difficulty, "Quick, solve this problem. Solve it now. I'm timing you." So, the pattern that we saw -- in summary statement, sir, the pattern that I saw with this patient was what would be expected, strong crystallized, mostly weak fluid.

[125] I have given Dr. Kaushansky's testing and opinion little weight. It was apparent that he did not appreciate how well the plaintiff performed at Telus after the accident. In cross-examination, he testified:

Q And -- and in Ms. Dhanji's profile, she made -- I'm going to put it to you that, you know, there -- there was a mess -- she had made a mess of her responses. Hence why you concluded they're atypical. And it doesn't make neuropsychological sense, essentially.

A I'll wait till your question. I'm sorry.

Q I'm done, sir.

A Yes, it does make sense. On this broken record that I'm bringing up between crystallized and fluid, it sure makes sense. Crystallized has been preserved. Fluid has been diminished.

Q And so fluid knowledge, let's say --

A No --

Q Sorry.

A -- fluid intelligence.

Q Sorry, fluid intelligence. Let's say -- suppose after the accident Ms. Dhanji has moved on to higher positions. She's been promoted. She is responsible for managing a team of technicians. She is responsible for -- for implementing new initiatives at Telus, and -- and she performs quite well. Is that an example of fluid intelligence, that she would have it?

A Yes.

[126] I am not critical of Dr. Kaushansky. I suspect that the plaintiff's SSD manifested itself in the plaintiff describing a somewhat dire work performance post-accident.

[127] In her February 20, 2021 report, Dr. Lysak concludes:

1. Dr. Kaushansky reported some failed and questionable validity tests as discussed above.
2. He concluded that the pattern of her cognitive test results and emotional complaints was "atypical" of a known neuropsychological disorder.
3. Dr. Kaushansky attributed her "atypical" test results to "medical variables" and "depression".
4. Such test results and clinical diagnoses obtained in the context of failed and questionable validity tests would tend to be interpreted as unreliable, meaning that they would not necessarily become confirmed on the subsequent assessments.
5. Indeed, Dr. Fung, psychiatrist for the plaintiff who saw the plaintiff around the same time as Dr. Kaushansky, contradicted Dr. Kaushansky's opinions regarding cognitive deficits, "medical variables" causing symptoms, and the diagnosis of "depression".

[128] In cross-examination, Dr. Lysak stated that she was "fine" with Dr. Fung's opinion that "it is more likely that [the plaintiff's] cognitive complaints are secondary to [SSD]".

[129] During her testimony, including cross-examination, the plaintiff had little difficulty understanding counsel's questions or in formulating her answers.

[130] In sum, I find that the plaintiff's cognitive complaints relate primarily to her SSD.

g) Treating Physicians

[131] In late November 2017, Dr. E. Alex became the plaintiff's family physician.

[132] Dr. Alex understood that the plaintiff came to see her because of headaches and soft tissue injuries related to the accident. The plaintiff had been referred by her grandmother to Dr. Alex who treated other members of the plaintiff's larger family.

[133] At the plaintiff's first visit to Dr. Alex, the plaintiff asked for a referral to Dr. P. Dhawan, psychiatrist, for Botox treatment for her headaches. Dr. Alex gave the referral.

[134] Dr. Dhawan also had treated the plaintiff's grandmother and other members of the plaintiff's larger family.

[135] Dr. Dhawan treated the plaintiff with Botox (and other nerve block) injections on a frequent basis as the effects of prior injections apparently diminished in effect over time. He testified that he found the plaintiff's facet (neck) joints to be "tender, painful, and loading". He also found tight neck muscles with spasms.

[136] Both Dr. Alex and Dr. Dhawan were aware of the plaintiff's trip to India for ayurveda treatment. Neither doctor had suggested the treatment, but neither of them discouraged the plaintiff from getting the treatment.

[137] At the end of Dr. Dhawan's testimony, I asked Dr. Dhawan a group of questions. The transcript reads (in part):

THE COURT Ms. Kandola asked you about avoiding normal surroundings because we have one expert concerning her report says -- and this is a psychiatrist. Basically the plaintiff quote "will benefit from consistent and gradual exposure to" quote/unquote "normal environments rather than continuing to modify or avoid normal surroundings". Would you be supportive of that?

A It's not an easy answer. I'll try to do my best.

Q Yes.

A I've been treating brain injury and neck pain and headaches for two to three decades, and depending on the person, if it's early -- like your --- Ms. Kandola asked, early response, I'm seeing somebody who has not had previous injuries and previous issues and they had a -- a presentation with cognitive issues and headaches, generally what the psychiatrist is saying is correct. We give them some time to heal and then gradually expose themselves to increasing challenges.

If a person like this, however, has been trying to push the envelope for five plus years and there has been so many reports of her worsening with light exposure, sound exposure, multiple people talking, examinations, travel, exhaustion, sleeplessness, then exposing them to -- to more of such stimuli is actually going to increase the negative, no susceptible or painful or aggravating stimulation to the brain. You see the brain, when it perceives a certain signals for a period of time --

Q Yes, I don't -- I don't -- I don't want to get into opinion.

A Opinion, yeah.

Q So I guess the question simply was, would you be supportive or not?

A Answer is no.

[138] On December 12, 2017, Dr. Dhawan first met with the plaintiff. His reporting consultation letter to Dr. Alex states: "I referred her for psychotherapy". The evidence does not reflect timely follow-up by either Dr. Dhawan, Dr. Alex, or the plaintiff.

[139] On November 19, 2020, Dr. Kaushansky recommended a psychologist. Dr. Kaushansky testified:

Q A couple questions. This third visit, really quickly, that -- that -- when Ms. Dhanji and her husband came in, you said that you gave them feedback. Did you also make treatment recommendations?

A Oh, sure, that they needed to see a psychologist.

Q And did you refer her to somebody in particular?

A Yes, because she has wanted mindfulness meditation. I knew of a practitioner in Vancouver who does mindfulness meditation, and suggested it.

Q And who was that person?

A Sean Pritchard.

[140] The plaintiff subsequently saw Dr. Pritchard.

8. findings on causation

[141] I find that the accident caused soft tissue injury to the plaintiff's shoulders, upper back and neck, with associated headaches. I also find that the accident also caused the plaintiff's SSD. She did not have SSD before the accident. Some other triggering event was not suggested or proven. Beyond mere assertion, there is not a basis to find that the plaintiff's SSD arose spontaneously.

9. findings on the plaintiff's medical condition

[142] While the physical injuries have not fully resolved, the primary existing condition is the plaintiff's mental injury which was classified by Dr. Fung as SSD under the DSM-5.

[143] The plaintiff's SSD affects, very significantly, the degree of physical pain she perceives and experiences. Her SSD also affects very significantly the intensity and duration of her headaches. Finally, the plaintiff's SSD also has given rise to the perception of light sensitivity, sound sensitivity, and imbalance.

[144] As noted, Dr. Fung has classified the plaintiff's SSD as "moderate, persistent".

