

CANADA / JUDGMENT

Funk v. White

2025 BCSC 2001

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2001 Funk v. White

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Funk v. White,

2025 BCSC 2001

Date: 20251010

Docket: S4651

Registry: Golden

Between:

Amber Shanielle Funk by her litigation guardian Teresa Evelyn Gertrude McGillis and the said
Teresa Evelyn Gertrude McGillis

Plaintiff

And

Scott Arthur White, Maple Leaf Loading Ltd, and GE Canada Leasing Services Company carrying
on business as GE Can Leasing Serv and the said GE Canada Leasing Services Company

Defendants

Before: The Honourable Justice Laurie

Reasons for Judgment

Counsel for the Plaintiffs:

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R.L. Garner

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Place and Dates of Hearing:

Golden, B.C.

February 18-21, 24-28, March 3, 6-7, and 10-11, 2025

Place and Date of Judgment:

Golden, B.C.

October 10, 2025

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Introduction

- [1] A tragic accident occurred on October 3, 2011, in which the 18-year old plaintiff Amber Shanielle Funk was struck by a commercial dump truck on a highway in Sparwood, British Columbia. The truck was driven by the defendant Scott Arthur White and owned by the defendant Maple Leaf Loading Ltd. As a result of the accident, the plaintiff sustained a severe traumatic brain injury (TBI) that has permanently changed all aspects of her life.
- [2] The present action for damages is brought on behalf of the plaintiff by her mother, Teresa McGillis, who is the plaintiff's committee and litigation guardian. The issue of liability for the accident has been resolved. The claim against the other defendant GE Canada Leasing Services Company was discontinued before the trial.
- [3] The plaintiff seeks over \$19 million in the usual heads of damages. The defendants dispute the amounts claimed by the plaintiff.

Background

Pre-Accident Life

- [4] The plaintiff grew up in Sparwood with her mother and older sister Sheree Funk. The family lived in Spardell Trailer Court.
- [5] Since the plaintiff and her sister have the same last name, for clarity I will refer to them by their first names. Ms. McGillis and Amber's father separated in 2000 and he had not been involved in Amber's life since then.
- [6] In 2004, Ms. McGillis met Scott McGillis, and they married the following year. Mr. McGillis was a kind man who doted on Amber and Sheree. He was particularly close to Amber.
- [7] Ms. McGillis testified that living at the Spardell Trailer Court felt like one big family. Everyone knew each other and there were 20 to 30 other children in the area. The children participated in barbecues and birthday parties, and they played in the park on the premises. She testified that her daughters had a happy childhood although there were some dark periods.
- [8] A significant dark period in Amber's life was when Mr. McGillis, who suffered from mental health issues, committed suicide by hanging himself in 2007. Amber who was in grade nine at the time struggled to comprehend the suicide. Her struggles eventually led her to engage in self-injury by cutting. In 2009, she was admitted to the hospital for a few days because of this. Fortunately upon her discharge, Amber did not engage in this behaviour again.

- [9] Amber experienced learning issues while attending school in Sparwood. When she was in grade seven, a pediatrician placed her on Concerta medication to assist with learning. Ms. McGillis testified that this medication was discontinued after one year as it did not appear to help and there were negative side effects. In high school, Amber received education assistance support.
- [10] Amber had part-time jobs while attending high school. In particular, she worked at McDonald's and Tim Hortons. In June 2010, upon completing grade 12, Amber received a School Completion Certificate.

The Accident

- [11] The accident occurred at approximately 1:00 a.m. on October 3, 2011. Amber her boyfriend Victor Winegarden were on foot on the highway that runs through Sparwood when they were struck by the dump truck. Amber was severely injured, and Mr. Winegarden did not survive the accident.

