

CANADA / JUDGMENT

## Frazer v. Allan

2025 BCSC 482

### COURT

Supreme Court of British Columbia

### DECIDED

20 February 2025

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2025 BCSC 482 Frazer v. Allan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Frazer v. Allan,

2025 BCSC 482

Date: 20250220

Docket: M193065

Registry: Vancouver

Between:

Tracy Ellen Frazer

Plaintiff

And

Owen Alexander Allan and Tac Kun Kwon

Defendants

- and -

Docket: M194494

Registry: Vancouver

Between:

Tracy Ellen Frazer

Plaintiff

And

Angelique Di Fulvio and Myles McCarthy

Defendants

Before: The Honourable Justice Veenstra

Oral Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.

February 3-7 and 10-12, 2025

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2025

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- [1] THE COURT: The plaintiff seeks compensation for injuries suffered in two motor vehicle accidents that occurred on October 4, 2017 (the "2017 MVA") and November 29, 2018 (the "2018 MVA"), collectively the "Subject Accidents".
- [2] Liability is admitted. As a result, the sole issue before the Court is the assessment of damages. I understand that I am not required to allocate damages as between the parties.
- [3] Special damages are agreed. The contested claims are for non-pecuniary damages, loss of future earning capacity, cost of future care, and loss of housekeeping capacity. No claim for past loss of earning capacity has been advanced.

## Facts

### The Plaintiff's Background

- [4] The plaintiff was born and grew up in Langley. After graduating from high school in the early 1990s, she worked as an office assistant and as a waitress, and also spent a year living and working in various parts of Europe. Later in the 1990s, she started taking some general-studies courses at Langara College, and then from 1999 to 2001 she obtained a diploma in marketing management at BCIT.
- [5] Medically, the plaintiff acknowledged having had an issue with migraines when she was about 19 or 20 years of age, then had no more than three from her early 20s to her mid-30s, then none at all for a period of years.
- [6] The plaintiff also had issues with depression. While the records do not indicate exactly when she began treatment, it was clear that by the time of the Subject Accidents, she had been managing this condition with antidepressant medications for many years.
- [7] After completing her BCIT program, the plaintiff worked for approximately eight years in various marketing roles with a professional association. During that time, she was in a relationship. With her then partner, she had a son in 2006. Her son was born very premature, and there were some very challenging times as they dealt with numerous medical challenges in her son's first few months and years. She and her then partner separated in 2008.
- [8] During this time, the plaintiff was drinking heavily. She attributes the loss of her job in 2009 to alcoholism that left her incapable of doing her job. She returned to BCIT for an evening program in graphic design. During that program, she found work with another association, but again lost that position after about a year.

- [9] Some of the issues in this case turn on injuries suffered in two motor vehicle accidents that predate the Subject Accidents. In October 2010, the plaintiff was in a vehicle that was rear-ended. She suffered injuries to her neck and shoulders with symptoms including neck and shoulder pain as well as headaches.
- [10] In May 2011, the plaintiff joined Alcoholics Anonymous ("AA"). Although she described some struggles in her first few months, she identifies September 21, 2011, as her sobriety date. She immersed herself in the AA community. She says that she did so both in order to maintain her own sobriety, but also to be able to pass along what she had learned to others. Initially, she would attend meetings five to seven days a week. She would participate in round-ups (or conferences), sponsor other women, and host a step group in her home.
- [11] In the spring of 2012, the plaintiff found a new position at a real estate company. She was initially hired as a graphic designer, then ended up covering a maternity leave for the company's marketing director. She said that the company kept her on after the maternity leave she was covering ended in the spring of 2013 to facilitate her looking for work.
- [12] On April 17, 2012, the plaintiff was again in a vehicle that was rear-ended. She again suffered neck and shoulder pain and headaches. She saw her family doctor, Dr. Naiker, on both April 20 and April 27, 2012. The clinical notes commented, under the "Subjective" heading, that "pt came in today as previously headaches once/week and now having daily headaches". Under the "Assessment" heading, Dr. Naiker wrote both "cervicogenic headaches" and "migraines". The plaintiff, when asked about this note, was quite confident that the word "migraine" was not mentioned during this appointment, and that it would have made an impression on her if it had been, given her experiences when she was around 19 or 20 years of age.
- [13] The next note in Dr. Naiker's file is dated November 2, 2012, over six months later. It appears that the appointment related to the preparation of a "CL19" report for ICBC. Dr. Naiker's notes include the following:

Pt came in today as previously headaches once/week

Some relief with advil

Duration - until pt goes to sleep

Aggravated by prolonged sitting/lifting heavy objects

Yrs ago had migraine - 19 yr

Last episode at 25 yrs prior to mva

Shoulder and bilateral neck pain

Aggravated by prolonged sitting/carrying objects/overhead activities

Improves with heat / massage / stretch

Occasional lower back

Nil radiation

Relieved by stretch

### **Aggravated by prolonged laying down**

- [14] Dr. Naiker prepared a medicolegal report in July 2013 regarding the plaintiff's injuries from the 2010 and 2012 accidents. In that report, Dr. Naiker noted having been advised the plaintiff's "last episode of migraine was at the age of 25 years and she had been migraine free since prior to the" 2010 and 2012 accidents. These comments were repeated in Dr. Naiker's discussion of prognosis. The word "migraine" did not otherwise appear in the report.
- [15] I note that this report was not introduced as an expert report. The actual diagnoses and prognoses in it are not admissible for their truth: *Seaman v. Crook*, 2003 BCSC 464 at para. 14. It is admissible only for purposes of reflecting the plaintiff's statements to Dr. Naiker about her history of migraines. I note that the report appears to simply copy what was recorded in the November 2, 2012 clinical notes.
- [16] I turn back to the plaintiff's employment history. In April 2013, the plaintiff was hired as Manager, Marketing & Graphic Design for a company, the name of which eventually became "TDZ Brandz", that owned two restaurant chains. The chain she was responsible for was Fatburger, and her employer owned the franchise rights for Canada. During her approximately eight years with the company, it grew from 23 or 24 restaurants to over 50. Initially, her job entailed working with the marketing coordinator on matters including planning store décor, planning out menus, working with franchisees, and managing a marketing budget, including the placement of advertising and other marketing work.
- [17] In December 2013, the plaintiff was promoted to be Fatburger's Director, Marketing and Creative Services. Her team gradually increased through the addition of two graphic designers.
- [18] The plaintiff had met her future husband, Scott Walker, during her early time in AA. Both had become sober in 2011. They had known each other for three years before they began dating in about 2014. Their activities together included hiking, cycling, camping, and other outdoor activities like go-carting. Both liked to do road trips, and they frequently visited family members, including in Oregon and on the Sunshine Coast. Both continued to be committed supporters of AA programs, attending meetings and related activities multiple nights a week. In about 2015, they began living together.

- [19] The plaintiff also became involved in other activities like running and working out. Although Mr. Walker was not a runner, he said that he and the plaintiff would go to the gym together to work out regularly. The plaintiff began running regularly with friends, including one of her school friends, Ms. Jones, who described regularly completing a 5 km run with the plaintiff within a half-hour.
- [20] The first part of 2017 was an eventful time for the plaintiff. She and Mr. Walker were married on April 22, 2017, and honeymooned in Thailand. As well, the plaintiff and Ms. Jones took part in two "adventure" races. One was called the "Spartan" and involved such things as running uphill in the snow on Mount Seymour, carrying a sandbag, crawling under barbed wire, and lifting giant tires. A second adventure race, called the "Rugged Maniac", had similarly challenging tasks. The plaintiff and Ms. Jones discussed doing the same two races again the following year. Ms. Jones moved to the Okanagan Valley in August 2017, but remained in regular contact with the plaintiff.
- [21] The plaintiff's evidence was that leading up to October 2017, her physical symptoms from the 2010 and 2012 accidents had mostly resolved. She said that if she was feeling stiff or sore, she would go to massage therapy, but that in general, the injuries she had from 2010 and 2012 had resolved to the point that they were not a daily concern and did not prevent her from a high level of physical activity. There was a clinic, known as "Back to Wellness", located in the same building as the Fatburger office. Her recollection was that by 2017, she went to massage therapy once a month or less.
- [22] The plaintiff was cross-examined on records from Back to Wellness on the three massage therapy appointments she had from January through September of 2017. On January 13, 2017, she reported complaints of pain in her neck, shoulders, and left hip, as well as headaches in her forehead and temples. On February 8, 2017, she referenced her upper back. The therapist noted that these were "aggravated by sitting at computer desk." At both sessions, there was reference to prior motor vehicle accidents. At the next appointment, on September 13, 2017, the clinical notes reference "usual shoulder/neck stiffness", that "low back is a bit sore right now", and "gets HAs in temple area sometimes".
- [23] Three medical records from Dr. Naiker's office, dated within the months leading up to the 2017 MVA, were also referenced in cross-examination. On August 10, 2017, the plaintiff saw Dr. Zheng, who was presumably covering for Dr. Naiker. She reported that she had been on Celexa, an antidepressant, for a long time, but that she was feeling "unmotivated" and "some anhedonia." Dr. Zheng administered two questionnaires, one to screen for depression and the other to screen for anxiety. Dr. Zheng also arranged for some blood tests, referred the plaintiff to the "BounceBack" program, and suggested that the plaintiff transition from Celexa to a different medication, Trintellix.

- [24] Dr. Naiker's files include a letter dated September 8, 2017, from BounceBack to Dr. Zheng. The letter described the BounceBack program as involving workbooks that a patient can work through with the assistance of telephone coaching and noted that the first two workbooks had been sent to the plaintiff. The letter noted as well that screening tests administered over the phone indicated moderate symptoms of both depression and anxiety.
- [25] Finally, the plaintiff saw Dr. Zheng again on September 15, 2017. At the appointment, the plaintiff reported positively on the transition from Celexa to Trintellix. She confirmed that she was doing well and that her husband believed she was a lot better. Dr. Zheng provided instructions for a continued transition to Trintellix.
- [26] Overall, the plaintiff described her mental health from 2015 to 2017 as good. She described this as a great time in her life. She was sober, she was in love, and her son was doing well. She felt that through medication and exercise, she was in good control of her depression; and notwithstanding the screening results recorded by Dr. Zheng and by the BounceBack program in mid-2017, she did not consider herself to have had any significant issues with anxiety.
- [27] The plaintiff reported that in 2017, prior to the 2017 MVA, she would go to the gym or lift weights at least three and sometimes five days a week. She had hired a personal trainer who she would meet with once a week and who had developed routines that she followed when she was working out on her own. She and her husband regularly went on road trips with regular destinations, including Oregon, Whistler, and Powell River. They did a lot of camping and hiking and also did longer trips like their honeymoon in Thailand and various trips to Mexico. The plaintiff was also running regularly. She said that she also contributed to household chores, including taking turns making dinner, cleaning up after meals, and sharing in chores inside the house.
- [28] The plaintiff found her work at Fatburger rewarding and felt that she was learning extensively as she went along. Socially, she and her husband were involved in AA, which would include various meetings, having people over for meals, and going for coffee. In 2017, the plaintiff was sponsoring 10 women in the AA program. She also maintained friendships with close friends from high school whom she would meet for dinners.

## The 2017 MVA

- [29] On the evening of October 4, 2017, the plaintiff was driving home from work along the Lougheed Highway in bumper-to-bumper traffic. At one point, she came to a stop and was hit from behind. Her vehicle cost \$6,745 to repair; while the vehicle that struck her was undrivable.

- [30] The plaintiff took the next day off work. She reported her shoulders, neck, and head as being sore and that she had a headache and felt a bit dizzy and nauseous. She returned to work the next day and was able to continue with her job. She also continued with her AA commitments.
- [31] She started massage therapy and physiotherapy. Over the next several months, she attended these treatments regularly. She reduced the frequency of her regular gym training sessions, reduced the weights she was working with and also generally reduced her exercise as a result of the pain.
- [32] Ms. Jones recalled that the plaintiff visited her in the Okanagan in the first part of 2018, that they went for a hike, and that the plaintiff appeared to her to tire easily and to be unable to go as hard as they would have previously.
- [33] The plaintiff reported that as she got towards the second half of 2018, her symptoms improved. She was able to start increasing the weights in her workouts. She said that by September 2018, she was feeling about 75% better with respect to her injuries from the 2017 MVA. She said that she still had neck and shoulder pain as well as headaches, but not to the severity they had been in the first few months after the 2017 MVA. She felt that she had gotten through the worst of it.
- [34] In the fall of 2018, the plaintiff became aware of a call for volunteers at a local community centre. It was an important place for her as it was a place to which she had taken her son for programs and where she had attended her first AA meeting. The centre was looking for someone with marketing experience to join their board. The plaintiff joined the board.