[145] Dr. Fung's prognosis is set forth at para. 75 above.

[146] While I accept Dr. Fung's statement that "full recovery is unlikely" even with appropriate treatment and the natural history of SSD is to "wax and wane", I find that there is a high probability of significant improvement for several reasons.

[147] First, the plaintiff is relatively young.

[148] Second, the plaintiff's physical injuries are not life-altering. Many individuals who have suffered whiplash injuries, which may persist, lead highly productive and fulfilling lives.

- [149] Third, the plaintiff is goal-oriented as reflected in her past performance at Telus and her desire to have children. If she accepts she has a SSD, I find that she will follow through with the psychotherapy and related steps necessary to address her SSD.
- [150] Fourth, the plaintiff has a loving, caring, and supportive spouse who also shares the plaintiff's goals.
- [151] Fifth, Telus has shown itself to be a supportive and accommodating employer.
- [152] Finally, in recent years, the stigma society has associated with a mental disorder or mental injury has been melting. Particularly, with the plaintiff's personality and natural abilities to relate to others, I find that she will have the understanding and support of many others.
- [153] In sum, I find that there is a high probability that, with psychotherapy, the plaintiff will, so to speak, almost get back the life she had before the accident.
10. Was there an intervening event?
- [154] The defendants say that the plaintiff's ayurveda treatment in India constitutes an intervening event which serves to break the chain of causation.
- [155] In their written submissions, the defendants submit (in part):
491. The defendants submit that they are not liable for any worsening of the plaintiff's purported symptoms resulting from the ayurvedic treatment she received in India, and therefore any loss of income resulting from the affects of this treatment. This is because "the chain of causation will be broken where an intervening event, rather than the defendants' conduct, is considered the proximate or legal cause of the subsequent injury" (*Dorsey v Bhindi*, 2016 BCSC 499 (*Dorsey*) at para. 100).
492. The principle known as *novus actus interveniens*, recognizes that defendants should not be held liable for objectively unforeseen consequences of their actions (*Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 (*Hussack*) at para. 87). The question of whether an intervening event breaks the chain of causation is a question of fact and depends on whether the plaintiff acted unreasonably (*Hussack* at para. 82).
494. The defendants submit that the plaintiff acted unreasonably in pursuing ayurvedic treatment. Dr. Wee opines that page 27 of her second report that "treatments such as what was described in India, with much bedrest, would likely lead to [further] declines in activity tolerance, which would imply indefinite persistence of current limitations, and possibly further decline in future." This opinion suggests that the treatments the plaintiff received in India caused decline in the plaintiff's purported limitations.
495. The defendants further submit that it was unreasonable for the plaintiff to undertake an unconventional treatment that was not medically recommended to her, without understanding what the potential negative impacts of undertaking such a treatment could be.

[156] I do not find that the plaintiff acted unreasonably. Although neither Dr. Alex nor Dr. Dhawan recommended ayurveda treatment, neither of them discouraged such.

[157] I find that the plaintiff's seeking ayurveda treatment is consistent with her SSD.

[158] In short, there is not a break in the chain of causation.

11. mitigation

[159] Our Court of Appeal in *Chiu v. Chiu*, 2002 BCCA 618 set forth the test for the defence of a failure to mitigate:

[57] The onus is on the defendant to prove that the plaintiff could have avoided all or a portion of his loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably. These principles are found in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146.

[160] The defendants submit that any damages awarded to the plaintiff should be reduced by 20% for failing to mitigate her damages. They note, in particular, that Dr. Fung opined that early psychotherapy is usually more beneficial.

[161] The defendants say that the plaintiff did not follow the recommendation for psychotherapy while spending \$3,600 of her own funds for neurofeedback treatments.

[162] I do not find that the plaintiff failed to mitigate her damages. She did not act unreasonably. She did not eschew recommended treatment.

[163] The nature of SSD is that the person perceives and experiences physical conditions or pain, or both. The person does not necessarily recognize the mental aspect.

[164] In the case at bar, there is no evidence that the plaintiff's doctors followed-up with her to insist that she have psychotherapy (or otherwise see a psychologist or psychiatrist). Accordingly, I do not find that the plaintiff "eschew[ed] the recommended treatment".

12. assessment of award

a) Non-Pecuniary Damages

[165] In *Karim v. Li*, 2015 BCSC 498, Justice Abrioux (then sitting in this Court) summarized the applicable law:

[120] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide as each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[121] The framework for the assessment of non-pecuniary damages was outlined by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34:

[46] The inexhaustive list of common factors cited in *Boyd [v. Harris]*, 2004 BCCA 146] 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 BCCA 54.

[122] The assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences and ability to articulate that: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

[166] In *Trites v. Penner*, 2010 BCSC 882, Justice Ker stated:

[188] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life and loss of amenities. The compensation awarded should be fair and reasonable to both parties: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 [Andrews]; *Jackson v. Lai*, 2007 BCSC 1023 at para. 134 [Jackson]; *Kuskis v. Hon Tin*, 2008 BCSC 862 at para. 135 [Kuskis].

[189] For the purposes of assessing non-pecuniary damages, fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide. Each case depends on its own unique facts: *Andrews*; *Jackson*; *Jenkins v. Bourcier*, 2003 BCSC 388 at para. 87; *Radford v. Drobot et al.*, 2005 BCSC 293 at para. 62; *Kuskis* at para 136.

[167] The defendants accept that the plaintiff "suffered a soft tissue injury to her neck and upper back" and that "an element of her headaches was related to her neck following the accident". The defendants say that an appropriate amount of award would be between \$55,000 and \$70,000.

[168] The defendants say that the plaintiff does not have a SSD. They say that the plaintiff has a factitious disorder or was malingering. In the defendants' written submissions, counsel states:

The defendants submit that, just as the plaintiff in *Ma* [v. Haniak, 2017 BCSC 549], Ms. Dhanji's credibility and reliability is major issue. There are numerous inconsistencies in her evidence and her alleged injuries are all based on her self reports. Further, the defendants submit that if she is accurately describing her symptoms, then it would have been impossible for her to perform at such an elite level in her position as a field manager at Telus following the Accident. If the plaintiff has any cognitive difficulties, they were not on display during her many hours of testimony at trial, nor are they evident from the objective performance reviews of the plaintiff in the years following the accident. However, currently she feels that she needs to play card games in order to improve her cognitive abilities. This new life that the plaintiff is saying she needs to lead is incredibly inconsistent with the reality she lived for the past 3 - 4 years and the fluid intelligence she was capable of using and displaying in her cognitively challenging position as a team manager who drove up sales and lead many new initiatives at Telus.

[169] I am not satisfied by the defendants' argument. I adopt Dr. Fung's expert opinion that the plaintiff has a SSD. In her report, Dr. Fung considers a factitious disorder or malingering as possible differential diagnoses.