Post-Accident Life

- [12] For almost two years following the accident, Amber was in various hospitals in Calgary, Fernie, Cranbrook, Kamloops, and ending up at the Rocky Mountain Village near Sparwood.
- [13] Amber sustained a traumatic brain injury involving multiple areas of the brain that severely impaired her cognitive function. In addition, she sustained fractures of the skull, left femur and vertebrae.
- [14] On December 19, 2013, Amber was discharged to live with her mother. When she returned home, she couldn't walk and required a wheelchair for mobility. She was using a feeding tube, and she was not toileting. Her language skills were very limited. She exhibited anger and physical aggression. For example, one time she bit her mother in the neck while Ms. McGillis was toileting her. Both Ms. McGillis and Sheree testified that caring for Amber at that time was like taking care of a baby.
- [15] With extraordinary patience and resolve, Ms. McGillis took over almost all aspects of Amber's care "24/7" including feeding, bathing, toileting, administering medication, transferring and transporting.
- [16] Over time, with the establishment of extensive routines and with assistance from Sheree and her husband Codty, Ms. McGillis was able to make significant progress with Amber including re-training her to feed herself, walk on her own and use the toilet with some assistance and supervision. Amber's aggression has also been significantly managed. These developments have allowed Ms. McGillis and Sheree to take Amber out shopping, dining, and attend community events and other social activities.

- [17] Despite these developments, Amber still requires extensive care and supervision. For example, Ms. McGillis continues to bathe her, brush her teeth, prepare her food and provide guidance and supervision with almost everything.
- [18] Significantly since the accident, Amber has developed a seizure disorder. Ms. McGillis testified that Amber has had numerous seizure episodes including two significant "grand mal" seizures that required urgent hospitalization. While the last grand mal seizure occurred in approximately 2018, Ms. McGillis testified that Amber continues to have smaller seizures that have to be monitored and managed.
- [19] Although she requires significant care, Ms. McGillis testified that Amber is generally in good spirits and enjoys spending time with her family.

Expert Evidence

- [20] The plaintiff relies on the evidence of the following experts:

Dr. Douglas Graeb - Neuroradiologist

- [21] Dr. Douglas Graeb is a neuroradiologist who reviewed diagnostic medical imaging performed on the plaintiff following the accident. Based on the scans, he opined that the plaintiff suffered a "devastating generalized brain injury" from the accident.
- [22] Dr. Graeb noted that the plaintiff's multiple skull fractures indicated an extreme magnitude of force transmitted to her skull, resulting in contusions affecting major portions of both frontal lobes, the entire right temporal lobe including the right hippocampus, and the anterior left temporal lobe. The consequences of these injuries include major frontal lobe and memory deficits, as well as possible motor, sensory and speech deficits.
- [23] Further, Dr. Graeb opined that the plaintiff more likely than not suffered severe generalized diffuse axonal injury, the consequences of which include brainstem motor and sensory deficits.

Dr. Hugh Anton - Physiatrist

- [24] Dr. Hugh Anton testified as a physiatrist. He assessed the plaintiff in March 2023. In his opinion, the plaintiff sustained the following injuries from the accident: TBI, multiple skull fractures, a fracture of the left femur, a small pneumothorax (a collection of air in the chest cavity outside the lung), and a T6-T7 vertebral fracture.
- [25] Dr. Anton also offered the following opinions:
- a) The plaintiff sustained permanent structural changes in the brain;
 - b) She sustained a severe TBI involving multiple areas of the brain with specific involvement of both frontal lobes;