## The 2018 MVA

- [35] On the morning of Thursday, November 29, 2018, the plaintiff was driving to work. She stopped at a red light. Two vehicles collided in the intersection in front of her, and one of those vehicles, a truck, ended up crashing into the front of the plaintiff's vehicle. Her airbags deployed. Her vehicle was a write-off.
- [36] The plaintiff's evidence was that she saw the truck coming at her, but then the next thing she knew, everything had happened. She did not remember the airbags deploying and said that she had a blank for a period of time. She said that despite having been rear-ended three times, this felt different than she had ever felt. She was tearful and confused. At some point, she realized that she should call her work to let them know she would be delayed. She recalled being very emotional on that call, which was different from her usual work behaviour. She described her thinking at the time as being very foggy. She said that the left side of her face was sore, as were her head and neck.

- [37] The plaintiff did not recall at trial how she got out of her vehicle but accepted the accuracy of evidence she gave on discovery in 2021 that firefighters had helped her out of the car. She recalled that she was taken to see the ambulance paramedics, who gave her the option of going to hospital or going immediately to see her family doctor. She chose the latter. She called her husband, who left his work to pick her up and took her to see her doctor.
- [38] Mr. Walker described arriving at the scene and finding the plaintiff still in the back of the ambulance. He described the plaintiff as crying and emotional and not doing well. He took her to her doctor's office, and recalled that on the way there, the plaintiff wanted to just close her eyes and relax.
- [39] Dr. Naiker's notes of seeing the plaintiff that day included the following as "current symptoms":
- Left side of face pain; Neck and shoulder pain flared up; aggravating factors unknown; relieved by unknown; headache assoc with neck pain 5/10; nil assoc. visual disturbances, nausea, vomit
- Feel groggy, nil light sensitivity, nil noise sensitivity; slightly dizzy; feel anxious
- [40] Dr. Naiker's summary of what the plaintiff reported about the accident included a note "nil loc".
- [41] With respect to "Plan", Dr. Naiker noted "Physio, massage; stretches; analgesic; hold cold compressor".
- [42] The plaintiff gave evidence as to injuries that were new after the 2018 MVA. She had migraines, pain in her jaw and her left hip. She was sensitive to noise and sound, sensitive to different visual movements, and had memory issues, including brain fog as well as blanking on words at times or having trouble remembering details when a lot is going on. When she was tired, her vision would sometimes get blurry. She had vestibular issues, which would make her nauseous and require her to find a quiet, dark place. When she is trying to work on a computer and scrolls through a document too quickly, it will make her nauseous, as will pop-up ads or other types of extra visual stimulus. If there is music and someone is trying to speak with her at the same time, then her brain "hurts."

### After the 2018 MVA

- [43] The plaintiff tried to return to work the following Monday, December 3. She was at work for an hour or two, but said she "just couldn't do it". She went back to see her doctor on Wednesday, December 5, and ended up off work for that week. Eventually, she was assigned an occupational therapist, who worked with her to develop a return-to-work schedule. During December 2018, some of her work hours were performed remotely, and some were in the office. Records from Fatburger indicate that she worked 76.5 of the 168 hours that she would ordinarily have worked in December 2018.

[44] The plaintiff described this as very difficult for her because she was very career-motivated and very much wanted to continue working. She felt she had worked very hard to get to the point she was at. However, she was only able to work for limited hours because of her injuries.

[45] Dr. Naiker's clinical notes for December 17, 2018, record under "Current Symptoms":

Took 1 week off from work

2nd week went to back work for 2 hrs - able to manage 1 hr computer and 1 hr admin

Pt reports when tried doing > 1 hr of work on computer - triggered headaches, nausea, vertigo

Pt feels like it takes longer to process things

Nil vertigo/nausea

Feels groggy

Pt has not been to work since then

When rest symptoms improve

Mood low

Still crying for no reason

Sleep interrupted

Up at night for couple of hours

Nil improvements with melaotinin

Nil suicidal ideation

Feels anxious

[Emphasis added.]

[46] The plaintiff was asked in cross-examination about the seemingly contradictory references to nausea and vertigo. Her recollection was that at this time, she had headaches and also nausea and vertigo, as well as sensitivity to light and sound.

[47] Dr. Naiker was not a witness, and only a few of her clinical notes were in evidence. The notes were recorded electronically rather than in handwriting. I noted significant similarity between the format and contents of notes with respect to visits following motor vehicle accidents, and it seems likely that a portion of her notes on each occasion reflected some sort of checklist that was cut and pasted into her notes. As well, some of the notes of the plaintiff's report of the motor vehicle accidents were so similar as between the first two or three appointments that it seems highly likely that they were simply cut and pasted and annotated or edited where necessary.

- [48] The plaintiff described her symptoms in the weeks following the 2018 MVA as including pain in her jaw, neck, shoulders, and left hip. She had headaches that were severe and continual. Although she did not initially identify the more severe headaches as migraines, they were subsequently diagnosed as such. She had symptoms of vertigo. She found that noise or lights or being on a computer would hurt her brain, and she would have to spend a lot of time in a dark room. She described herself as emotional and moody.
- [49] The plaintiff had regular sessions with a registered clinical counsellor over the first seven months of 2019. She said that this helped her to process what had happened and her emotions. Eventually, she found that it led to too much wallowing or feeling sorry for herself and led her to focus too much on her loss, and so she did not continue with that counselling after July 2019.
- [50] The plaintiff had regular massage therapy sessions after the 2018 MVA. She was also referred to an occupational therapist. In a February 2019 report to ICBC, one occupational therapist reported having administered a Montreal Cognitive Assessment ("MoCA") screening test and that the plaintiff had scored 26/30.
- [51] The plaintiff's employer made a decision to continue paying her regular salary, even though she was not working full-time hours. Her hours worked each month were recorded, and that record was included in the documents. It shows the plaintiff gradually increasing her work hours over the course of 2019. She worked between 45-58% of regular hours in the first three months, then 60-69% of regular hours from March through June, then about 85% of regular hours in the summer of 2019, then 91-92% in September and October, then over 98% of regular hours beginning in November 2019. By January 2020, she was back to pretty much full-time hours.
- [52] The plaintiff said that she found everything at work was different and harder after the 2018 MVA. There was a breadth of things that she had to be on top of, and she was not able to do it as well. She had an owner who changed things frequently, which had never been an issue for her previously, but she found it difficult to adapt and that things would get missed sometimes. This caused friction at work.
- [53] Over the course of 2019, the plaintiff struggled to return to some of her previous activities. She described having gone for a hike with her husband about six months after the 2018 MVA. She said that she was initially doing fine, but that when the trail changed from a nice level gravel path to rocks and things to get around, she had to stop and take a break. She closed her eyes and ended up falling asleep for about half an hour along the side of the trail. Her husband then had to help her get back.
- [54] On August 14, 2019, the plaintiff began a series of treatments with a chiropractor at a concussion clinic. At the end of December 2019, she began active rehabilitation.

- [55] At about the end of 2019 or the beginning of 2020, the plaintiff's job title changed from Director of Marketing to Senior Director of Marketing. She said this was part of a corporate reorganization flowing from changes to the other part of the business, which had a separate restaurant chain. That side formerly had a VP of Marketing who was no longer there, and so everyone who had been Directors of Marketing became Senior Directors of Marketing. The change in job title did not result in a change in salary. Her salary remained at \$100,000 plus a \$7,000 car allowance, plus a discretionary bonus. Her total income in 2017, 2018 and 2019 remained steady at just over \$114,000.
- [56] At the time, she had two graphic designers and a marketing coordinator reporting to her. The plaintiff and her team dealt with the design of new restaurant interiors, advertisement, franchise development, recruitment of new franchisees, limited-time offering promotions, general pricing and packaging, and also gift card programs.
- [57] In early 2020, Fatburger's director of operations had health issues. The plaintiff said that by this point, she had doubts as to whether her current employment was right for her, but in light of her colleague's health, she made a decision to continue with Fatburger for the time being.
- [58] In March 2020, the COVID pandemic began. The plaintiff said that COVID had particularly bad impacts in the restaurant industry. Within a short time, salaries at Fatburger were reduced to 50%, but employees were expected to continue doing the same amount of work. Over the next few months, the salaries gradually moved back upward, going to 75% of original and then 87.5%. However, there was no specific timeline as to when the salaries would return to 100%. Her tax return indicated total income for 2020 of just over \$93,000, which is about \$21,000 less than what she had earned the previous three years.
- [59] It appears that the plaintiff was seen by at least two different treating neurologists: a Dr. Toth in the spring of 2019, and a Dr. Randhawa in the spring of 2020. At some point, she began to receive Botox injections as treatment for migraines. It is not clear exactly when those injections began, although presumably it occurred between her initial consultation with Dr. Randhawa in 2020 and her examination for discovery in August 2021, at which time, as noted below, she discussed the impact of that particular treatment.
- [60] In the fall of 2020, the plaintiff began looking for other job opportunities. She acknowledged in her evidence many reasons for this, including her challenges fulfilling her role at Fatburger, as well as the reduced pay and stress in the workplace due to issues the restaurant industry faced and the health issues her counterpart on the operations side had suffered. The plaintiff said that she was interested in finding a different industry to which her marketing skills might transfer, potentially in a larger, more "corporate" organization. She said that she hoped for a more focused area of responsibility within a larger organization.

- [61] In February 2021, the plaintiff found employment at her current employer, Dexcom. Dexcom makes a continuous glucose monitoring system for people with diabetes. It is a publicly traded company based in California but with international operations. The plaintiff said that she could see within the corporate structure more opportunity for growth and advancement. She still hoped that her condition would gradually improve and saw this as a good environment for her to advance her career.
- [62] It is clear that Dexcom has been growing rapidly. The Court heard from Ms. Struss, who was the first marketing employee at the Burnaby office when she joined in 2017, and Ms. Prpic (who has been the plaintiff's supervisor since the plaintiff joined Dexcom) herself joined Dexcom in 2019. There are now several employees in Dexcom's Burnaby-based marketing group.
- [63] The plaintiff's initial title was Marketing Manager with responsibility for advertising and trade. Initially, she did not have to manage other employees. Her pay was slightly higher than at her previous employment, with a base salary of \$105,000, a structured bonus program with a 15% target each year and retention stock options. The bonus is based on a combination of the employee meeting personal targets and also the overall company performance. The retention stock options are earned each year, then vest over a three-year period, provided the employee remains with the company.
- [64] For the first several months that the plaintiff was at Dexcom, staff worked almost entirely remotely. At some point in late 2021 or early 2022, Mondays became the designated in-office day with all staff there in person and participating in the bulk of their regular meetings. That format remained in place at the time of trial.
- [65] The plaintiff was examined for discovery in August 2021. At that time, she confirmed that her migraines had improved since the 2018 MVA. When asked how much they had improved, she estimated 75%, then went on to explain that rather than having migraines five times a week, she was then experiencing them about twice each week. She said that occasionally she would be migraine-free for a period of time after receiving a Botox injection. She also noted that she had been prescribed a rescue medication that, if taken immediately upon feeling the onset of the migraine, would greatly reduce the pain. She said that if a migraine becomes severe, she would need to rest or be in a dark room, and that typically a migraine would last for the remainder of the day.
- [66] In March 2022, the plaintiff was promoted to Senior Marketing Manager. The plaintiff's salary increased to just under \$127,000, plus eligibility for a bonus of just over \$15,000 and stock options valued at US \$70,000. The plaintiff's evidence was that the promotion was something initiated by her supervisor, Ms. Prpic, who spoke to her about it in advance, rather than something she had applied for.
- [67] The plaintiff continued to be responsible for both advertising and trade. She was responsible for supervising an associate marketing manager who was newer to the field and who the plaintiff trained and mentored. On the advertising side, the plaintiff was responsible for

consumer advertising, including TV, digital, and print. The trade area of the business was still quite new, although it was an area of rapid growth. It focused on introducing the product to pharmacies, promoting the product to pharmacists, and preparing promotional materials for use within pharmacies. It involved quarterly business meetings in Toronto as well as participation in trade shows where the product would be showcased to different pharmacists.