[170] In her report, Dr. Fung is alive to the fact that the plaintiff's cognitive difficulties were not as necessarily described by the plaintiff. In her report, Dr. Fung notes:

Although she describes ongoing cognitive dysfunction, this was not apparent during the assessment. No word finding difficulties were noted. She maintained concentration during the assessment. Her description of her history is as described in the records and she was able to provide a level of detail spontaneously (e.g. medication doses) that is not often seen in those with neurocognitive disorders. It is more likely that her cognitive complaints are secondary to her somatic symptom disorder.

[171] The defendants say that if the plaintiff has a SSD, then the upper range of an appropriate award would be \$80,000.

[172] With respect to SSD, the defendants rely on two authorities. The defendants' written submissions read:

427. The plaintiff in *Sandhu v Parmar*, 2018 BCSC 2116, involves a 50 year [old] at the time of trial, female plaintiff with ongoing soft tissue injuries and pain in her neck, shoulder and back, recurrent headaches, chronic pain, major depressive disorder and somatic symptom disorder with predominant pain. The prognosis for her ongoing injuries was guarded. Since the accident she has withdrawn from social and family life. The award for non-pecuniary damages was \$80,000 (reduced by 10% for failure to mitigate her loss by not seeking out counseling recommended by her physician). The present value of this is approximately \$89,813.

428. The plaintiff in *Carreon-Rivera v. Zhang*, 2014 BCSC 709, involves a 30 year-old (at time of first of three accidents, 37 year-old at trial) female plaintiff with ongoing: neck pain, myofacial pain syndrome, numbness in left buttock, twice weekly headaches, generalized anxiety disorder and somatic symptom disorder with predominant pain. The prognosis for her ongoing injuries was guarded. The award for non-pecuniary damages was \$95,000. The present value of this is approximately \$99,688.
- [173] I believe the case names in the defendants' written submissions are misplaced in that Sandhu is described in para. 428 and Carreon-Rivera in para. 427.
- [174] The plaintiff seeks an award of \$180,000 for non-pecuniary damages. The plaintiff's written submissions read:
156. In *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81, the 41 year old Plaintiff developed a chronic pain condition as a result of the accident. He also developed sleep disorder, anxiety and depression. Prior to the accident, the Plaintiff did not suffer from any psychological or psychiatric difficulty. Mr. Justice Voith (as he then was) awarded \$180,000 in non-pecuniary damages. *Pololos* is a significant case as it provides a comprehensive discussion of the legal context for "exaggerated or unrealistic perceptions of disability" which are common for chronic pain patients with psychological overlay (paras. 87-93). Adjusted for inflation, this award equates to a present value of \$192,000.
157. *Pearson v. Savage*, 2017 BCSC 1435 (aff'd 2020 BCCA 133): Ms. Pearson sustained largely soft tissue injuries, and suffered from chronic pain in her neck, back, and left knee and debilitating headaches. She sustained psychological injuries including somatic symptom disorder, depression and anxiety, symptoms of PTSD, physical deconditioning, symptoms of cognitive dysfunction, altered sleep, difficulties with her former recreational activities, and difficulties with her ability to work. Her life had been drastically changed. Madam Justice Loo awarded \$175,000 in non-pecuniary damages. Adjusted for inflation, this award equates to a present value of \$183,000.
158. *Zawadzki v. Calimoso*, 2011 BCSC 45: Mr. Justice Voith found that the plaintiff had sustained injuries including pain, a sleep disorder, depression, anxiety and alcohol abuse. The prognosis for resolution was very uncertain. Similar to the case at bar, the plaintiff had previously been a successful, happy, well-rounded and social individual. Voith J. awarded \$180,000 in non-pecuniary damages (reduced by 20% to \$144,000 for failure to mitigate). Adjusted for inflation, this award equates to a present value of \$205,000.
159. *Kallstrom v. Yip*, 2016 BCSC 829: The plaintiff was found to have chronic pain. The trial judge held that it is not important from a legal perspective whether absent objective evidence of permanent musculoskeletal physical injury, one labels the condition as myofascial pain, "chronic pain syndrome", fibromyalgia, or "persistent somatic symptom disorder with predominant pain". The Court had no doubt that Ms. Kallstrom has suffered, and will continue to suffer, from a complex constellation of disabling neck and back pain, headaches and depression and was satisfied that the conditions are "real" in the sense that Ms.

Kallstrom genuinely experienced them (para. 352). Mr. Justice Kent awarded \$180,000 in non-pecuniary damages. At paragraphs 336 and 337, Mr. Justice Kent provides a discussion of the principles to be applied in assessing claims of psychological injury. Adjusted for inflation, this award equates to a present value of \$192,000.

160. Brundige v. Bolton, 2018 BCSC 1843: the 39-year old Plaintiff suffered from severe psychological illness and chronic pain. Mr. Justice Butler (as he then was) found that the Plaintiff sustained adjustment disorder, depressed mood and somatic symptom disorder which were all caused by the accident. He found these injuries caused the Plaintiff to be anxious, depressed and preoccupied with her perceived pain. Her pain prevented her from working and every aspect of her life was affected negatively. The Court found that the Plaintiff's SSD magnified her preoccupation of pain and caused her to see her level of impairment higher than it was. The Court awarded \$165,000 in non-pecuniary damages. Adjusted for inflation, this award equates to a present value of \$170,000.
- [175] I will award \$120,000 in non-pecuniary damages. As the defendants recognize the plaintiff suffered a physical injury to her neck and upper back which, in turn, is an element contributing to the plaintiff's headaches.
- [176] I find that the plaintiff's mental injury is a serious injury. As Dr. Fung classifies the plaintiff's SSD as "moderate, persistent" and even with appropriate treatment, full recovery is "unlikely". Further, even with appropriate treatment resulting in improvement, the SSD will still "wax and wane".
- [177] In short, despite the fact the plaintiff's SSD is serious, I find that with appropriate treatment, the plaintiff will probably enjoy significant improvement. The SSD has an ongoing nature that the plaintiff will have to monitor and address for the rest of her life and may give rise to particular concerns from time to time.
- [178] In assessing the appropriate award, I have had particular regard to the following:
- a) the plaintiff's relative youth;
 - b) the plaintiff's pre-accident general good health;
 - c) the nature of the plaintiff's physical injuries which I found are manageable with appropriate exercises and, with such, have a good probability of further resolution; and
 - d) the ongoing lifetime nature of the plaintiff's SSD, but, as I find, with the high probability of significant improvement.
- [179] As noted, I assess that the appropriate award for non-pecuniary damages to be \$120,000.
- b) Past Loss of Earning Capacity
- [180] With respect to past loss of earning capacity, Justice K. Smith, writing for our Court of Appeal in Rowe v. Bobell Express Ltd., 2005 BCCA 141, stated:

[30] Thus, in my view, a claim for what is often described as "past loss of income" is actually a claim for loss of earning capacity; that is, a claim for the loss of the value of the work that the injured plaintiff would have performed but was unable to perform because of the injury.