- c) Frontal lobe injuries may be associated with impairment of executive function and cause neuro-behavioural changes such as emotional dysregulation;
 - d) The plaintiff's post-accident behavioral changes including her aggressive behaviour were almost certainly a result of her frontal lobe injury;
 - e) Due to her TBI, it would be more difficult for the plaintiff to acquire the skills and knowledge required to function as an independent adult; and
 - f) The effects of the plaintiff's TBI on cognitive function would be amplified by any pre-injury intellectual disability or learning problem.
- [26] Dr. Anton opined that the plaintiff has multiple impairments arising from the residual effects of TBI:
- a) The plaintiff has severe impairment of cognitive function. For example, during the assessment she was not oriented to time or place and could follow only one-step commands;
 - b) The plaintiff probably also has impairment of executive function secondary to frontal lobe injury that negatively affects her ability to make decisions, plan, and initiate and regulate behaviour;
 - c) The plaintiff probably also has impairment of receptive and expressive speech;
 - d) The plaintiff's impaired cognitive and language function means that she requires cueing and supervision to complete basic activities of daily living;
 - e) The plaintiff's behavioral problems could recur and escalate should she have new stresses in her life, medical issues, or changes in her living situation; and
 - f) The plaintiff has impairment of motor function which is associated to impaired mobility. She is able to walk short distances without aids but is predisposed to fatigue due to her TBI and associated physical and cognitive impairments. In addition, she is at risk for falls.
- [27] With respect to the plaintiff's pre-injury level of function, Dr. Anton noted that the plaintiff appears to have had an intellectual disability and learning disorder or ADHD prior to the accident. Based on the information available, he opined that the range of jobs available to the plaintiff would likely have been limited, but it is probable that she would have been able to participate in some type of gainful employment and live independently but for the accident.
- [28] In terms of prognosis, Dr. Anton opined that TBI can lead to late medical complication. He noted that the plaintiff has already developed a post-traumatic seizure disorder. In his opinion, she is at risk for further seizures which can be ameliorated, but not eliminated, by optimal pharmacological treatment.

- [29] The plaintiff is also at risk for injury to the anterior pituitary gland. In this connection, Dr. Anton recommends that the plaintiff undergo certain tests and be referred to an endocrinologist if the results are abnormal.
- [30] The plaintiff is also at risk for late cognitive decline such as Alzheimer's disease. While this risk is probably small, her relative risk compared to that of the general population is increased.
- [31] In addition, Dr. Anton stated that psychiatric disorders such as depression are common after TBI.
- [32] Further, since the plaintiff's TBI has left her with reduced cerebral reserve, she is at risk for decreased recovery and increased cognitive impairments in the event of another TBI or other type of brain injury such as a stroke.
- [33] Finally, Dr. Anton opined that the plaintiff is at increased risk of decline in function over time including a likely decline in mobility when she gets older.

Dr. Douglas Cohen - Neuropsychologist

- [34] Dr. Douglas Cohen testified as a neuropsychologist. He assessed the plaintiff in March 2023, and prepared a report dated August 25, 2023, that set out his opinions and conclusions.
- [35] Based on his review of medical and other materials regarding the plaintiff's pre-injury level of function, Dr. Cohen stated that he could not identify any objective evidence that the plaintiff was "mentally retarded" as suggested in the reviewed material. He also noted that the proper term for low functioning individuals is "developmentally or intellectually disabled".
- [36] In Dr. Cohen's opinion, it is more likely that the plaintiff was struggling with a learning disability and / or attention deficit in school. He stated that he would have expected the plaintiff to have at least continued to maintain employment at her pre-injury level, and would have been fully independent as an adult, absent the brain injury from the accident.
- [37] Dr. Cohen noted that the plaintiff's intellectual disability did not arise developmentally, but rather through a severe TBI.

Dr. Tom Elliott - Life Expectancy Expert

- [38] Dr. Tom Elliott testified as an expert in internal medicine, endocrinology and life expectancy.
- [39] He testified that the key indicators of life expectancy in survivors of significant TBI is best determined by the level of function in two areas: degree of ambulation and self-feeding. Based on his assessment of the plaintiff's abilities in these areas, he formed the opinion that the plaintiff's life expectancy is 41 years (up to age 73) based on the mean or average survival rate of the relevant cohort, or 44.8 years (up to age 76) based on median survival rate.