- [68] The plaintiff described a typical Monday in this role as involving a marketing team meeting, then meetings with her associate manager, followed by meetings with others depending on what projects were underway, including typically a meeting with Ms. Prpic. Mondays were generally not a good day for focused work or sending detailed emails. Tuesdays and Wednesdays would typically involve online meetings in the mornings, with the afternoons for getting things done, while Thursdays would be a day to actually get work done. In the new role, the plaintiff found that she had to work more on weekends in order to stay caught up, and so she found herself cutting down on other things.
- [69] The plaintiff's evidence was that as the trade portion of the job got busier, there came a point where she could not manage it all. She found herself struggling with concentration as she tried to juggle too many different tasks and having conflict with some of her colleagues. She found herself taking longer to get focused on one thing and then switch.
- [70] Mr. Walker recalled that there was more conflict between himself and the plaintiff at this time, and that at the end of a work day, the plaintiff would retreat to the couch, put a heating blanket over her head, and just lie there.
- [71] In June 2022, the plaintiff gave up her position on the board of the local community centre. She said that she had to give up on other activities in order to have the necessary time and energy to do her work. She explained that although in the past she had always tried to push herself when she felt low on energy, she learned through her sessions at a concussion clinic that she only has so much gas in the tank every day, and so she needs to focus on what is important. She has chosen to prioritize work, which means that she cannot always go to meetings or be social.
- [72] In July 2022, the plaintiff was involved in another motor vehicle accident. She said that she changed lanes while driving and had to brake rapidly to avoid a car in that lane. Her evidence was that she "ended up just tapping his bumper", but neither she nor the other driver was injured. No evidence was introduced that contradicted this evidence.
- [73] On August 29, 2022, the plaintiff attended a physical capacity and work tolerance assessment with Mr. Bruce Hunt, whose report will be discussed below. The plaintiff evidence was that she had just returned from a business trip to San Diego.
- [74] The plaintiff's 2022 income tax return shows a total income of just over \$155,000. She indicated that one of the boxes on the return indicated the sale of some of the shares she had received, which she explained was done in order to pay taxes in respect of the options.

- [75] In July 2023, the plaintiff's work responsibilities were reduced. She said that she was getting tired of apologizing for not being able to do all of the work and that her boss advised that the company was going to split up the consumer and trade marketing work. The plaintiff said she was offered a choice between these two, and that even though the trade part of the business had more potential for growth and advancement, she concluded that "consumer marketing was what I knew and also would have less travel, less meeting with other teams, less dealing with other teams, less doing many of the things that are harder for me".
- [76] The plaintiff's title has remained the same - Senior Manager, Marketing - but her area of responsibility is reduced to consumer marketing. One other person - another Senior Marketing Manager, Ms. Struss - reports to her. The plaintiff is no longer required to go to trade shows, but still travels to various meetings with agencies and others.
- [77] In August 2023, the plaintiff began receiving nerve block injections between Botox injections to help with her migraine symptoms and also began using a new rescue medication called Ubrelvy. Her evidence is that her migraine symptoms have not changed since August 2023.
- [78] The plaintiff's 2023 income tax return shows total income of just over \$205,000. That would include her base salary, her bonus, and the sale of some of the stock options.
- [79] The plaintiff receives an annual "compensation statement" from Dexcom each March. The statement she received in March 2024 confirmed that her base pay for the upcoming year will be just under \$134,000 (a \$4,100 increase). Her bonus target will be just over \$27,000, and her long-term incentive stock options will be valued at US \$55,000.
- [80] In November 2024, the plaintiff recommenced physiotherapy.

## Current Symptoms

- [81] The plaintiff described pain in her shoulder, neck, and back that is always there, although it ranges in severity, as well as frequent pain in her left hip. This pain is exacerbated when she is sitting for a long time or working at a computer or travelling. It often gets worse as the day goes by. It is alleviated by heat or by massage therapy. She also does stretches and exercises recommended by her kinesiologist and physiotherapist. She takes microbreaks during the work day when she gets up, stretches and takes a mental break. At night, she often wakes up at 1:00 or 2:00 a.m. and thereafter moves around trying to get comfortable.
- [82] The plaintiff takes ibuprofen for the pain, but finds it is of minimal help. However, she avoids stronger pain medication due to her history of alcoholism.

- [83] The plaintiff distinguished throughout her evidence between headaches and migraines. She said headaches come frequently, with it being rare that she would go a day without one. However, they are generally manageable. She would have two to four more significant headaches a week depending on her activities. She tends to alternate between heat and ice, and described having a cap that she can put in the freezer and then put on her head. She would also use Advil or Aleve to treat headaches.
- [84] With migraines, the plaintiff said that they come on quickly and usually affect one part of her head in particular. She described feeling the veins in her head throbbing. She said that if she can take the rescue medication early on, it will generally be manageable. Since she has been having the combination of Botox, nerve blocks, and rescue medication, she is down to generally one significant migraine a week.
- [85] The plaintiff described being sensitive to light and sound as well as to visual movement. Sometimes light and sound will trigger nausea and dizziness. If she is tired, her vision can get fuzzy, and she can have memory issues or brain fog. With respect to brain fog, she described sometimes being not able to find a word or to losing track of what is coming next in a presentation. She has adapted by carrying a notebook with her everywhere and making extensive notes so that she can always refer back to them.
- [86] The plaintiff has various pairs of glasses. On the first day of her evidence, she wore glasses that have what she described as "blue light" and "neurolens" features. She uses them regularly for reading or computer work in particular. On the second day she wore dark glasses for most of the day, and she said she was feeling overwhelmed with a headache, brain fog, and shoulder pain.
- [87] The plaintiff described her mood as being quite erratic. If she is feeling overwhelmed, she can be snappy, angry, or overemotional. She commented that her husband and her son have gotten used to having to "take over" when she is overcome by emotions. She finds it difficult, having always been very independent, that she now feels vulnerable and in need of the help of others.
- [88] The plaintiff continues to take two antidepressant medications as well as a daily medication to help with migraines and another to help with her vertigo and nausea. She takes Ubrelvy, the migraine rescue medication as needed.
- [89] The plaintiff described having developed strategies to get through the work days. She will generally stack meetings in the morning when she has more energy and take a lot of notes. Being able to work from home four days a week allows her greater scope for microbreaks or even longer breaks from time to time, and she is able to work later in the day or on weekends to make up for lost time. That is not always possible, however, and when there are extra meeting days or travel required in a week, this poses extra challenges. As well, the plaintiff described how some PowerPoints and video presentations that have moving features or bright lights will trigger vestibular effects, and sometimes she will have to either ask for features to be turned off or even leave a meeting briefly in order to be able to carry

on. The plaintiff has a work station close to a window, which allows her to control the blinds so that there is not too much light. Work on a computer has its own challenges. The plaintiff says that if a computer screen is scrolling, particularly if she is not in control of it, it can trigger symptoms. Generally speaking, the plaintiff says that the less control she has over her environment, the more likely she is to experience symptoms.

- [90] The plaintiff finds driving to and from the office to be a challenge. She said there were a few instances at Fatburger where she had to ask a colleague to drive her home, but that has not happened since she has been at Dexcom.
- [91] With respect to recreational activities, the plaintiff has made work her priority. She does not go to the gym regularly, nor has she continued to run regularly, finding that it sometimes triggers symptoms. She does a fair bit of walking, both during the lunch break and sometimes on evenings and weekends. She usually has little energy for evening activities.
- [92] The plaintiff now sponsors four women at AA rather than 10 and attends meetings much less frequently.
- [93] The plaintiff travels much less than she used to. For road trips, she will typically wear dark glasses and earplugs and try not to watch where they are going, and even then, she finds she cannot do very long distances. When they travel, she generally tries to have quiet mornings, then go out walking, then take an afternoon break to lie down.
- [94] With respect to household chores, the plaintiff says that she cannot do anything in an awkward position (like scrubbing a bathtub). She can only vacuum for about 10 minutes before she feels pain. Usually by the time she is done work, she is exhausted, and so her husband makes the majority of their dinners.
- [95] Both the plaintiff and her husband described the impact of the Subject Accidents and particularly the 2018 MVA on their relationship. Mr. Walker said that he now finds himself regularly taking care of the plaintiff, who was formerly very independent. She is often overwhelmed and completely out of energy, particularly at the end of the work day, and needs to lie down and be quiet, leaving little time for any interaction. He described tension in their relationship and disconnection that was not there before.

## Collateral Witnesses

- [96] Four collateral witnesses gave evidence. The plaintiff called Mr. Walker, Ms. Jones, and Ms. Prpic. The defendant called Ms. Struss. I have already described the key points from Mr. Walker's evidence.

- [97] Ms. Jones has known the plaintiff since they were in high school. They travelled together in Europe in their 20s and kept in touch thereafter. Ms. Jones did the adventure races with the plaintiff in early 2017. She moved to the Okanagan later that year but continues to see the plaintiff a few times a year. She described a hike she did with the plaintiff in 2018 in which the plaintiff struggled with the activity, and generally commented that when she sees the plaintiff now, the plaintiff looks tighter, aged, and with much less of a spark.
- [98] Ms. Prpic described the plaintiff as being very good at her job and in particular as being analytical and very organized. She relies on the plaintiff to manage the biggest budget responsibility in her organization. Ms. Prpic confirmed much of the plaintiff's evidence as to the shift in her job responsibilities in 2023, in particular that the plaintiff asked to focus her work on managing the direct-to-consumer marketing, given that the areas she had been responsible for were exploding.
- [99] Ms. Prpic described being aware of the plaintiff's sensitivity to flashing lights and loud music and sometimes having trouble sitting through lengthy meetings.
- [100] Ms. Struss described the plaintiff as an exceptional worker and colleague. She noted being aware that the plaintiff has issues with certain things on a screen such as unsteady camera movement and recalled having been asked to sit in at a sales meeting once that took place at the top of the Sea to Sky Gondola.

#### Medical Expert Evidence

##### **Dr. Hawkeswood, Psychiatrist**

- [101] Dr. Hawkeswood conducted an independent medical examination ("IME") of the plaintiff at the request of counsel for the plaintiff. He assessed the plaintiff on December 16, 2020, a few weeks prior to her departure from Fatburger. He diagnosed the following:
- a) Grade 2 whiplash associated disorder affecting the cervical, thoracic and lumbar spine, including post-traumatic myofascial neck pain; interscapular (thoracic) pain, predominantly soft-tissue in nature; and low back pain;
  - b) Probably bilateral temporomandibular joint dysfunction;
  - c) Bilateral shoulder pain likely due to a myofascial pain referral pattern;
  - d) Probable concussion after the 2018 MVA;
  - e) Complex headaches and migraines with multiple contributing factors;
  - f) Longstanding depression, seemingly well-controlled at the time of the assessment, although subject to fluctuation; and
  - g) Sleep disruption.

- [102] With respect to causation, Dr. Hawkeswood noted that there were records of premorbid mood issues that were well-controlled by medication, as well as premorbid neck and shoulder pain from past motor vehicle accidents that were also well controlled and rarely flared up. He also noted a premorbid history of migraines when the plaintiff was in her teens and early 20s.
- [103] He concluded that the Subject Accidents likely reactivated a latent neck and shoulder condition, as well as a latent headache and migraine condition. He concluded that the jaw, mid-back, and left hip symptoms were probably attributable to the 2018 MVA, as was the concussion. As well, he concluded that the Subject Accidents also had a negative impact on her mental health, particularly early on.
- [104] He recommended stretches, core-based activities, and postural exercises, TMJ exercises, continued balance, and vestibular-ocular exercises for persistent vertigo symptoms and regular non-impact aerobic activity for most days of the week - possibly including an exercise bike, as well as gentle yoga or Pilates. He recommended monthly sessions with allied health treatments, referral to a dentist with expertise in TMJ dysfunction, and counselling.
- [105] With respect to prognosis, he opined that:
20. Based on the duration of Ms. Frazer's symptoms and today's clinical presentation, a complete recovery from the subject accidents is of low probability. While the above treatment plan should convey a degree of improvement with respect to conditioning and clinical symptoms, I doubt she will experience lasting pain relief with the above suggestions. In other words, Ms. Frazer is likely to experience ongoing pain on account of injuries sustained in the subject accidents.
- [106] On cross-examination, Dr. Hawkeswood was asked whether his diagnosis of a concussion was based on the plaintiff reporting a loss of consciousness. He expressed doubt that she had actually lost consciousness; rather, he described her condition as involving post-traumatic amnesia, with a gap in the memory function. He concluded that at the very least, there was an alteration in cognitive processing.
- [107] Dr. Hawkeswood was also presented with the clinical notes of three massage therapists from January to September 2017 (described above). He confirmed that those notes had not been provided to him at the time of the IME. He was asked if based on the fact that the plaintiff had referenced neck and shoulder conditions, he would change his opinion as to those conditions being latent. After carefully reading through the notes as well as the other comments in his reports, he concluded that those reports were consistent with the plaintiff's comments to him that she had occasional flare-ups. As a result, it did not alter his opinion on causation. Rather, he suggested that absent the Subject Accidents, it would be reasonable to conclude that the plaintiff would have continued to have occasional flare-ups with approximately the same frequency as outlined in those pre-accident records.