[31] Evidence of this value may take many forms. As was said by Kenneth D. Cooper-Stephenson in *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 205-06,

... The essence of the task under this head of damages is to award compensation for any pecuniary loss which will result from an inability to work. "Loss of the value of work" is the substance of the claim -- loss of the value of any work the plaintiff would have done but for the accident but now will be unable to do. The loss framed in this way may be measured in different ways. Sometimes it will be measured by reference to the actual earnings the plaintiff would have received; sometimes by a replacement cost evaluation of tasks which the plaintiff will now be unable to perform; sometimes by an assessment of reduced company profits; and sometimes by the amount of secondary income lost, such as shared family income.

[K. Smith J.A.'s underscoring; other emphasis in original.]

[181] The defendants say that the plaintiff's loss of earning capacity should be limited to the "initial time frame where she was off work from Telus". That is, until the plaintiff returned to work full-time in December 2016. The defendants calculate the appropriate gross amount to be \$10,648, which after tax, is \$8,045.

[182] The plaintiff does not claim past loss of earning capacity for 2017, 2018, and 2019. As noted, the plaintiff continued to work full-time throughout these three years.

[183] The plaintiff calculates her past loss of earning capacity (before tax) to be:

2016

\$13,810

2020

\$87,504

2021

\$19,261

\$120,575

[184] With respect to 2016, the plaintiff's calculation of \$13,810 is based on losing 327.50 hours of work (based on a review of her 2016 employment records post-accident).

- [185] In 2016, the plaintiff's base salary was \$80,000 with a performance bonus not to exceed 20%. Using \$80,000, plaintiff's counsel calculates a \$42.17 hourly rate. Accordingly, the loss for 2016 is \$13,810 ($\$42.17/\text{hour} \times 327.5 \text{ hours}$). I accept plaintiff's counsel's calculation as a reasonable assessment.
- [186] In 2019, the plaintiff earned \$87,504 (excluding a bonus and an award of restricted stock units paid in 2020).
- [187] The plaintiff says that she should be awarded \$87,504 for 2020 on the basis that she would have earned a similar amount in 2020 as she did in 2019. I accept plaintiff's counsel's calculation as a reasonable conservative assessment (a bonus and a restricted stock unit award are not included).
- [188] For 2021, the plaintiff says that the annual income of \$87,504 should be used, with the addition of the bonus and award of restricted stock units with a total value of \$28,062 (earned in 2019 and received in 2020).
- [189] In the result, the plaintiff calculates the loss for 2021 based on the two months in 2021 prior to the start of trial. The plaintiff says that the amount is \$19,261 ($\$87,504 + \$28,062 \times 2/12$). I agree.
- [190] As shown above, the total past loss of earning capacity (before tax) for 2016, 2020, and 2021 is \$120,575. The plaintiff then reduces this amount to \$91,106 based on a 24.44% average tax rate (defendants' counsel agree that 24.44% is the appropriate tax rate). Again, I agree.
- [191] In sum, the plaintiff is awarded \$91,106 for past loss of earning capacity.

c) Future Loss of Earning Capacity

- [192] In *Perren v. Lalari*, 2010 BCCA 140 at para. 32, our Court of Appeal set forth the rule that there must be a "real and substantial possibility of a future event leading to an income loss" before such a loss may be assessed. The loss may be quantified using the earnings approach or the capital asset approach. The earnings approach is the more suitable approach in the case at bar. There was significant evidence regarding the plaintiff's past earnings with Telus and potential future earnings related to a realistic career path.
- [193] In *Rosvold v. Dunlop*, 2001 BCCA 1, our Court of Appeal stated:
- [9] Because damage awards are made as lump sums, an award for loss of future earning capacity must deal to some extent with the unknowable. The standard of proof to be applied when evaluating hypothetical events that may affect an award is simple probability, not the balance of probabilities: *Athey v. Leonati*, [1996] 3 S.C.R. 458. Possibilities and probabilities, chances, opportunities, and risks must all be considered, so long as they are a real and substantial possibility and not mere speculation. These possibilities are to be given weight according to the percentage chance they would have happened or will happen.

- [10] The trial judge's task is to assess the loss on a judgmental basis, taking into consideration all the relevant factors arising from the evidence: *Mazzuca v. Alexakis*, [1994] B.C.J. No. 2128 (S.C.) (Q.L.) at para. 121, *aff'd* [1997] B.C.J. No. 2178 (C.A.) (Q.L.). Guidance as to what factors may be relevant can be found in *Parypa v. Wickware* [(1999), 65 B.C.L.R. (3d) 155 (C.A.)], at para. 31; *Kwei v. Boisclair* (1991), 60 B.C.L.R. (2d) 126 (C.A.); and *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.) per Finch J. They include:
- [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.
- [194] There is a three-step process for the assessment of loss of future earning capacity. In *Rab v. Prescott*, 2021 BCCA 345, our Court of Appeal summarized matters:
- [47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown v. Golaïy* (1985), 26 B.C.L.R. (3d) 353 (S.C.)). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in *Dornan v. Silva*, 2021 BCCA 228] at paras 93-95.
- [48] In this case, as we have seen, the judge correctly stated the test at para 88: he must determine "whether the respondent had proven that there is a real and substantial possibility of a future event leading to an income loss." But, in effect, he skipped that step altogether. He concluded at para 89 that the respondent had suffered a loss of capacity due to the aggravation of her pain, increased migraines, and reduced energy, thereby becoming "less valuable to [her]self as a person capable of earning income in a competitive labour market". That loss of capacity was the future event in question. What he did not articulate was any analysis of whether there was a real and substantial possibility that this loss of capacity would cause a pecuniary loss in the future, nor did he proceed to articulate an assessment of the relative likelihood of any such possibility occurring.

- [195] The defendants submit that there should be no award for loss of future earning capacity. They say that "the plaintiff has not established a real and substantial possibility that she will suffer a [future] pecuniary loss".
- [196] I reject the defendants' argument. The plaintiff has a SSD "moderate, persistent" which, with appropriate treatment, may improve but will "wax and wane".
- [197] As a result of her SSD, the plaintiff perceives and experiences greater pain and conditions without an etiological basis (e.g., sound sensitivity). The plaintiff's SSD has affected her future earning capacity.
- [198] With respect to Rab, the plaintiff's SSD is a chronic mental injury that, in particular, has "rendered [the plaintiff] less capable of earning income from all types of employment": *Brown v. Gola* (1985), 26 B.C.L.R. (d) 353 (S.C.) at 356.
- [199] The plaintiff's SSD will cause a pecuniary loss because it affects so many aspects of her day-to-day physical and mental performance.
- [200] Further below, I assess the loss of earning capacity having considered the three real and substantial possibilities that exist. As guided by Rosvold, I have "given weight according to the percentage chance they will happen".
- [201] Plaintiff's counsel in their written submissions state:
207. Nafeesa is only 31 years old and has most of her working life in front of her. She earned approximately \$115,000 in 2019 her last full year of full-time employment. Her income increased every year she was at Telus, and based on the evidence of her co-workers and supervisor regarding her value as an employee and the expectation that she would continue to advance at the company, it is all but assured that had she not been injured her income would have continued to advance in the years to come.
208. It is submitted that Nafeesa's capacity to earn income has been severely undermined. The most probable without-accident scenarios for Nafeesa were:
- a. Continue to work for Telus;
 - b. Obtain a promotion to Director in 2022 (5 years after her promotion to Manager in 2017); and
 - c. Obtain a promotion to Vice President in 2032 (after 10 years as a Director).
209. The most probable with-accident scenario is that Nafeesa may never again return to the workplace in any capacity. If she does, it will be at a significantly reduced schedule and with considerable limitations. Most optimistically, she may after several years of treatment return to a job like Field Support Manager at Telus, reaching the top of that income band but not beyond.