Jacquelyn Abdel-Barr - Occupational Therapy and Life Care Planning

- [40] Jacquelyn Abdel-Barr testified as an occupational therapist (OT) and certified life care planner. She prepared a cost of future care report dated November 1, 2023, based on a home assessment conducted on November 15, 2022.
- [41] In Ms. Abdel-Barr's opinion, the plaintiff has likely plateaued or reached maximum physical and cognitive rehabilitation. While further treatment may assist in preventing deterioration, it is not likely to substantially improve her functional abilities.
- [42] Due to the combination of the plaintiff's limited self-awareness, severely impaired cognition, risk of behavioural problems and poor performance with activities of daily living and instrumental activities of daily living, Ms. Abdel-Barr assessed the plaintiff to require 24-hour care to ensure her personal safety.
- [43] In Ms. Abdel-Barr's opinion, the plaintiff requires a supervised living situation with constant supervision where support and guidance are provided by caregivers / personal support workers (PSW). She recommends that care be provided in the plaintiff's current home with the use of home care agencies to hire caregivers / PSW. She recommends this model of care to continue until such time when the plaintiff's condition deteriorates to the point where care in a residential facility is the only appropriate option.

Darren Benning - Economist

- [44] Darren Benning is an economist who provided calculations in respect of the plaintiff's claims for past and future income loss, and present values of costs of future care.
- [45] Based on the assumption that the plaintiff would have made earnings commensurate with the average B.C. female with a high school diploma, and taking various labour market contingencies into account, Mr. Benning calculated the plaintiff's past loss of income from the date of the accident to the trial date to be \$282,424 after deduction of EI premiums and income taxes.
- [46] Mr. Benning calculated the present value amounts of the plaintiff's future income loss to be between \$911,535 and \$968,515 assuming a life expectancy as estimated by Dr. Elliott adjusted to the date of trial.
- [47] The defendants rely on the evidence of the following experts:

Dr. John Sehmer - Life Expectancy

- [48] Dr. John Sehmer testified as an expert in occupational medicine and life expectancy. Although he agreed with Dr. Elliott that one's ability to ambulate and self-feed are powerful predictors in determining the plaintiff's life expectancy, he was of the view that other factors have a significant impact including the plaintiff's seizure disorder, her need for 24-hour supervision, and her living circumstances. Taking these factors into account, Dr. Sehmer opined that plaintiff's life expectancy is 37 years up to age 68.[1]

Tanya Percy - Occupational Therapy

- [49] Ms. Tanya Percy testified as an occupational therapist. She provided a cost of future care report on behalf of the defendants in which she provided two potential modes of delivery of 24-hour care for the plaintiff. The first involves the use of a care agency. The second involves the use of private hire caregiver services. Although Ms. Percy also provided costing for a residential care program in the Kelowna area, she acknowledged that this is not the preferred model of care for the plaintiff.

"Day in the Life" Video

- [50] Due to the nature and severity of the plaintiff's impairment, she did not have the capacity to testify at the trial. However, a "day in the life" video filmed by Erin Parks, a professional videographer, was tendered in evidence to provide the Court with a glimpse into the plaintiff's present condition and life. The video was taken over three days in October 2024 and depicts the plaintiff going about her daily routine and usual activities.
- [51] In the video, the plaintiff was generally cheerful and appeared to be happy in the company of her mother and sister. She could walk on her own albeit with some unsteadiness. She appeared to have some difficulty standing from a seated position but could manage without assistance. She ate the food that her mother prepared for her without assistance.
- [52] The plaintiff's language skills as demonstrated by the video were limited. She appeared to understand simple questions and instructions. Although at times she appeared to participate in the conversation around her, she tended to use the same words or phrases repeatedly, and they were not always responsive to what was going on.
- [53] It appeared from the video that the plaintiff could toilet on her own with some cueing and supervision from her mother, however she relied entirely on Ms. McGillis for bathing and personal hygiene such as brushing her teeth.
- [54] In addition to showing the plaintiff at home, the video also captured the plaintiff leaving her home for a shopping trip with Ms. McGillis and Sheree. It also showed her attending a physiotherapy appointment. The plaintiff received cueing and assistance from her mother with getting in and out of the car. She was well behaved while shopping with her mother and sister and during physiotherapy. She complied with simple instructions given to her.