**Dr. Cameron, Neurologist**

[108] Dr. Cameron conducted an IME of the plaintiff at the request of counsel for the plaintiff.

The assessment was on January 19, 2022, at a time after she had begun working for Dexcom but before her March 2022 promotion to Senior Manager.

[109] With respect to neurological matters in particular, Dr. Cameron opined that:

- a) The plaintiff probably suffered a brief altered state of consciousness or loss of consciousness at the time of the 2018 MVA.
- b) The plaintiff suffered a mild traumatic brain injury ("MTBI") at the time of the 2018 MVA.
- c) The plaintiff has developed symptoms of post-traumatic brain injury syndrome or post-concussion syndrome following the 2018 MVA with symptoms including post-traumatic headaches, dizziness, vertigo, blurred vision, decreased memory, decreased concentration, decreased attention span, multitasking difficulties, decreased ability to socialize, photophobia, phonophobia, sleep disturbance pattern, and daytime fatigue, with those symptoms having improved but not completely resolved.
- d) The plaintiff developed post-traumatic musculoskeletal and cervicogenic headaches as a result of the soft tissue and musculoskeletal injuries sustained in the 2017 MVA.
- e) Following the 2018 MVA, the plaintiff developed a combination of residual ongoing post-traumatic musculoskeletal headaches and post-traumatic common migraine headaches.

[110] Dr. Cameron noted that the botulinum toxin injection therapy has led to improvements in the plaintiff's headaches but that she will probably require those injections every three months indefinitely to treat her ongoing migraine headaches.

[111] With respect to prognosis, he noted that adult patients in this age group typically improve up to approximately two years following any such injury. He concluded that the ongoing cognitive complaints are likely multifactorial in etiology, i.e. still residual to the MTBI that she sustained in the 2018 MVA and aggravated by chronic pain and post-traumatic headaches, and exacerbation of the psychological problems in the form of depression and anxiety. He described her condition as likely permanent.

[112] Dr. Cameron was cross-examined at length about his diagnosis of a concussion. Dr. Cameron was taken to a 2023 "Special Communication" paper from the American Congress of Rehabilitation Medicine regarding Diagnostic Criteria for Mild Traumatic Brain Injury. This paper was, of course, about a year after Dr. Cameron's report in this matter. Dr. Cameron agreed that it refined the pre-existing criteria for MTBI diagnoses. His view, however, was that the three core criteria had not changed substantially. Rather, he viewed the 2023 paper as adding other variables to the definitions.

- [113] Much of the cross-examination centred on Dr. Naiker's note of November 29, 2018, and in particular the words "nil loc". It was suggested to Dr. Cameron that it was essential to the diagnosis of an MTBI that there be a loss of consciousness diagnosed on the day of the accident. He disagreed saying that diagnoses are often not made on the day of an event, and that if there was a gap in the patient's memory at the time of the event, then that can satisfy the applicable criteria depending on the other signs and symptoms.
- [114] It was put to Dr. Cameron that post-concussive syndrome is no longer an accepted diagnosis given that it does not appear in the DSM-5 TR or the International Classification of Diseases (ICD-11). Dr. Cameron responded that in his view, an MTBI is a neurological symptom or disease and not a psychiatric symptom or disease. He remained of the view that the diagnosis he made in his report was appropriate in the circumstances.

### **Dr. Cohen, Neuropsychologist**

- [115] Dr. Cohen conducted a neuropsychological IME of the plaintiff on October 31 and November 1, 2023. His report is dated January 19, 2024. He noted in his report that his test findings had limitations due to the plaintiff's inability to tolerate some visual tests involving scanning and sustained focus and attention.
- [116] Dr. Cohen summarized the results of his cognitive testing as indicating that the plaintiff is high functioning (superior intellect), but her memory functioning and aspects of her executive cognitive functioning are below the expected level. She demonstrated uneven cognitive performance, with many areas showing as high average to superior, but with aspects of visual processing speed/reaction time showing as borderline or impaired. Auditory working memory was also below expected levels, as was her attention capacity for tasks involving auditory divided attention.
- [117] Dr. Cohen accepted the diagnoses from Drs. Hawkeswood and Cameron of an MTBI. He concluded that the results of his cognitive testing were consistent with the initial impact of a mild neurocognitive disorder due to traumatic brain injury. He also concluded that the plaintiff presents with symptoms consistent with generalized anxiety disorder and somatic symptom disorder. Her symptoms of major depressive disorder appeared to be in remission at the time of assessment. He concluded that the plaintiff's:

cognitive difficulties and problems are likely arising from a combination of factors in my opinion, including any principally residual effects from the November 2018 [MTBI], but with relatively increasing impacts from impaired sleep and fatigue, sensory intolerances, visual and vestibular disruptions, mood and anxiety symptoms, somatic preoccupations, and chronic pain her pre-MVA mood and anxiety symptoms were aggravated by the accidents and sequelae (indeed to the degree that she developed an anxiety disorder).

- [118] Dr. Cohen opined that the plaintiff has likely reached near maximal clinical recovery given the time since the 2018 MVA.

- [119] On cross-examination, Dr. Cohen was asked about a clinical note from Dr. Naiker's record from September 2021 which stated: "pt wondering about adhd - hoping to look at non stimulant rx - was dx with adhd 15 yrs ago". Unfortunately, this note was never put to the plaintiff, and Dr. Naiker did not testify. So there is very little information about the note. It appears from this note that Dr. Naiker gave the plaintiff some documentation to complete in 2021. It is not clear whether that documentation was completed or analyzed, and if so, what conclusion Dr. Naiker came to with respect to it.
- [120] Dr. Cohen noted that he had no information about any diagnosis of ADHD, which he described as "a fairly elaborate diagnosis". He was asked whether ADHD might provide an alternative explanation for any of the symptoms he reported on in his report. He noted the plaintiff's history prior to the 2018 MVA of functioning well in high-level jobs and commented that the sorts of cognitive deficits she demonstrated during testing would not have been present for her prior to the 2018 MVA. He was of the view that it was really unlikely that ADHD would account for the attention-focus scores that he observed. This was particularly so given the difference between the several high-functioning scores that were achieved and the specific areas in which the scores were dramatically lower.
- [121] Dr. Cohen was also asked about the report of an occupational therapist from February 2019 noted above, which commented that the plaintiff had scored 26/30 on a MoCA test. Dr. Cohen described MoCA as a very brief screening test that family doctors can use to screen for early cognitive decline, but that it is a very rough test completed in one-and-a-half to two minutes, and not all that useful for diagnosis of MTBIs and consequences that might arise. He was clearly of the view that the detailed neuropsychological tests he undertook were more useful and accurate than a MoCA assessment.
- [122] Similarly, Dr. Cohen said that he did not use PHQ or GAD-7 screening tools during his assessment. Rather, for forensic purposes like this, he uses more sophisticated tools.
- [123] Finally, Dr. Cohen was asked about the impact of past alcohol consumption on the cognitive testing results. He said that he did not factor it in given the plaintiff had been sober for so many years.
- [124] Dr. Cohen commented in his opinion on the impacts of some of the plaintiff's cognitive issues on her vocational prospects. He acknowledged that he did not do any vocational interest inventories but said that he did do skills testing. He noted that a vocational rehabilitation consultant would do other tests but not cover neuropsychological factors.

Dr. Sexton, Neuro-Ophthalmologist

- [125] Dr. Sexton conducted an IME of the plaintiff in March 2022.
- [126] She opined that at that time, there was no convergence insufficiency or binocular dysfunction.

[127] She also opined that the plaintiff was suffering chronic post-traumatic headaches. She noted that the plaintiff had a history of migraines in her 20s but that there was no reason to think that they would have spontaneously occurred in the absence of the Subject Accidents. She suggested potential additional medications for headache reduction.

[128] Dr. Sexton was not required to attend for cross-examination.

## Issues

[129] As noted above, liability is admitted and special damages are agreed upon. The only issues for determination are the quantum of damages for:

- a) Non-pecuniary damages;
- b) Loss of future earning capacity;
- c) Cost of future care; and
- d) Loss of housekeeping capacity.

## Credibility and Reliability

[130] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey*, 1995 CanLII 3498, [1995] O.J. No. 639, 22 O.R. (3d) 514 (C.A.), at para. 35, cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable.

[131] In considering credibility, the evidence of a witness must be assessed for "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": *Faryna v. Chorny*, [1952] 2 D.L.R. 354, [1951] B.C.J. No. 152 at 357 (C.A.).

[132] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness's evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296. It includes:

- a) The ability and opportunity of the witness to observe events;
- b) The firmness of their memory;

- c) Their ability to resist the influence of interest to modify their recollection;
- d) Whether their evidence harmonizes with independent evidence that has been accepted;
- e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;
- f) Whether their evidence seems generally unreasonable, impossible or unlikely;
- g) Whether the witness has a motive to lie; and
- h) The demeanour of the witness generally.

[133] A trier of fact may accept none, part, or all of a witness's evidence and may attach different weight to different parts of a witness's evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[134] In *Edmondson v. Payer*, 2011 BCSC 118 at paras. 31-34, Justice N. Smith dealt with a situation in which numerous minor issues with respect to clinical records were seized on to attack a plaintiff's credibility:

[31] In *Diack v. Bardsley* (1983), 46 B.C.L.R. 240, 25 C.C.L.T. 159 (S.C.) [cited to B.C.L.R.], aff'd (1984), 31 C.C.L.T. 308 (C.A.), McEachern C.J.S.C., as he then was, referred to differences between the evidence of a party at trial and what was said by that party on examination for discovery, at 247:

... I wish to say that I place absolutely no reliance upon the minor variations between the defendant's discovery and his evidence. Lawyers tend to pounce upon these semantical differences but their usefulness is limited because witnesses seldom speak with much precision at discovery, and they are understandably surprised when they find lawyers placing so much stress on precise words spoken on previous occasions.

[32] That observation applies with even greater force to statements in clinical records, which are usually not, and are not intended to be, a verbatim record of everything that was said. They are usually a brief summary or paraphrase, reflecting the information that the doctor considered most pertinent to the medical advice or treatment being sought on that day. There is no record of the questions that elicited the recorded statements.

[34] The difficulty with statements in clinical records is that, because they are only a brief summary or paraphrase, there is no record of anything else that may have been said and which might in some way explain, expand upon or qualify a particular doctor's note. The plaintiff will usually have no specific recollection of what was said and, when shown the record on cross-examination, can rarely do more than agree that he or she must have said what the doctor wrote.

[35] Further difficulties arise when a number of clinical records made over a lengthy period are being considered. Inconsistencies are almost inevitable because few people, when asked to describe their condition on numerous occasions, will use exactly the same words or emphasis each time. As Parrett J. said in *Burke-Pietramala v. Samad*, 2004 BCSC 470, at paragraph 104:

...the reports are those of a layperson going through a traumatic and difficult time and one for which she is seeing little, if any, hope for improvement. Secondly, the histories are those recorded by different doctors who may well have had different perspectives and different perceptions of what is important. ... I find little surprising in the variations of the plaintiff's history in this case, particularly given the human tendency to reconsider, review and summarize history in light of new information.