210. Economic multipliers were tendered from Mr. Benning and Mr. Gosling, Economists. The Plaintiff submits that Mr. Benning's economic multiplier for males should be accepted in this case. Firstly, given Nafeesa's pre-Collision performance at work and the evidence regarding her plans to only take 1-year maternity leave if she should have children, in her particular circumstances the "female" labour market contingencies would understate her actual loss. Secondly, the use of female data also runs contrary to the principle that the use of historical data may incorporate gender bias which is to be avoided where possible; *Gill v. Lai*, 2019 BCCA 103 (at paras. 52-56).
211. Nafeesa's future loss of earning capacity can be considered using the earnings approach, given her steady pre-Collision earning history and the evidence about her likely career path at Telus in the "without accident" world. It is submitted that Nafeesa's "without accident" earnings would be:
- a. 2021 - High end Manager at \$150,000 (multiplier .827) \$124,050;
 - b. 2022 to 2032 - Director at average earnings of \$203,000 (multiplier 8.481) \$1,721,643;
 - c. 2032 to retirement at age 65 in 2054 - Vice President at \$384,000 (multiplier 11.457) \$4,170,348;
 - d. Total uninjured income earning stream - \$6,016,041.
212. With accident:
- a. 2021 - 2023 - no earnings. During these years Nafeesa will be focused on treatment and recovery with the goal of returning to work;
 - b. 2023 - 2026 - Return to position of Manager as she did in 2017 to 2019, \$120,000 per year (multiplier 2.383) \$285,960;
 - c. 2026 - 2054 - Earnings at the top end of Manager income - \$150,000 per year (multiplier 15.922) \$2,388,300;
 - d. Total injured income earning stream - \$2,674,260
213. The difference between the without accident and with accident scenarios above is \$3,341,781.
214. Contingencies, both positive and negative, should be considered. It is possible that with Nafeesa's pre-Collision talent and reputation that she could have advanced to either the top end of VP earnings, or even beyond, to positions comparable to Messrs. MacDonnell and Geheran. Another positive contingency is that if Nafeesa does not improve, she may never achieve the "with accident" scenario above of returning to a full-time Manager position. The most significant negative contingency is that with further improvement, Nafeesa may still be able to achieve some of her pre-Collision goals and advance beyond the Manager level. Although in our submission the positive and negative contingencies largely balance each other out, the following are illustrations of some possible reductions if the negative

contingencies are determined to outweigh the positive:

- 30%: \$2,339,246
- 40%: \$2,005,068
- 50%: \$1,670,890

216. Reviewing all of the evidence, including Nafeesa's extraordinary career potential, her present disability, and the optimism for some improvement to a level where she will hopefully be able to return to considerable earnings as described above, Nafeesa's claim for loss of future earning capacity is \$2,000,000.

[Footnotes omitted.]

[202] I find that the plaintiff's current inability to work is the result of her SSD. Dr. Alex and Dr. Dhawan have each supported her long-term disability claim, albeit on the basis that they understand that the plaintiff has a brain injury which gives rise to most of her symptoms. Neither doctor has pursued, with vigour, active psychotherapy for the plaintiff.

[203] In stating the foregoing, I do not intend to be critical of either doctor. It is only with the various tests that establish that most of the plaintiff's symptoms are unlikely to have any etiological basis (other than the whiplash soft tissue injury to the plaintiff's neck, upper back, and shoulders, and as an element of her headaches) has the situation become clear. As Dr. Fung describes, the plaintiff has been "over-medicalized" and "over-investigated". With hindsight, it is apparent, as Dr. Fung describes, the plaintiff has a SSD.

[204] With the benefit now of Dr. Fung's report and the fact that the plaintiff may have exaggerated her symptoms based on her perceptions, I expect Dr. Alex and Dr. Dhawan have or will change the course of treatment to that recommended by Dr. Fung. At trial, it was clear, in answering the Court's questions set forth above, that Dr. Dhawan was under the mistaken impression that the plaintiff had a brain injury.

[205] With respect to the plaintiff's written submissions, I have three comments. First, I agree that economic multipliers for males are a better guide. I find that the plaintiff had the requisite adhesion to working at Telus.

[206] Second, I cannot find that it was "all but assured that had she not been injured her income would have continued to advance in the years to come" in the way plaintiff's counsel suggests. I find that there was a good probability of such but not that it was "all but assured". There are many vagaries in an organization and any business organization may be buffeted by the economy, legislative or regulatory changes, and future technological developments. High paying positions are also highly competitive and Telus, in addition to fostering promotions from within, also hires laterally talent from other organizations.

- [207] Third, as noted, plaintiff's counsel did not distinguish between a brain injury and SSD in terms of quantifying loss, and viewed the prognosis of either as poor. Dr. Fung does not opine that the plaintiff's prognosis is "poor".
- [208] There is a fundamental difference between a physical brain injury (which does not resolve in say, two years) and a mental disorder. It is not possible to fix a physical brain injury. A mental disorder may be treated. There is no physical limitation.
- [209] As noted, the plaintiff is fortunate to have a supportive spouse and family. Telus has also been an accommodating employer throughout.
- [210] As a real and substantial possibility, I find that after three years of working, on average, half-time, the plaintiff will return to her pre-accident career trajectory.
- [211] In stating "on average, half-time", I anticipate that a return to work will be graduated with possibly less than half-time near the beginning, and there may be some "fits and starts".
- [212] Mr. Geheran testified that Telus constantly looks out for high performers and the plaintiff was such. She had the "business acumen" and was "given the opportunity to test out her leadership skills" by managing a group of largely male technicians.
- [213] Mr. Geheran testified that the plaintiff's team "stood out as a high-performing team".
- [214] Mr. MacDonnell is the President of Telus Security and Automation which provides alarm systems for residential and business customers across Canada. He supervises approximately 1650 employees. His prior position at Telus was a Senior Vice-President.
- [215] Mr. MacDonnell testified that he would generally not attend at trial for an employee. He stated that the plaintiff was a key member with a phenomenal track record and wished to be supportive.
- [216] I find that it is highly probable that Telus will support the plaintiff on a graduated return to work basis over several years even though there may not be part-time leadership positions. The plaintiff has shown her leadership abilities post-accident. The plaintiff's performance reviews at Telus show that the plaintiff has many talents that Telus values.
- [217] I find that there are three real and substantial possibilities as to the plaintiff's future earnings. Each involves a three-year attempt to return to work at Telus on the career path the plaintiff was enjoying before the accident.
- [218] The first possibility is that the attempt is successful. I have assigned 75% to this possibility, having regard to the factors I have previously set forth, including the support of the plaintiff's spouse, her family, and her goal-oriented personality.