Issues

[55] The issues in this case are:

- a) What is the plaintiff's life expectancy?
- b) What is the plaintiff's pre-accident level of function?
- c) What is the appropriate model of care for the plaintiff?
- d) What is the appropriate quantum of damages?

Assessment of Credibility and Reliability

Legal Principles

[56] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013) as follows:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.); *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[57] Credibility and reliability are not the same thing. Reliability analysis "is concerned with the accuracy of a witness's testimony; it involves consideration of a witness's ability to accurately observe, recall, and recount the events in issue": *Ford v. Lin*, 2022 BCCA 179 at para. 104; see also *R. v. Khan*, 2015 BCCA 320 at para. 44, leave to appeal to SCC ref'd, 36623 (17 March 2016).

[58] In the case at bar, the Court heard evidence regarding the plaintiff's pre-accident and post-accident life, health and level of function from her family and friends.

- [59] The defendants do not seriously take issue with the credibility of the lay witnesses, however they argue that some of their evidence is not reliable and should not be afforded weight. In particular, they submit that the plaintiff's friends and family overstated evidence that favoured the plaintiff's case and understated the evidence that did not.

Teresa McGillis - The Plaintiff's Mother

- [60] The bulk of the evidence at trial with respect to the plaintiff's pre-accident and post-accident life came from Ms. McGillis. She testified for over two days and was cross-examined extensively.
- [61] I found Ms. McGillis to be a credible and reliable witness. She testified in a direct manner. I observed her to be a careful witness who seemed to be candid and fair. She readily admitted what she didn't know or remember and did not embellish. In addition, her evidence regarding the plaintiff was generally consistent with the evidence of other witnesses, and with the "Day in the Life" video.
- [62] The defendants submit that Ms. McGillis downplayed the plaintiff's academic difficulties and limitations in performing basic housework before the accident. They also submit that parts of Ms. McGillis's evidence are internally and externally inconsistent.
- [63] For example, the defendants point to the evidence of Ms. McGillis that in high school, Amber was given the same work as everyone else but with more time to complete the work. In reality, Amber participated in a modified academic program and received "No Mark" in many courses because she did not complete the curriculum. Another example was that Ms. McGillis denied that Amber had any pre-accident restrictions or limitations in her ability to plan meals, cook, and perform basic housework, testifying instead that Ms. McGillis preferred to perform all household chores for her children. However, Sheree testified that she performed chores and cooked meals at home.
- [64] I will not list all of the examples provided in the defendants' submissions. I have considered them. While I accept that the perception of Ms. McGillis regarding her daughter may in certain respects not completely align with the objective evidence, in my view, the difference is marginal and does not undermine the overall credibility and reliability of her evidence. To the extent that her evidence differs from the objective evidence, for example the plaintiff's school records, I give her evidence less weight. Ultimately in my view, not much turns on the alleged discrepancies.

Sheree Funk - The Plaintiff's Sister

- [65] Similarly, the defendants submit that parts of Sheree's evidence should not be given weight for essentially the same reasons articulated in respect of Ms. McGillis. For example, they point to Sheree's description of Amber as "the responsible one" which is inconsistent with Ms. McGillis's evidence regarding Amber's immaturity. They submit that Sheree downplayed Amber's experience in high school by stating that Amber "grew into herself" and that

Amber's experience was "nothing that isn't common these days". She also downplayed Amber's mental well-being after she came home from being admitted in hospital for cutting, by stating that Amber "seemed to do really really well".