[135] To similar effect are the comments of Justice N. Smith in *Carvalho v. Angotti*, 2007 BCSC 1760, as follows:

[15] The attack on the plaintiff's credibility is based, in part, on various contradictions and inconsistencies within her evidence at trial and between that evidence and her discovery evidence, documents she prepared for other purposes, or statements recorded in clinical records. It is a rare case of this kind where such inconsistencies cannot be found. By the time a personal injury case gets to trial, the plaintiff typically will have provided information to a number of people - including doctors, adjusters and disability insurers - on a number of occasions over a period of years. This provides fertile ground for cross-examination precisely because very few people will have perfect and identical recollection on each of those occasions.

[16] The record created on many of those earlier occasions may consist of answers a plaintiff gave to questioners who were primarily interested in only part of what the plaintiff had to say. For example, a doctor treating a plaintiff for a specific injury may seek only very general information about aspects of the plaintiff's medical history unrelated to the injury that doctor is treating. The information recorded may only be a brief summary or paraphrase of what the plaintiff said. The plaintiff will usually have no specific recollection of what he or she said on that occasion, but, when confronted with the record on cross-examination, will usually agree with the suggestion: "That is what you told Dr. X, isn't it?" The danger of giving too much weight to such inconsistencies was noted by Parrett J. in *Burke-Pietramala v. Samad*,

[17] Although there are inconsistencies in the plaintiff's evidence, I am satisfied that she was attempting to tell the truth as she recalls it. Those inconsistencies may cause me to question the accuracy of her recollection on some points, but they come nowhere near to being a basis for a finding of outright and deliberate dishonesty.

[136] The defendants in the case at bar questioned the credibility of the plaintiff and most of the witnesses she called. The defendants suggested that the plaintiff was not sincere and transparent as to her capabilities, functions, and activities following the Subject Accidents.

The defendants suggested the plaintiff at times told medical experts that she had lost consciousness despite Dr. Naiker's note of "nil loc" from the day of the 2018 MVA. The defendants suggested that the plaintiff's demeanour completely changed from her direct to her cross-examination.

- [137] The defendants suggested the first two collateral witnesses called by the plaintiff (specifically, her husband Mr. Walker and her friend Ms. Jones) are both people who want the best for the plaintiff and thus could not give reliable evidence.
- [138] In my view, there was a difference between the plaintiff's demeanour on the first and second day of trial. However, the plaintiff was clearly having difficulty even during the portion of her direct examination that continued on the second day. I accept her explanation of the difficulties she had that morning.
- [139] With respect to the question of loss of consciousness, I find myself in agreement with Dr. Hawkeswood that the plaintiff most likely had a gap in her memory with respect to the time of the 2018 MVA. It is not clear to me that any individual, whether medically trained or not, would be able to tell whether that gap relates to a loss of consciousness or what Dr. Hawkeswood referred to as post-traumatic amnesia.
- [140] Similarly, I do not find it unusual that the plaintiff might have referred in response to a request to estimate the amount of her recovery in 2021, to some symptom being 75% better, and then to be uncertain of that number in 2025.
- [141] The plaintiff is clearly an intelligent person who was being asked detailed questions about records dating back some 15 years. After having been called out for her lack of immediate recollection of some of the details from those records, she appeared to be keen to want to look at the records as she was answering questions. I do not see that as an unnatural reaction, and in my view, it did not impact on her credibility.
- [142] Overall, I found the plaintiff to be a credible witness.
- [143] With respect to Mr. Walker, I found him to be a very frank witness who had clearly thought carefully about the impacts of the Subject Accidents on his relationship with the plaintiff. I found his comments sincere and insightful and his evidence reliable and credible.
- [144] The evidence of both Ms. Jones and Ms. Struss was brief, and I have no reason to doubt the accuracy of what either of them had to say.
- [145] Ms. Prpic was careful and thoughtful in her evidence, and I found her very credible.

## Causation and Extent of Injuries

- [146] The general test for causation for which the leading case is *Athey v. Leonati*, [1996] 3 S.C.R. 458, was concisely summarized by Justice Kent in *Kallstrom v. Yip*, 2016 BCSC 829, as follows, at para. 318:

1. the general, but not necessarily conclusive test for causation is the "but for" test requiring the plaintiff show his injury and loss would not have occurred but for the negligence of the defendant;
2. this causation test must not be applied too rigidly. Causation need not be determined by scientific precision as it is essentially a practical question of fact best answered by ordinary common sense;
3. it is not necessary for the plaintiff to establish that the defendant's negligence was the sole cause of the injury and damage. As long as it is part of the cause of an injury, the defendant is liable; and
4. apportionment does not lie between tortious causes and non-tortious causes of the injury or loss. The law does not excuse the defendant from liability merely because causal factors for which he is not responsible also helped to produce the harm.

[Emphasis in original.]

[147] In *Athey*, at paras. 32-35, Justice Major noted the following key legal principles:

- [32] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). However, the plaintiff is not to be placed in a position better than his or her original one. It is therefore necessary not only to determine the plaintiff's position after the tort but also to assess what the "original position" would have been. It is the difference between these positions, the "original position" and the "injured position", which is the plaintiff's loss .
- [34] The respondents argued that the plaintiff was predisposed to disc herniation and that this is therefore a case where the "crumbling skull" rule applies. The "crumbling skull" doctrine is an awkward label for a fairly simple idea. It is named after the well-known "thin skull" rule, which makes the tortfeasor liable for the plaintiff's injuries even if the injuries are unexpectedly severe owing to a pre-existing condition. The tortfeasor must take his or her victim as the tortfeasor finds the victim, and is therefore liable even though the plaintiff's losses are more dramatic than they would be for the average person.
- [35] The so-called "crumbling skull" rule simply recognizes that the pre-existing condition was inherent in the plaintiff's "original position". The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage. Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award. This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant

risks and shortcomings, and not a better position.

[Citations omitted.]

[148] These principles were further explained by Chief Justice McLachlin in *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3 at paras. 78-81:

[78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: *Athey*. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

[79] At the same time, the defendant takes his victim as he finds him -- the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: What was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

[80] Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: *Athey*, at paras. 32-36.

[81] All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

- [149] The primary factual issue with respect to causation was whether the plaintiff suffered an MTBI in the 2018 MVA. Both Dr. Hawkeswood and Dr. Cameron opined that she did. There was no expert opinion evidence to directly contradict their opinions on this point. Rather, the defendants cross-examined each of them at length on this conclusion, including by putting various publications to Dr. Cameron.
- [150] In my view, this is a question that is squarely within Dr. Cameron's expertise. I accept the view he expressed that the 2023 publication the defendants relied on refined the various criteria for MTBI and provided additional symptoms to be made part of the consideration but did not undercut the opinion he had come to a year prior to that publication.
- [151] I am satisfied that the expert medical evidence supports and establishes what has clearly been a consistent understanding of the plaintiff's treating physicians, that is that she is suffering the effects of an MTBI suffered in the 2018 MVA.
- [152] Various alternative theories were put to Dr. Cohen with respect to the cognitive issues that his neuropsychological testing identified. None of those theories were supported by any medical expert evidence, and the entire question of ADHD was based on a factual point not put to any other witness and referenced only tangentially in the clinical records.
- [153] The defendants argued that Dr. Cohen's report should be given no weight because he was an advocate. That argument appears to be in significant part premised on Dr. Cohen's refusal to accept the propositions of defence counsel with respect to such matters as the significance of a possible past ADHD diagnosis, the impact of past alcohol abuse, and the significance of the 2019 MoCA test. In my view, Dr. Cohen stated his opinion with respect to these issues and explained his views appropriately. He presented as a knowledgeable and thoughtful witness in his area of expertise and set out his opinions clearly and without demonstrating advocacy.
- [154] I am satisfied that through application of the "but for" test, the cognitive issues that the plaintiff has experienced are caused by the 2018 MVA.
- [155] The other causation question arises from the question of ongoing impact, if any, of the injuries the plaintiff suffered in the 2010 and 2012 accidents. I accept Dr. Hawkeswood's opinion with respect to that, and in particular that while it is likely that absent the Subject Accidents, the plaintiff would have suffered from the occasional flare-up of neck and shoulder pain, the great bulk of the physical symptoms she has experienced since the Subject Accidents are symptoms that she would not have experienced but for the Subject Accidents.
- [156] Similarly, I am of the view that the plaintiff's depression and other psychological issues were well controlled by medication and exercise prior to the Subject Accidents. I do not see this as being undercut by the change in medication that occurred in August 2017.

[157] I accept the evidence of the medical experts, which was generally consistent, that given the time that has passed since the Subject Accidents, the plaintiff's symptoms are unlikely to improve and will have to be managed indefinitely.

## Damages

### Non-Pecuniary Damages

#### Legal Principles

[158] The principles guiding the assessment of non-pecuniary damages were summarized in *Stapley v. Hejslet*, 2006 BCCA 34 at paras. 45-46:

[45] Before embarking on that task, I think it is instructive to reiterate the underlying purpose of non-pecuniary damages. Much, of course, has been said about this topic. However, given the not-infrequent inclination by lawyers and judges to compare only injuries, the following passage from *Lindal v. Lindal*, *supra*, at 637 is a helpful reminder:

Thus the amount of an award for non-pecuniary damage should not depend alone upon the seriousness of the injury but upon its ability to ameliorate the condition of the victim considering his or her particular situation. It therefore will not follow that in considering what part of the maximum should be awarded the gravity of the injury alone will be determinative. An appreciation of the individual's loss is the key and the "need for solace will not necessarily correlate with the seriousness of the injury" (*Cooper-Stephenson and Saunders*, *Personal Injury Damages in Canada* (1981), at p. 373). In dealing with an award of this nature it will be impossible to develop a "tariff". An award will vary in each case "to meet the specific circumstances of the individual case" (*Thornton* at p. 284 of S.C.R.).

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

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

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

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

- (j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[159] Stapley reminds the court that in assessing non-pecuniary damages, one must consider the particular plaintiff in their particular circumstances and make an award that accommodates those unique circumstances.

### Positions of the Parties

[160] The plaintiff submits that an appropriate award in this case would be \$200,000. The plaintiff bases her submissions on two cases that she says are comparable:

- a) *Steinlauf v. Deol*, 2021 BCSC 1118, which involved a 26-year-old RCMP officer who suffered an MTBI, soft tissue injuries to his head, neck, shoulders, and back, post-concussive headaches, depression, anxiety, and nerve pain. The plaintiff continued to work at the time of trial, but the court concluded that he would likely be discharged and not attain the high level of promotion he otherwise would have. The court awarded non-pecuniary damages of \$225,000.
- b) *Mantei v. Afzali*, 2023 BCSC 759, which involved a very fit 50-year-old firefighter who suffered neck and shoulder pain, lower back pain, headaches, balance problems, difficulty with concentration, mild neurocognitive disorder, major depression with anxious distress and psychotic features, PTSD, and somatic symptom disorder and aggravated osteoarthritis in his knee. The non-pecuniary damages award was \$175,000.

[161] The defendants submit that an appropriate award should be based only on the plaintiff having aggravated pre-existing chronic neck and shoulder pain and a headache condition. They suggest a range of \$90,000-\$100,000 and rely for that purpose on three cases said to reflect comparable circumstances:

- a) *Mohammed v. Doe*, 2023 BCSC 534, in which a 31-year-old plaintiff suffering ongoing neck, shoulder, and lower back pain, received a non-pecuniary damages award of \$95,000.
- b) *Franklin v. Coco*, 2022 BCSC 1929, in which a 52-year-old female suffering soft tissue injuries to her neck, upper back, and left shoulder, and the triggering of degenerative disc problems in the lower back and onset of related headaches and migraines, received a non-pecuniary damages award of \$100,000.
- c) *Torrance v. Davies*, 2022 BCSC 1630, in which a 39-year-old plaintiff suffering soft tissue injuries to her neck, headaches once or twice a week, driving anxiety, which became a more generalized anxiety, received a non-pecuniary damages award of \$110,000.

## Analysis

- [162] In my view, the cases cited by the defendants are premised on the court concluding that the plaintiff did not suffer an MTBI. They are thus of limited utility. At the same time, the plaintiff's cases involve plaintiffs who were either significantly younger (in the case of Mr. Steinlauf) or several years older (in the case of Mr. Mantei) than the plaintiff in this case. That said, I do conclude that there is significant similarity between the overall symptom burden of the plaintiff and that of Mr. Mantei. Both had very active pre-accident lifestyles. Mr. Mantei had additional knee issues, but he was, as noted, older than Ms. Frazer.
- [163] In my view, an appropriate award for non-pecuniary damages in this case is \$175,000. With reference to the comments I will make below, this award includes an amount in respect of the plaintiff's efforts to contribute to housekeeping.