- [219] The second possibility is that the plaintiff will be able to continue to work at Telus but is not able to perform so that she advances beyond the level of a Manager-Field Support (or another position of the same level). I have assigned a 15% to this possibility, having regard to the fact that the plaintiff had been able to perform well as a Manager-Field Support for three years after the accident but without the help of psychotherapy to address her SSD.
- [220] The third possibility is that the plaintiff will not be able to perform at Telus at the level she had in the past and will not be able to work at Telus after the three-year attempt. I also find that she will also not be employable anywhere else.
- [221] In this regard, I realize that much is not known about mental disorders and even with the best treatment, the treatment may not be successful. I have assigned 10% to this possibility.
- [222] Before analyzing the three possibilities, I will make two adjustments to plaintiff's counsel's calculation of uninjured and injured income earning streams.
- [223] The first adjustment is a 25% reduction of the total uninjured income earning stream of \$6,016,041, as calculated by plaintiff's counsel to account for the vagaries I describe in paragraph 206 above. I will reduce the projected uninjured income earning stream by 25% to account for such vagaries. The result is \$4,512,030 ($\$6,016,041 \times 75\%$).
- [224] The second adjustment is to account for earnings over three years as part of a graduated return to work. I will use one-half of an annual base salary of \$90,000 or \$45,000 (the plaintiff's base salary in 2019 was \$87,500). For three years, the total is \$135,000. Accordingly, the total injured income earning stream is \$2,809,260 ($\$2,674,260 + \$135,000$).
- [225] The difference between the uninjured income earning stream and the injured income earning stream is now \$1,702,770 ($\$4,512,030 - \$2,809,260$).
- [226] I did not make a 25% reduction to the injured income earning stream because at the lower income, the plaintiff is far less likely to be affected and, if affected, would be in a strong position to find a position that paid a similar amount.
- [227] For each of the three scenarios, the plaintiff will lose \$105,000 a year compared to her actual income as part of a graduated return to work. In this regard, I have used a base salary of \$120,000 and find that the plaintiff would have received \$30,000, but for the accident, in a bonus and a restricted stock unit award for a total annual remuneration of \$150,000. The \$120,000 base salary reflects a progression in base salary towards a "high end manager". The plaintiff's future loss of earning capacity each year is \$105,000 ($\$150,000 - \$45,000$). The total loss for the three years is \$315,000 ($\$105,000/\text{year} \times 3 \text{ years}$).
- [228] Under the first scenario, the plaintiff must also be compensated for the fact that the plaintiff's career path was interrupted as a result of the accident by approximately three years. As a consequence, she will not otherwise enjoy what would have been three years of higher earnings as a vice-president of \$384,000 annually (commonly consisting of, \$180,000 base salary, a 30% performance bonus, and \$150,000 in restricted stock units).

- [229] Having regard to actuarial and labour market contingencies, the general 25% reduction that I have previously used in relation to vagaries, and the fact that the plaintiff will receive income as part of a graduated return to work, I assess the present value to the foregone lost high wage income to be \$600,000.
- [230] In sum, the amount I assess as the loss related to the first possibility to be \$686,250 $((\$315,000 + \$600,000) \times 75\%)$.
- [231] With respect to the loss related to the second possibility, I assess it to be \$302,655 $((\$315,000 + \$1,702,700) \times 15\%)$.
- [232] With respect to the loss related to the third possibility, I assess it to be \$437,700 $((\$4,512,030 - \$135,000) \times 10\%)$.
- [233] The future cannot be measured with mathematical certitude. The use of mathematical scenarios only help to assess damages within a reasonable framework. Within this framework, there are various assumptions as to possibilities and probabilities that are left by the law for the trial judge to forecast, foresee, and foretell. "The assessment of damages is a matter of judgment, not calculation": Rosvold at para. 12.
- [234] In sum, I assess that the appropriate award for future loss of earning capacity to be \$1,426,605 $(\$686,250 + \$302,655 + \$437,700)$, rounded \$1,426,600.
- d) Cost of Future Care
- [235] In *Johal v. Meyede*, 2014 BCCA 509, our Court of Appeal stated that in considering costs of future care, the trial judge should ensure (at para. 44):
- an "evidentiary link between the caregiver's assessment of pain or disability and the recommended care";
 - "regard for the real and substantial possibility that the expense will be incurred" and that "an allowance for the contingency that the cost may not be incurred"; and
 - "the specific amount awarded for each item claimed" is identified.
- [236] In *Paur v. Province Health Care*, 2017 BCCA 161, Justice Newbury, writing for our Court of Appeal, stated:
- [109] The law is clear that in order to be included in an award of damages, an item of future care must be medically necessary. In *Tsalamandris v. McLeod* 2012 BCCA 239, this court reviewed the applicable principles:

The test for assessing future care costs is well-settled: the test is whether the costs are reasonable and whether the items are medically necessary: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 [S.C.] at page 78; affirmed (1987), 49 B.C.L.R. (2d) 99 (C.A.):

3. The primary emphasis in assessing damages for a serious injury is provision of adequate future care. The award for future care is based on what is reasonably necessary to promote the mental and physical health of the plaintiff.

McLachlin J., as she then was, then went on to state what has become the frequently cited formulation of the "test" for future care awards at page 84:

The test for determining the appropriate award under the heading of cost of future care, it may be inferred, is an objective one based on medical evidence.

These authorities establish (1) that there must be a medical justification for claims for cost of future care; and (2) that the claims must be reasonable. [At paras. 62-3.]

While there must be some evidentiary link between a medical expert's assessment of disability and the care recommended, it is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: *Gregory v. Insurance Corporation of British Columbia* 2011 BCCA 144 at para. 39; *Aberdeen v. Zanatta* 2008 BCCA 420 at paras. 43, 63.

[237] The defendants submit that the plaintiff should receive no award for the cost of future care. In their written submissions, they state:

The defendants resist an award for future care as the plaintiff has had ample passive treatment beyond what was medically justified. She needs to employ her 'will-power' to get back to exposing herself to normal stimuli and to stop living in a bubble.

[238] The plaintiff submits that the appropriate award for the cost of future care is \$285,000.

[239] The starting point for the plaintiff's basis for the award she seeks is the table that follows prepared by Mr. Hosking. Mr. Hosking is a physiotherapist with a specialty in functional capacity evaluation and was qualified to provide opinion evidence with respect to physiotherapy, including functional capacity evaluation and the cost of future care.