- [66] I have considered all of the defendants' submissions although I have not listed all of the examples provided by them.
- [67] Generally, I also found Sheree to be a credible and reliable witness. She testified in a straightforward manner and answered questions directly without mincing words.
- [68] Specifically, I do not interpret Sheree's description of Amber as "responsible" to be inconsistent with Ms. McGillis's evidence. Sheree was asked to describe Amber's personality and maturity level after graduation. She responded that Amber was "probably more responsible" than she was. She explained what she meant by providing examples. She stated that Amber was good at managing her money. She also recalled an incident when her daughter Skylar had a bad diaper rash and Amber called Child Protection Services because she did not think Sheree was paying enough attention. What I take from this evidence is that there were occasions during which the plaintiff demonstrated a sense of responsibility.
- [69] However, as with Ms. McGillis, accepting that Sheree's perception of Amber may to some extent differ from the objective evidence, I assign less weight to her evidence. Ultimately, I am not persuaded that the examples provided by the defendants significantly undermined the credibility and reliability of Sheree's evidence.

Darcy Funk - The Plaintiff's Uncle

Chelsea Small - The Plaintiff's Friend

Bryce Gorman - The Plaintiff's Friend

- [70] The Court also heard evidence from the plaintiff's uncle Darcy Funk, her schoolmate and friend Chelsea Small and Bryce Gorman who is Skylar's dad. Each testified to their respective recollection of the plaintiff before the accident.
- [71] I find that these witnesses to be generally credible and reliable. However, although they were familiar with certain aspects of the plaintiff's life, their knowledge of the plaintiff was limited. For example, they were not aware or did not recall that the plaintiff had significant personal struggles or that she had been sexually assaulted in high school.
- [72] While I generally accept their evidence, their limited knowledge or recollection of details regarding the plaintiff's pre-accident life informs the context in which I view their evidence and the corresponding weight that I attach to it.

Other Lay Witnesses

- [73] No issue was taken in respect of the credibility and reliability of the remaining lay witnesses. I assess their evidence to be credible and reliable. These witnesses are:

- a) Erin Parks - creator, Day in the Life video;
- b) Hettie De Beer - OT;
- c) Dr. Shayne Soetaert - physician;
- d) Lyanne Vaughn - OT;
- e) Sharlene Charest - school counsellor; and
- f) Caroline Wojczak - rehabilitation assistant.

Expert Witnesses

- [74] There is no dispute regarding the credibility and reliability of the following expert witnesses: Dr. Anton, Dr. Graeb, Dr. Cohen, and Mr. Benning. With respect to Ms. Percy, while plaintiff's counsel submits that the Court should go with Ms. Abdel-Barr's recommendations, he does not specifically take issue with Ms. Percy's credibility and reliability. Generally, I have no difficulty with the credibility and reliability of these witnesses.
- [75] With respect Ms. Abdel-Barr, the defendants submit that her evidence should not be given any weight. They assert that she was argumentative and took on the role of an advocate, that her report is "outdated" and that she relied on incorrect assumptions and on medical opinion that was not before the court.
- [76] I would not accede to the defendants' submissions regarding Ms. Abdel-Barr. I generally found her evidence to be credible and reliable. Importantly, there was broad agreement between Ms. Abdel-Barr and Ms. Percy on overarching propositions regarding the plaintiff's care. Ultimately, my assessment of Ms. Abdel-Barr's recommendations are based on my factual findings.
- [77] With respect to Dr. Elliott and Dr. Sehmer, each party argues that the Court should reject the evidence of the other party's expert. I discuss my assessment of their evidence later in these reasons.

Causation

- [78] Except in special circumstances, the plaintiff must establish on a balance of probabilities that the defendant's negligence caused an injury. The defendant's negligence does not have to be the sole cause of the injury so long as it is a necessary cause: *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.

- [79] The primary test for causation asks: but-for the defendant's negligence, would the plaintiff have suffered the injury? The "but-for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21-23; *Zenone v. Knight*, 2024 BCCA 200 at para. 55.
- [80] The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse: *Blackwater v. Plint*, 2005 SCC 58 at para. 78. Tortfeasors must take their victims as they find them even if the plaintiff's injuries are more severe than they would be for a normal person (the "thin skull" rule). A defendant is fully liable for the unexpectedly severe injuries of the thin skull plaintiff because liability cannot be apportioned between causes: *Dornan v. Silva*, 2021 BCCA 228 at para. 41. However, the defendant need not compensate the plaintiff for any debilitating effects of a pre-existing condition which the plaintiff would have experienced anyway (the "crumbling skull" rule): *Athey* at paras. 32-35.
- [81] In the case at bar, the defendants reasonably do not take issue with causation. In any event, I am satisfied that the plaintiff has established on a balance of probabilities that the injuries she sustained including TBI and the resultant impairments were caused by the accident.