## Loss of Earning Capacity - Future

- [164] In this case, the plaintiff does not advance a claim for past loss of earning capacity but does advance a claim for loss of future earning capacity.
- [165] Before turning to my analysis, I will briefly reference the expert evidence specific to this issue.

### Expert Evidence Regarding Earning Capacity

## Bruce Hunt, Work Capacity Evaluator

- [166] Mr. Hunt conducted an IME to assess the plaintiff's physical capacity and work tolerance at the request of counsel for the plaintiff. He assessed the plaintiff on August 29, 2022, and issued his report on August 31, 2022.
- [167] With reference to the chronology above, this was after the plaintiff had been promoted to Senior Manager in March 2022, but before her work duties were divided in July 2023 to make them more manageable. This was a very stressful time for the plaintiff as she was struggling to keep up with the demands of her work.
- [168] Unfortunately, the plaintiff had significant challenges completing the tests that Mr. Hunt had planned. Some of the tests were stopped for safety reasons (for example, those involving visual observation and rapid eye stimulation). With respect to others, Mr. Hunt noted certain impacts of his tests on the plaintiff's symptoms. He recorded the plaintiff taking recurrent microbreaks as she worked through the tests, which is not something the standardized testing models are designed to accommodate. This significantly limited the conclusions that Mr. Hunt could draw. It also limited his ability to complete the sorts of tests that would typically be relied on to ensure appropriate effort.

- [169] Mr. Hunt noted that 18% of tests were completed at a competitive work performance level, including repetitive sit/stand transitioning and sustained walking. Other tests were completed at non-competitive work rates, including repetitive lateral shoulder and overhead reaching, bimanual forward upper abdomen reaching and handling, and limited lower waist to upper abdomen reaching and handling.
- [170] As noted by the defendants, with respect to the job requirements of a Marketing Manager (or similar desk job), Mr. Hunt concluded that the plaintiff was able to meet "the primary sitting, standing, intermittent walking and brief limited to sedentary occupational demands" of such a position. This, of course, relates to physical ability and not cognitive.
- [171] Mr. Hunt recorded and included in his report the various explanations given by the plaintiff for the challenges she faced completing the tests he asked her to perform. Counsel for the defendants read those passages as unnecessary and indicative of sympathy and bias. Mr. Hunt explained on cross-examination that where tests were not completed properly, he saw it as important to document why.
- [172] I do not conclude that Mr. Hunt was biased. That said, the challenges he identified in having the plaintiff fully complete the testing render his report of little direct assistance.
- [173] Mr. Hunt also provided a report in which he identified certain potential future care items, mostly in other expert reports but including a few as well that he recommended, and providing cost information with respect to those care items.

### **Andrew Hosking, Functional Capacity Evaluator**

- [174] Mr. Hosking did not conduct an IME. Rather, he was asked to comment on Mr. Hunt's report. Much of his report is aimed at suggesting that Mr. Hunt was biased. He also disputed whether the grip testing device used by Mr. Hunt was "gold standard."
- [175] In my view, an expert report aimed primarily at providing an opinion as to the bias of another expert is of little value. That is a matter for the court to assess.
- [176] With respect to the grip testing device, Mr. Hunt was cross-examined as to the device he uses. I accept that each of Mr. Hunt and Mr. Hosking has a view as to which device is best. That is not an issue that I need to resolve for purposes of this case.

Kevin Turnbull, economist

- [177] Mr. Turnbull is an economist who prepared three reports at the request of counsel for the plaintiff.

- [178] The first report uses multipliers to calculate the present value of certain of the cost-of-future-care amounts presented by Mr. Hunt. The second report provides tax gross-up calculations applicable to future loss projections. The third report provides multipliers that may be of value in calculating quantum should the Court adopt various approaches advanced by the plaintiff with respect to future loss of earning capacity.
- [179] On cross-examination, Mr. Turnbull confirmed that his third report does not include estimates of negative market contingencies such as unemployment, part-time work, etc.

## Legal Principles

- [180] The task of assessing a claim for loss of earning capacity was described by Justice Dickson (as he then was) in *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1, [1978] 2 S.C.R. 229 at 251:

We must now gaze more deeply into the crystal ball. What sort of a career would the accident victim have had? What were his prospects and potential prior to the accident? It is not loss of earnings but, rather, loss of earning capacity for which compensation must be made: *The Queen v. Jennings*, [[1966] S.C.R. 532]. A capital asset has been lost: What was its value?

- [181] The fundamental goal is to the extent possible to put the plaintiff in the position they would have been in but for the injuries caused by the defendant's negligence: *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133.
- [182] The earning capacity of a plaintiff may be affected in many different ways. A useful framework for considering loss of earning capacity is found in *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.) at para. 8, where the court set out four factors that may be considered:
- [8] The means by which the value of the lost, or impaired, asset is to be assessed varies of course from case to case. Some of the considerations to take into account in making that assessment include whether:
1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
  2. The plaintiff is less marketable or attractive as an employee to potential employers;
  3. The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
  4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market.
- [183] As noted in *Rab v. Prescott*, 2021 BCCA 345 at para. 36:

- [36] ... these considerations are not to be taken as means for assessing the dollar value of a future loss; they provide no formula of that nature. Rather, they comprise means of assessing whether there has been an impairment of the capital asset, which will then be helpful in assessing the value of the lost asset.
- [184] Assessing a party's loss of future earning capacity involves comparing a plaintiff's likely future had the accident not happened to their future after the accident. This assessment depends on the type and severity of the plaintiff's injuries and the nature of the anticipated employment in issue: *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217 at para. 7.
- [185] The proper approach to assessing future loss of earning capacity was canvassed by the Court in *Rab*, where at para. 47, Justice Grauer set out the following three-step process:
- [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*). 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* at paras 93-95.
- [186] The plaintiff is not entitled to an award for loss of earning capacity if there is not a real and substantial possibility of a future event leading to income loss: *Ploskon-Ciesla* at para. 14. In describing the "real and substantial possibility" threshold in *Rab*, Grauer J.A. stated at para. 28:
- [28] Difficult as it is, that task is a necessary first step in the analysis of whether a plaintiff has established a claim for loss of future earning capacity. This was explained by Mr. Justice Goepel, dissenting but not on this point, in *Grewal v. Naumann*, 2017 BCCA 158:
- [48] In summary, an assessment of loss of both past and future earning capacity involves a consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. A future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation. If the plaintiff establishes a real and substantial possibility, the Court must then determine the measure of damages by assessing the likelihood of the event. Depending on the facts of the case, a loss may be quantified either on an earnings approach or on a capital asset approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32.
- [187] In *Dornan v. Silva*, 2021 BCCA 228, Grauer J.A. concluded at para. 75 that:
- [75] to support a contingency deduction, the law does not require that the "measurable risk" involved be wholly inherent in the plaintiff's pre-existing condition, without the need for any external event to act upon it in order to give rise to a debilitating effect. The question is

whether, given the pre-existing condition, there was a real and substantial possibility of future debilitating symptoms absent the accident. That real and substantial possibility may arise solely from the nature of the pre-existing condition itself, or require an external event acting upon that condition. In either case, the possibility must be real and substantial, not speculative.

[188] He continued at paras. 92-95 to note that:

[92] The importance of evidence in cases involving a specific contingency was discussed in Graham (and cited with approval by this Court in Hussack):

46 [C]ontingencies can be placed into two categories: general contingencies which as a matter of human experience are likely to be the common future of all of us, e.g., promotions or sickness; and "specific" contingencies, which are peculiar to a particular plaintiff, e.g., a particularly marketable skill or a poor work record. The former type of contingency is not readily susceptible to evidentiary proof and may be considered in the absence of such evidence. However, where a trial judge directs his or her mind to the existence of these general contingencies, the trial judge must remember that everyone's life has "ups" as well as "downs". A trial judge may, not must, adjust an award for future pecuniary loss to give effect to general contingencies but where the adjustment is premised only on general contingencies, it should be modest.

47 If a plaintiff or defendant relies on a specific contingency, positive or negative, that party must be able to point to evidence which supports an allowance for that contingency. The evidence will not prove that the potential contingency will happen or that it would have happened had the tortious event not occurred, but the evidence must be capable of supporting the conclusion that the occurrence of the contingency is a realistic as opposed to a speculative possibility: *Schrump v. Koot*, supra, at p. 343 O.R.

[Emphasis added.]

[93] The process, then, as discussed above at paras 63-64, is one of determining whether, on the evidence, the contingency or risk in question is a real and substantial possibility. If it is, then the process becomes one of assessing its relative likelihood, as we saw from the excerpt from *Athey* quoted above at paragraph 64.

[94] It follows that here the judge was required to engage in three different kinds of assessments. The first concerned what had happened to the appellant in the past, which had to be proved on a balance of probabilities. The second concerned what might happen to the appellant in the future, which possibilities, as discussed in *Athey*, could be taken into account only to the extent they were found to be real and substantial possibilities.

[95] Once the hypothetical event in question was found to be a real and substantial possibility, it became incumbent upon the judge to undertake the third assessment: the relative likelihood of that possibility.

- [189] In *Lo v. Vos*, 2021 BCCA 421, the plaintiff had developed severe depressive symptoms after the motor vehicle accident. The trial judge reduced the award of damages based on a "real and substantial possibility" the plaintiff would have developed depression after the collision anyway as a result of pre-existing back pain. The Court of Appeal concluded that nothing in the evidence in that case was capable of supporting that conclusion, commenting at paras. 71, 74-75 and 78-79:
- [71] I observe at the outset that no expert in this case suggested that, absent the accident, the appellant was at risk of developing a major depressive disorder, or any of the other psychological problems that the appellant experienced after the accident, and which were found to be the cause of her continuing disability. There was no evidence of a risk of a natural (i.e., without accident) progression from the pre-existing state to the relevant future hypothetical event.
- [74] The existence of a specific contingency such as was found here must be proven by evidence that is capable of supporting the conclusion that the occurrence of the contingency is a real and substantial possibility, as opposed to a speculative possibility: *Graham* at 15; *Hussack v Chilliwack School District No. 33*, 2011 BCCA 258.
- [75] In my respectful view, nothing in the evidence in this case is capable of supporting that conclusion. There was no indication that the appellant had any inherent vulnerability to mental health problems because of her without-accident state. Instead, on the evidence, it took a particular combination of factors that began with the appellant's pre-existing condition, but also required the impact of the injuries caused by the accident in the form of (1) soft tissue and acute injuries leading to (2) a condition of chronic pain that, (3) when combined with PTSD arising from the accident, resulted in (4) the development of generalized anxiety disorder and major depressive disorder.
- [78] I should add that it is, of course, essential to consider a plaintiff's pre-existing state, such as the appellant's low back problems here, in the assessment of damages. That is part of her original state, and distinguishes her from someone whose original state was free of any physical problems. But whether her original state gave rise to a measurable risk of a future hypothetical event is a different question, requiring additional evidence.
- [79] In the circumstances before us, it is my respectful view that the evidence was not capable of establishing, as found by the judge, a measurable risk that the appellant "would have developed a major depressive disorder consequent on chronic lower back pain even without the accident". That is no more than speculation.
- [190] Thus, the trial judge's reasons reflected a palpable and overriding error. The Court of Appeal substituted the trial judge's award of \$225,000 for loss of earning capacity with an award of \$810,000.

[191] The challenges involved in applying these principles were the subject of recent discussion in *Charters v. Jordan*, 2024 BCCA 351. The trial judge had not made an award for future loss of earning capacity. Justice Horsman for the majority commented at para. 100 that:

[100] The central task for a court faced with a claim for future loss of earning capacity is to compare the plaintiff's likely future working life with and without the accident: *Dornan v. Silva*, 2021 BCCA 228 at paras. 156-157. This is, as has often been observed, a "notoriously difficult task": *Davies v. Penner*, 2023 BCCA 300 at para. 3. Damages are only assessed once, and therefore the court must make findings about the pecuniary impact of the plaintiff's accident-related injuries over the remainder of their working life.