[240] Mr. Hosking prepared the following table:

Product or Service Group

One Time Cost - Lower Range

One Time Cost - Upper Range

Ongoing Costs - Lower Range (cost range/yr)

Ongoing Costs - Upper Range (cost range/yr)

Frequency/

Replacement

Age of

Commencement

Botox

\$1,902.50

\$16,430.00

5 times per year

31

Neuro-Optometry

\$2,040.00

\$2,410.00

10 - 12 sessions

31

Physiotherapy

\$2,560.00

\$3,070.00

30 - 36 sessions

31

Kinesiology

\$1,555.00

\$1,903.00

26 - 32 sessions

31

Occupational Therapy

\$2,990.00

\$2,990.00

12 months

31

Psychologist (Sean Pritchard)

\$1,080.00

\$1,350.00

8 - 10 sessions

31

Driving training (contingency)

\$0.00

\$1,195.00

Once

unknown

Gabapentin/Lyrica (contingency)

\$0.00

\$113.15

Daily

unknown

Amitriptyline/Nortriptyline

(contingency)

\$0.00

\$153.30

Daily

unknown

Topiramate

\$0.00

\$153.30

Daily

unknown

Vacuum

\$399.99

\$399.99

Once

31

Toilet brush, long handle

\$20.59

\$20.59

Yearly

31

Duster extended

\$9.99

\$9.99

Yearly

31

Handy Scrub Telescopic

\$29.09

\$29.09

Yearly

31

Swiffer mop

\$29.99

\$29.99

Yearly

31

Sit to stand desk

\$187.20

\$259.00

Every 5 years

31

Ergonomic chair

\$59.80

\$95.00

Yearly

31

Telephone headset

\$36.99

\$36.99

Yearly

31

Document holders

\$24.99

\$24.99

Yearly

31

Childcare (contingency)

\$0.00

\$65,520.00

Estimate 7 years

unknown

Regular household cleaning

\$1,170.00

\$1,170.00

Once/week

31

Heavier household cleaning

\$600.00

\$600.00

8 hours/year

31

Gym membership

\$406.98

\$406.98

Yearly

31

Vocational Consultation (contingency)

\$2,400.00

\$2,400.00

Estimate 15 hours

31

Totals

\$13,024.99

\$81,237.99

\$4,478.12

\$19,532.37

[241] The plaintiff is not seeking to be compensated for a yearly \$406.98 gym membership.

[242] The plaintiff submits that the other items claimed when given present values results in a potential cost of future care of \$379,447. The plaintiff then reduces this amount by 25% to take into account that "there is some possibility that [the plaintiff's] symptoms and functions may improve".

[243] I have given little weight to Mr. Hosking's cost of care report for several reasons. First, Mr. Hosking relied on the reports of Dr. Wee and Dr. Cameron, and apparently proceeded on the basis that the plaintiff was suffering from concussive symptoms. At the time he prepared his report, he did not have the benefit of Dr. Fung's diagnosis of the plaintiff's SSD.

[244] Even with the reports of Dr. Wee and Dr. Cameron in hand, Mr. Hosking did not follow the general recommendation for a two-day test where cognitive issues are involved. In this regard, in cross-examination, he testified:

Q Okay. So if a functional capacity evaluation is used to evaluate cognitive issues as well, two days is generally recommended, but you did a one-day, which is more useful, you would think, for physical issues?

A Well, practicality and logistics often -- often prevail, and so, yes, it's -- it's more traditional to -- it's more conventional to complete an FCE in one day, typically for sort of primarily physical functional limitations, and it's preferable to have a two-day evaluation for cognitive. But in this case, yes, I completed it in one day.

[245] Second, Mr. Hosking relied, in large measure, on the plaintiff's description. In this regard, Mr. Hosking, in cross-examination, testified:

Q Okay, so let's put it a different way. You say that Ms. Dhanji has barriers to being competitively employed and those barriers -- you know, they're threefold, her physical issues, psychosocial issues and cognitive issues. With respect to the functional capacity evaluation, it's best for determining what physical limitation she may have, if any, correct?

A Yes, yes. That's the primary objective and that's the -- the most useful information that will be gleaned from that -- from that evaluation, yes.

Q Okay, and now at page 20 of your report, there's -- there's a table called "Self-assessment of abilities of limitations." When I look at the right-hand column where it says "Current ability" -

A Yes.

Q -- some of them are incomplete, but some of these items are filled in. Is this information from Ms. Dhanji or is this information a combination of her reports plus your -- your observations or testing in any way?

A No, this is purely subjective -- subjective reports from her.

[246] Where a person has SSD, the person's description of symptoms and abilities is suspect and, therefore, reliability is questionable.

[247] Third, Mr. Hosking used a template to frame much of his report. I am not critical that Mr. Hosking used a template. That said, if a template is used, it is imperative that care be taken to avoid errors based on the description of previous clients.

[248] In his report, Mr. Hosking refers "[t]he findings of a home visit that [he had] completed" as one of his sources of information upon which his report was based.

[249] In fact, Mr. Hosking never visited the plaintiff's home. In cross-examination, he testified:

Q Okay, and with respect to lifting, would that involve tasks such as laundry?

A Yes. So certainly in considering strength capacity, we think of lifting, carrying and pushing and pulling, so really any -- any whole body movement that involves use of force. So she's using a heavier vacuum, for instance, that involves a component of lifting and some pushing and pulling, lifting, carrying groceries. Lifting and preparing foods, dishes, heavier dishes can -- can be in the -- in the range of 10 to 15 pounds or more.

Q Okay. And, again, you did not make a home visit in Ms. Dhanji's case so you didn't observe her to do these various household tasks, correct?

A That's correct, yes.

Q Did you ask her what sort of vacuum she has at home?

A I don't believe I did ask her specifically what sort of vacuum. She just said that she's not able to use whatever she has.

[250] For most of the items listed on Mr. Hosking's chart, there is no requisite evidentiary link between a medical assessment and the recommended care. In this regard, I approach matters to address primarily the plaintiff's SSD which, in turn, causes the plaintiff to perceive and experience greater pain and discomfort regarding the soft tissue injury to her shoulders, upper back, and neck, and associated headaches.

[251] Before reviewing Mr. Hosking's chart in detail, I will first say that I reject the defendants' submission that the plaintiff simply "needs to employ her 'will-power' to get back to exposing herself to normal stimuli and stop living in a bubble".

[252] The plaintiff suffered a mental injury, SSD, as a result of the accident. A mental injury is not necessarily as easily addressed as the defendants suggest. Dr. Fung opines that the plaintiff's SSD, even with appropriate treatment, "full recovery is unlikely" and it will "wax and wane".

[253] Of the items and services Mr. Hosking lists in his chart, I find that only physiotherapy and sessions with a psychologist are medically justified and further, that there is a real and substantial possibility that the associated expenses will be incurred.

[254] Psychological treatment is necessary to treat the plaintiff's SSD. As noted, a mental injury may be difficult to treat. I will award 20 sessions at \$135 per session, for a total of \$2,700. I recognize that the plaintiff may also see a psychiatrist (such services are currently covered by Medical Services Plan).

[255] The plaintiff's soft tissue injuries justify the need for physiotherapy. I will award 36 sessions for a total of \$3,070. One session a month for three years is reasonable to help treat the plaintiff's soft tissue injuries in conjunction with regular exercise and directed exercises the plaintiff may undertake.

[256] With respect to the medications, I am not satisfied that the plaintiff will actually take the medications. She has been reluctant to take such medications in the past.

[257] I find that Botox injections, neuro-optometry, kinesiology, occupational therapy, and "driving training" are not medically justified. They reflect the plaintiff's SSD. As Dr. Fung states, the plaintiff's symptoms have been "over-medicalized". The plaintiff's physical injuries alone do not provide the requisite evidentiary link.

- [258] The assorted items on Mr. Hosking's chart listed from a "vacuum" to and including "document holders" do not have the requisite evidentiary link. For each of the items, I find that if the accident had not occurred, there is a real and substantial possibility that each would have been purchased by the plaintiff (or her employer) in the normal course of events.
- [259] With respect to childcare, I also find that there is not the requisite evidentiary link. If the accident had not occurred, I find that the plaintiff would have been working at Telus at the time she may have become a mother, and like many working mothers, would have incurred significant childcare expenses.
- [260] With respect to the regular household cleaning, I find that such an activity is one of the many types of activities that may be encouraged in the treatment of the plaintiff's SSD. For the heavier cleaning chores, I find that, without the accident, the plaintiff's spouse would have undertaken such chores. The plaintiff and her spouse have a supportive marriage, the plaintiff's spouse is physically able and, as noted, the plaintiff is of slender build and is 5'2" tall.
- [261] In sum, the plaintiff is awarded \$5,770 (\$2,700 + \$3,070) for the cost of future care.
- e) Special Damages
- [262] In *MacIntosh v. Davison*, 2013 BCSC 2264, Justice Davies succinctly summarized the guiding principles for an award of special damages as follows:
- [128] In summary, I am satisfied that when assessing special damages the standard is the reasonableness of the expense claimed in the context of the injuries suffered. Medical justification for any expense is a factor to be considered, but not the only one. Subjective factors can also be considered including whether the plaintiff believed the treatments were reasonably necessary.
- [263] The defendants noted in particular Justice Melnick's reasons in *Costello v. Rafique*, 2010 BCSC 441 where he stated:
- [21] I have no doubt that Mr. Costello has relied excessively on the relief he believes he experiences from passive therapy. To date he has apparently not been dissuaded from that belief by any member of the medical profession. Because he has relied for years on such passive therapy he may have just continued with his past practice. That said, there is a limit to which a defendant should be responsible for treatments where the court is not satisfied they were medically required, even if no one suggested otherwise. A defendant will not be liable for excessive or unnecessary treatments. In all the circumstances, I award Mr. Costello \$5,000 for compensation for physiotherapy and massage therapy. In my view this amount, approximately 35% of his claim, is reasonable in the face of the nature and extent of his injuries from the motor vehicle accident and likely even somewhat generous.

- [264] The plaintiff claims \$39,519 in special damages. At trial, the plaintiff provided a schedule of special damages. I have attached the plaintiff's schedule to these reasons as Schedule "A".
- [265] During submissions, I understood the plaintiff to not be asking to be compensated for items 18(m), 18(q), 18(u), 18(v), 18(w), and 18(y). The plaintiff's revised claim is, as noted, \$39,519.
- [266] The defendants, in their written submissions, state:
440. The defendants are of the position that \$7,274.40 is appropriate for the plaintiff's special damages claim. This is to compensate her for one year of treatment at the Arbutus Club and the Anderson Performance Clinic following the Accident. The remainder of the treatments were pursued by the plaintiff without medical justification. The defendants are of the position that the Botox and cortisone treatments were not necessary and there was no basis for same. Under the circumstances, the defendants are of the position that half of the amount claimed by the plaintiff would be fair at \$1,815.93.
- [267] Accordingly, the defendants say that the appropriate award for special damages is \$9,090 ($\$7,274 + \$1,816$). The \$1,816 is one-half of \$3,631 shown as prescriptions (Botox and cortisone) under item AB of the plaintiff's schedule. The plaintiff was not charged for Dr. Dhawan's fees for the injection services related to the Botox and cortisone treatments.
- [268] I will allow the full amount of the Botox (and cortisone) of \$3,631. Dr. Dhawan administered the treatments. I am satisfied that he would not have done so unless he was of the opinion, at the time, that the injections were medically justified.
- [269] I will also allow, in full, the \$2,300 for the Advanced Concussion Clinic sessions, plus \$24 in mileage for the plaintiff to travel to and from the clinic. It was reasonable for the plaintiff to have thought she had suffered a concussion and to seek treatment and support.
- [270] I will also allow, in full, the \$1,479 for the NUCCA Health Clinic (a type of chiropractic treatment for the neck) plus \$57 in mileage (\$1,536). Dr. Alex was aware that the plaintiff was going to seek such treatment and did not dissuade her from doing so.
- [271] The balance of the plaintiff's claim is \$32,028 ($\$39,519 - (\$3,631 + \$2,324 + \$1,536)$).
- [272] I will not allow the \$846.72 claimed in relation to the ayurveda treatment. There is not "sufficiently clear, convincing and cogent" evidence to show medical justification. The plaintiff's belief that such treatment might afford relief is not sufficient to base an award where such treatment is not generally medically recognized.
- [273] The balance of the claim is \$31,181 ($\$32,028 - \$847$), which represents almost entirely the costs of massage, physiotherapy, and some chiropractic treatments.
- [274] I recognize that a person with SSD will perceive and experience greater pain. That said, SSD does not mean that the person is not rational. Again, there is not "sufficiently clear, convincing and cogent" evidence to establish the full amount of the plaintiff's claim.

[275] I will follow Melnick J.'s approach in Costello other than I will award 50% of the \$31,181, having regard to the plaintiff's SSD. The result is \$15,591 ($\$31,181 \div 2$).

[276] In sum, the total award for special damages is \$23,082 ($\$3,631 + \$2,324 + \$1,536 + \$15,591$).

13. conclusion

[277] The Court awards the plaintiff the following damages:

a) Non-pecuniary damages:

\$120,000

b) Past loss of earning capacity:

\$91,106

c) Future loss of earning capacity:

\$1,426,600

d) Cost of future care:

\$5,770

e) Special damages:

\$23,082

Total:

\$1,666,558

14. costs

[278] If the parties wish to speak to costs, I ask that they, within 90 days of this judgment, arrange through Supreme Court Scheduling a 9 a.m. 55-minute hearing before me.

"Funt J."

Schedule "A"

The Plaintiff's Schedule of Special Damages

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