[192] Justice Horsman summarized the proper approach to the second-stage inquiry, noting at para. 108 that:

[108] the court should take a common-sense approach to the evidence in assessing the effect of pain on a plaintiff's ability to work over time. It is, for example, open to a trial judge to find as a matter of common sense that constant and continuous pain may take its toll over time in terms of a plaintiff's ability to work: *Gill v. Davis*, 2023 BCCA 381 at para. 12, citing *Morlan v. Barrett*, 2012 BCCA 66 at para. 41; *Davies* at para. 40.

See also *Dong v. Li*, 2024 BCCA 404 at paras. 17-23.

[193] With respect to assessing loss of earning capacity, there are two established approaches: (1) the "earnings approach"; and (2) the "capital asset approach": *Rab* at paras. 66-68; *Grewal* at para. 48; and *Perren v. Lalari*, 2010 BCCA 140 at para. 32. Both approaches are correct, but they apply in different situations.

[194] The earnings approach is more straightforward and is applicable when the loss is easily measurable, *Perren* at para. 32. For example, when an accident results in injuries that render the plaintiff unable to work at the time of trial and for the foreseeable future: *Ploskon-Ciesla* at para. 11.

[195] The capital asset approach is less clear-cut and is more appropriate when the loss "is not measurable in a pecuniary way": *Perren* at para. 12. For example, in instances where the plaintiff's injuries have led to continuing deficits, but their income at trial is similar to what it was at the time of the accident; *Ploskon-Ciesla* at para. 11.

[196] Under either approach, the assessment of loss must be based on the evidence but requires an exercise of judgment and is not a mathematical calculation: *Pololos* at para. 133. The questions of reasonableness and fairness of an award should be reviewed at the end of the assessment once the real and substantial possibilities that are identified have been assessed, and a preliminary conclusion has been reached: *Lo* at para. 117.

Positions of the Parties

## Plaintiff

- [197] The plaintiff submits that at the time of the Subject Accidents, the plaintiff was on an established and successful career path such that but for the Subject Accidents, she would have been promoted to a Director-level position and then a Senior Director-level position at an organization like Dexcom and with income comparable to that available at Dexcom. The plaintiff further submits that there is a significant likelihood that the plaintiff will end up having to retire earlier than she otherwise would have.
- [198] The plaintiff's evidence is that, given her limitations, she thinks it would be unrealistic and, in fact, risky for her to seek further advancement. She is in a position now with flexibility to work at home, which allows her to manage her environment, and she is able to perform her current role to the satisfaction of her employer. She is concerned that if she pursues and obtains a higher-level role, there is a significant chance that she would be unable to perform to the required level.
- [199] The plaintiff submits it is reasonable to infer from her evidence as to her desire to pursue advancement within the marketing world that the plaintiff would, absent the Subject Accidents, have continued to work her way up the corporate ladder and would have continued working until aged 67. While the plaintiff gave evidence that her goal prior to the Subject Accidents was to become a VP Marketing, the plaintiff calculates her claim upon the plaintiff reaching the Senior Director of Marketing level instead, which is said to reflect a conservative approach.
- [200] The plaintiff relies on evidence from Ms. Prpic as to the job requirements and the likely compensation at Dexcom with respect to both the Director of Marketing and Senior Director of Marketing positions. Ms. Prpic testified that she and other senior staff at Dexcom follow the market closely in order to ensure that the compensation Dexcom provides is competitive. Ms. Prpic said that a Director of Marketing would have 15 years of experience in Marketing, with 10 years in a leadership role. The plaintiff's work at both Fatburger and Dexcom would qualify as leadership experience, and she had several years of prior experience in Marketing. Based on this, the plaintiff says it is reasonable to anticipate that absent the Subject Accidents, she would have advanced to a Director role around the time of trial.
- [201] The evidence indicated that a Senior Director role would require an additional three-to-five years of leadership experience, and the plaintiff submits that the Court should infer that, absent the Subject Accidents, the plaintiff would have become a Senior Director four years after trial.
- [202] The plaintiff submits that the evidence indicated that at the Director level and assuming that the full bonus and stock option were earned and awarded every year, the overall income would be about \$120,000 more than what the plaintiff earns as a Senior Manager. At the Senior Director level, the overall income level would be about \$283,500 more than what the plaintiff earns as a Senior Manager. Applying Mr. Turnbull's multipliers, the present

value of \$120,000 per year for four years is \$453,960, while the present value of \$283,500 per year from year five to year 17 is \$3,063,000.

- [203] With respect to early retirement, the plaintiff submits that she is at risk of having to retire early based on the symptoms she is facing, as well as the common sense conclusion that constant and continuous pain may take its toll over time in terms of the plaintiff's ability to work. If she retires at age 60, then applying the year 10 to year 17 multiplier from Mr. Turnbull's report to her current income would result in a loss of \$1,692,173. The plaintiff submits an award of \$1.5 million in respect of early retirement appropriately captures this risk.
- [204] With respect to contingencies, the plaintiff submits that it is important not to double count contingencies and notes that some contingencies are built into the choice of a Senior Director role as the ultimate target, as well as to the timing of the early retirement. The plaintiff submits the positive contingencies would have to include:
- a) The plaintiff might have been promoted above a Senior Director role, given her pre-accident intention to become a VP Marketing;
  - b) The plaintiff might have worked beyond age 65, given her drive and dedication to work; and
  - c) It is by no means guaranteed that the plaintiff will be able to continue working at her current level to age 60, and there is a resultant risk that she might be forced to retire even before age 60.
- [205] The plaintiff submits an appropriate overall contingency would be 15%, and thus calculates a loss of \$453,960 plus \$3,063,000 plus \$1.5 million less 15% which comes to \$4,264,600.

## Defendants

- [206] The defendants note Dr. Hawkeswood's opinion that the plaintiff "probably has the physical capacity to continue on with a sedentary position". The defendants note that not only has the plaintiff continued to work in her chosen field since the Subject Accidents, she (a) was promoted to Senior Director at Fatburger (albeit with no increase in pay), (b) found and successfully transitioned to a new employer in 2021, and (c) has been promoted to a Senior Manager position at Dexcom. She is now earning significantly more than she ever did prior to the Subject Accidents, and the two work colleagues who testified at trial clearly value her as a work colleague.
- [207] The defendants submit that the plaintiff has not established that a future potential event could lead to a loss of capacity, and that there is a real and substantial possibility that such an event will cause a future loss. The defendants submit that the plaintiff's theory of this claim is speculative at best. The defendants say that the plaintiff is claiming based primarily on her aspirations, not on the reality.

[208] Alternatively, if the Court finds there has been a loss of future earning capacity, the defendants say that any loss should be assessed using the capital asset approach given that the plaintiff has continued to work and has had no loss of income to date. The defendants submit that absent the Subject Accidents, the plaintiff's employment trajectory would have been the same. There is no evidence that she has declined a promotion, and no reason to think that her future years would look any different. The defendants submit that the likelihood of any loss is minimal, and that even a real and substantial possibility will have a low likelihood of occurring.

[209] Finally, the defendants identify the following negative contingencies:

- a) The plaintiff's premorbid conditions would have impacted her ability to work;
- b) Future events such as the loss of or health decline of loved one would have led to a worsening of her pre-accident symptoms;
- c) Her current symptoms may improve over time with proper treatment, particularly her psychiatric symptoms;
- d) Any future promotion may require a university degree; and
- e) The plaintiff's colleagues have not observed any limitation in her ability to do her job other than her avoidance of flashing lights, moving objects, and loud music.

[210] The defendants say any award should be limited to one year's salary at the level of the plaintiff's earnings from prior to the Subject Accidents, i.e. \$114,000.

## Analysis

[211] I begin by considering the plaintiff's likely employment course absent the Subject Accidents.

[212] I accept that the plaintiff was at all material times highly focused on her career. In accepting the plaintiff's evidence on that point, I see as significant the extent to which the plaintiff has deliberately structured her post-accident life to prioritize her work at the expense of other social, recreational, and extracurricular activities. While this would probably not have been necessary absent the Subject Accidents, I see it as indicative of a person who would have pursued her career with determination in any event.

[213] In my view, consideration of future earning capacity must appropriately take into account that the plaintiff was someone who was at the time of the Subject Accidents steadily employed in a focused career area with good prospects of ongoing work. She clearly has knowledge and expertise in her chosen career areas, combined with the sorts of analytical and organizational skills that allow her to put her expertise to good use, as well as the required communication and interpersonal skills to succeed in a corporate environment.

- [214] In terms of the plaintiff's likely career path absent the Subject Accidents, there is a significant likelihood that she would have continued to advance within the marketing field. I accept that she wanted to eventually become a VP Marketing, but I see there being significant uncertainty as to whether she would have succeeded in that, and even if she had, whether she would have done so within a larger or smaller corporate environment. However, having heard both Ms. Prpic and Ms. Struss with respect to the plaintiff's abilities, I see the prospect of her advancement as being real and substantial.
- [215] I do see it as likely that she would have moved on from her work at Fatburger in much the same manner as she did, even absent the Subject Accidents.
- [216] I also see it as likely that she would have continued working until at least the age of 65, in the absence of any medical or family concerns that might have led her to leave the workforce, and possibly to age 67.
- [217] In my view, given the plaintiff's established career path and the available evidence on likely income levels within that career path, this is an appropriate case to apply the earnings approach rather than the capital approach. The plaintiff works in a corporate environment in which available income levels for employees providing significant contributions are substantial. The plaintiff still has a number of years before typical retirement age, and a consideration of income streams provides important context to the assessment of that lost capacity. It is also my view that given the differences between the income available from the plaintiff's work at Fatburger in comparison to that available in a larger corporation like Dexcom, it would be unfair to the plaintiff and artificial to award compensation based solely on the amounts she earned in her final years at Fatburger.
- [218] I turn to the plaintiff's likely future employment in light of the injuries she suffered in the Subject Accidents. Rab requires initial consideration of whether the evidence discloses a potential future event that could lead to a loss of capacity. In this case, the evidence leads to the conclusion that it is very likely that the plaintiff will continue to be impacted in her ability to work, with some impact from the chronic pain and headaches, but a greater impact coming from her struggles with respect to concentration, her sensitivity to light and sound, and the other cognitive impacts identified in the expert evidence.
- [219] The plaintiff gave evidence that when faced with a decision in 2023 between continuing with the trade portfolio with a larger potential for growth and advancement, and the consumer advertising work with which she was more familiar and had greater ability to control her environment, she chose the latter. The evidence suggests that the need for this split of the areas the plaintiff had previously been responsible for came at least in part from tremendous growth in the trade area - although I suspect the plaintiff's struggles to maintain the variety of areas probably brought this need to the forefront sooner. The plaintiff's choice to take the easier of the two courses is reflective of the sorts of choices she will need to make moving forward.

- [220] I conclude that the most likely future course is that the plaintiff will continue with work at about her current level and salary indefinitely, or as long as she is able. She is in a fairly good place right now, with colleagues who recognize her abilities and a work environment that facilitates the adaptations she has developed. In any corporate environment, however, there is always a risk of corporate changes or downsizing, which is of concern given that the plaintiff is still 15-17 years away from a typical retirement age. While I do not accept that the plaintiff is not competitively employable, I do accept that she has been rendered less capable by the Subject Accidents, and she is less marketable to potential other employers. I see a real and substantial possibility that if the plaintiff is unable to continue at Dexcom, she would be unable to find work at her current level and salary. That said, I see it as more likely than not that she will be in a position to continue at Dexcom indefinitely.
- [221] Finally, I also accept the plaintiff's submission that there is a real and substantial possibility that the struggles of working through her limitations will wear on the plaintiff to the extent that she will reasonably retire earlier than she might have otherwise absent the Subject Accidents.
- [222] Mr. Turnbull's reports provide a multiplier of 13.102 for losses from trial to age 65. That is, for every \$1,000 the plaintiff's income is reduced by over the course of those 15 years, the present value of that loss is \$13,102.
- [223] I accept the plaintiff's calculation that a Director of Marketing would earn about \$120,000 more than the plaintiff currently earns and that a Senior Director would earn about \$283,500 more. However, I do not accept the plaintiff's assertion that I should assess damages based on a virtual certainty that absent the Subject Accidents, the plaintiff would have become a Director of Marketing around the time of trial and a Senior Director four years later (less an overall 15% contingency).
- [224] I also accept the plaintiff's calculation that if the plaintiff was to retire at age 60 rather than 65-67, her loss based on her current income level would be in the range of \$1.5 million to \$1.7 million. Again, however, I do not accept that this amount should be included as her loss, less only an overall 15% contingency.
- [225] I accept that there are a number of positive contingencies to consider, including the possibility that absent the Subject Accidents, the plaintiff might have advanced further than a Senior Director, or might have worked beyond age 65. I also see as appropriate upward contingencies the possibility that the plaintiff might be forced to seek new work and be unable to find work that pays as well as what she currently earns, as well as the risk that she might retire before age 60.
- [226] However, it is my view that there is significant uncertainty as to whether, when, and to what extent, she would have moved up in the corporate world. I also see it as being quite uncertain that the plaintiff would actually retire at age 60.
- [227] With respect to the contingencies advanced by the defendants:

- a) I do not see a significant likelihood that the plaintiff's premorbid conditions would have impacted her earning capacity given the minimal impact they had prior to the Subject Accidents.
- b) The likelihood of her current symptoms improving is minimal, given the opinions of the various doctors. While the defendants specifically referenced the possibility of improvement to the plaintiff's psychological symptoms if she has ongoing counselling, my sense is that those psychological symptoms have minimal impact on the plaintiff's earning capacity.
- [228] I also see it as appropriate to consider as a contingency the possibility that from time to time, either the plaintiff or the company as a whole might not reach the targets necessary to grant the bonus or retention stock-option elements of the plaintiff's compensation.
- [229] Most of these contingencies advanced by the defendants can be appropriately dealt with in the general contingency I propose to apply. With respect to the potential need for a university degree and the possibility that the plaintiff may succeed in advancing in any event, I see those as appropriately dealt with in assessing the actual income amounts.
- [230] In my view, the plaintiff's earning capacity has been impacted by a reduction in the likelihood of her advancing to higher-level marketing management roles. In my view, considering the likelihood of her succeeding in advancement absent the Subject Accidents, the appropriate means to assess this loss is to base it on an overall loss of earning capacity of \$100,000 per year until the plaintiff's age 65. Applying the applicable multiplier, this gives a number of \$1.3 million.
- [231] In terms of quantifying the real and substantial possibility that the plaintiff will retire earlier than she otherwise would have, it is my view that this claim is best assessed by taking just under half of the \$1.5 million calculation advanced by the plaintiff to reflect the partial likelihood of this occurring. I thus assess this claim at \$700,000.
- [232] These numbers are based on multipliers in Mr. Turnbull's report that reflect mortality rates but do not reflect other standard employment-related contingencies. As well, I have identified other general contingencies in the analysis above. In my view, the amounts I have determined should be reduced by an overall 25% general contingency amount to reflect the combined impact of these various contingencies. The two above amounts add up to \$2 million, and applying a 25% contingency reduces the amount to \$1.5 million.
- [233] I would thus award \$1.5 million in respect of loss of future earning capacity.

#### Cost of Future Care

### Legal Principles

- [234] The purpose of an award for the cost of future care is to restore the injured party to the position they would have been in but for the accident. In Gao, the Court of Appeal summarized the applicable principles at paras. 68-70:

[68] An award for damages for cost of future care is based on the principle of restitution. In *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229 at 241-242, Dickson J., as he then was, explained the purpose of an award for cost of future care:

In theory a claim for the cost of future care is a pecuniary claim for the amount which may reasonably be expected to be expended in putting the injured party in a position where he would have been in had he not sustained the injury. Obviously a plaintiff who has been gravely and permanently impaired can never be put in the position he would have been in if the tort had not been committed. To this extent, "restitutio in integrum" is not possible. Money is a barren substitute for health and personal happiness but to the extent, within reason, that money can be used to sustain or improve the mental or physical health of the injured person it may properly form part of the claim.

[69] An award for cost of future care is based on what is reasonably necessary, on medical evidence, to promote the mental and physical health of the claimant: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.) at 78, aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Aberdeen v. Zanatta*, 2008 BCCA 420 at para. 41; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at para. 30. An award for future care must (1) have medical justification, and (2) be reasonable: *Milina* at 84; *Aberdeen* at para. 42.

[70] In *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144, this Court clarified that the medical necessity of future care costs may be established by a health care professional other than a physician, such as an occupational therapist, if there is a link between a physician's assessment of pain, disability, and recommended treatment, and the health care professional's recommended care item (at para. 39).

[235] Assessing damages for cost of future care is not a precise accounting exercise. As noted in *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21:

[21] Damages for cost of future care are a matter of prediction. No one knows the future. Yet the rule that damages must be assessed once and for all at the time of trial (subject to modification on appeal) requires courts to peer into the future and fix the damages for future care as best they can. In doing so, courts rely on the evidence as to what care is likely to be in the injured person's best interest. Then they calculate the present cost of providing that care and may make an adjustment for the contingency that the future may differ from what the evidence at trial indicates.

[236] The test is whether a "reasonably minded person of ample means would be ready to incur the expense": *Brennan v. Singh*, [1999] B.C.J. No. 520, 1999 CarswellBC 484 at para. 78 (S.C.); *Cheema v. Khan*, 2017 BCSC 974. The court must be satisfied that the care item is one the plaintiff would, in fact, use; that it was made necessary as a result of the accident; and that it is not a care item the plaintiff would have procured in any event: *Williams v. Sekhon*, 2019 BCSC 1511 at paras. 171-172.

[237] The plaintiff's claims in respect of cost of future care include costs related to assistance with housekeeping. For purposes of analysis, I will deal with those claims separately.

#### Positions of the Parties

[238] The plaintiff claims the following:

- a) Ongoing Botox injections at an annual cost of \$3,280 to \$3,371 (net present value of \$83,386);
- b) Weekly massage therapy at an annual cost of \$6,000 (net present value of \$157,970);
- c) 24 physiotherapy sessions per year at an annual cost of \$2,640 (net present value of \$66,197);
- d) Tai chi as a light aerobic activity at a cost of \$600 per year until age 60, and \$450 per year thereafter (net present value of \$13,724); and
- e) Psychological counselling: three treatment cycles of approximately 12 to 15 hours each with an additional six hours of community consultation time plus another four to six sessions of couples counselling, all at a cost of \$225 per hour. The plaintiff suggests a net amount of \$12,000, which is slightly under the combination of the above numbers.

[239] The total present value of these claims is \$333,277.

[240] The defendants say that there is a chance the plaintiff may not use these services, and that as a result, they should not be allowed, at least not in full. The defendants dispute that many of the items in Mr. Hunt's report were actually recommended by medical professionals. They note in particular that tai chi was not mentioned in any other reports and dispute whether it is an appropriate replacement for the yoga that Dr. Hawkeswood recommended. They also dispute whether counselling was recommended.

#### Analysis

[241] The evidence was clear that the Botox injections are a key part of the treatment plan for the plaintiff's migraines. That amount is allowed in full at \$83,386.

[242] My sense was that the plaintiff was attending massage therapy every couple of months or so prior to the Subject Accidents. She now attends two to three times per month. I think that awarding weekly massage therapy is more than is appropriate, but I would accept two and a half sessions per month, or 30 sessions per year, reduced by six sessions per year to reflect what she was doing prior to the Subject Accidents. So that should be 24/52 sessions times \$157,970, and it is going to be \$72,909.

[243] The plaintiff's use of physiotherapy has been inconsistent. She has made more use of kinesiology. What I see as appropriate is to combine the two together and award \$50,000 to be used by the plaintiff for the two services, i.e. physiotherapy and kinesiology combined.

[244] I see massage, physiotherapy, and kinesiology to all be within the scope of Dr. Hawkeswood's recommendations.

- [245] Tai chi was recommended by Mr. Hunt in lieu of yoga, given that yoga often requires the sort of head movement that a person with issues like the plaintiff might find challenging. The cost of tai chi appears to me to be less than the cost of yoga. I would award the amount of \$13,724 to be used by the plaintiff for either tai chi or yoga based on which of the two she finds to be most beneficial.
- [246] Counselling was recommended, and I see the \$12,000 proposed by the plaintiff as being reasonable.
- [247] I would award the sum of \$232,019 for costs of future care.

### Loss of Housekeeping Capacity

- [248] The plaintiff says that she struggles with nearly all cleaning activities and that she tries to help but that her husband and son do nearly all the work. The plaintiff seeks an award based on Mr. Hunt's calculations based on the price of cleaning once every three weeks, \$3,000 plus seasonal cleaning four times a year, \$840. The present value of those two items totals \$82,572.
- [249] The defendants say no separate award for housekeeping capacity should be made and that if anything is awarded to reflect loss of housekeeping capacity, it should be included within the award of non-pecuniary damages.
- [250] The law related to the loss of housekeeping capacity was recently summarized by Justice Basran in *Steinlauf* at para. 222, *aff'd* 2022 BCCA 96 at paras. 116-117:
- Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.
  - A plaintiff who has suffered an injury that would make a reasonable person in his circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.
  - Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.
  - As the award is intended to reflect the loss of a capacity, the plaintiff is entitled to compensation whether or not replacement services are actually purchased.
  - Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.
- [251] The summary of legal principles set out by Justice Gomery in *Ali v. Stacey*, 2020 BCSC 465 at para. 67, is to similar effect and was cited with approval in *McKee v. Hicks*, 2023 BCCA 109, at paras. 106-107. In *McKee*, the Court explained what some had thought was a difference between the approaches in *Kim v. Lin*, 2018 BCCA 77, and *Riley v. Ritsco*, 2018 BCCA 366. The Court in *McKee* noted at paras. 108-109 and 112:

- [108] It is important to recognize that Kim and Riley dealt with somewhat different issues. Kim considered a situation of genuine incapacity - one where the injuries made it unreasonable to expect the plaintiff to perform some household tasks. Kim established that such claims are typically to be dealt with by awarding pecuniary damages. Further it states that such damages should generally be assessed with a view to the cost of obtaining replacement services on the open market.
- [109] Kim recognizes, however, that the preference for awarding pecuniary damages in such cases is not absolute. A judge retains discretion to assess damages as non-pecuniary, where it is considered appropriate to do so. The case also suggests (citing *McIntyre v. Docherty*, 2009 ONCA 448) that, in some cases, full compensation for the loss of housekeeping capacity may require an award of both pecuniary and non-pecuniary damages.
- [112] To sum up, pecuniary awards are typically made where a reasonable person in the plaintiff's circumstances would be unable to perform usual and necessary household work. In such cases, the trial judge retains the discretion to address the plaintiff's loss in the award of non-pecuniary damages. On the other hand, pecuniary awards are not appropriate where a plaintiff can perform usual and necessary household work, but with some difficulty or frustration in doing so. In such cases, non-pecuniary awards are typically augmented to properly and fully reflect the plaintiff's pain, suffering and loss of amenities.
- [252] In my view, in light of the evidence that the plaintiff continues to perform a small portion of the household work, I have included some recognition of this in my award of non-pecuniary damages. It is clear to me, however, on the evidence, that the plaintiff's husband does perform the bulk of the regular housework in circumstances in which prior to the Subject Accidents, the indoor housework was equally shared. In those circumstances, a separate pecuniary award is warranted. I would award \$60,000.

### Special Damages

- [253] Special damages were agreed at \$13,398.44.

### Conclusion

- [254] For the reasons set out above, I award:

- a) Non-pecuniary damages: \$175,000;
- b) Loss of future earning capacity: \$1.5 million;
- c) Cost of future care: \$232,019;
- d) Loss of housekeeping capacity of \$60,000; and
- e) Special damages of \$13,398.44.

- [255] The plaintiff is entitled to applicable court order interest.

- [256] Should either party seek costs other than the usual order, they should provide their submission to me in writing through Supreme Court Scheduling within 60 days of the date of this judgment. The other party may reply within 30 days thereafter. I will advise whether I believe a hearing is necessary, although the parties are welcome to indicate in their submissions whether they believe a hearing would be appropriate. If neither party makes a submission with respect to costs, then the plaintiff will have her costs on Scale B.
- [257] If the parties identify any mathematical errors or if there is any issue that I have failed to deal with that was properly before me, or that arises from this judgment, then the parties may seek clarification or determination of those matters with the same schedule for submissions as in respect of costs.

"Veenstra J."

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