Discussion

What is the Plaintiff's Life Expectancy?

- [82] The plaintiff tendered expert evidence from Dr. Elliott who the plaintiff's life expectancy to be 41 years or up to 73 years old. The defendants rely on the opinion of Dr. Sehmer who estimated the plaintiff's life expectancy to be 36 years or up to 68 years old.
- [83] Both experts agree that the plaintiff's life expectancy is reduced because of her injuries, however they differ on the quantum of reduction. Both experts relied on studies conducted by J.C. Brooks et al regarding life expectancy of individuals after a TBI. Those studies considered a person's age, sex, walking ability and feeding ability to estimate life expectancy.
- [84] The plaintiff criticizes Dr. Sehmer for relying on an older study from 2015. Dr. Elliott relied on a more recent study from 2022. The 2022 study states that it supersedes the results reported in the 2015 study. However, as Dr. Sehmer testified, the 2022 study also acknowledges that the life expectancies in the two studies are not markedly different.
- [85] It is unclear to me why Dr. Sehmer would not have used the most up-to-date empirical data available. However, in the absence of evidence that the result would have been significantly different if he had, I do not find that this factor alone significantly undermined the reliability of Dr. Sehmer's evidence.
- [86] The studies acknowledge that some "refinement" of the life expectancy figures may be appropriate in some cases. The 2022 study described its limitations:

The walking-feeding comparison groups are broad, and some refinement of the life expectancy figures to reflect a particular individual's pattern of abilities and disabilities may be indicated for prognosis in some cases.

- [87] Both Dr. Elliott and Dr. Sehmer placed the plaintiff in the category of people with "some walking ability". They also agree that the plaintiff can self-feed.
- [88] Their main point of contention relates to the degree to which the life expectancy figures require "refinement" if any, to account for the plaintiff's individual risks, such as her risk of seizures.
- [89] In forming his opinion, Dr. Elliott considered the plaintiff's specific life risks to be "average". Dr. Elliott testified that a person's ability to walk is the most important factor in determining life expectancy. As I understand his evidence, he considered the quantification of the plaintiff's specific life risks, such as those related to seizures and falls, to be subsumed in the 2022 study life expectancy figures. He did not consider it necessary to make any adjustments to those figures.
- [90] Dr. Sehmer on the other hand testified that while the plaintiff's ability to walk and self-feed are "powerful predictors" of life expectancy, other factors must also be considered such as her risks of seizure and falling, and her cognitive impairment. He testified that he adjusted the 2015 study life expectancy figures to account for these factors.
- [91] Respectfully, I have difficulty with the opinions of both experts. At trial, both were argumentative and defensive regarding their respective positions. Importantly, neither of them adequately explained the methodology and rationale behind their respective opinions.
- [92] For example, when asked, Dr. Elliott could not clearly articulate: (1) the basis upon which he considered the plaintiff's risks to be "average", (2) the basis upon which he concluded that the plaintiff's risk of seizure disorder was subsumed in the study calculations, and (3) what types of factors might cause him to conclude that a person's risk of premature death was higher or lower than the average individual with a TBI.
- [93] With respect to Dr. Sehmer, although he testified that his opinion was based on the 2015 life expectancy figures with adjustments to account for the plaintiff's specific risks, he could not explain his methodology. For example, he testified that he used an increased standardized mortality ratio (SMR) of "6" in calculating the plaintiff's life expectancy. Based on the study, an SMR range of "3.1 to 3.8" would apply to the plaintiff. Dr. Sehmer testified that he used an the increased SMR to account for the plaintiff's specific risks. However, he could not articulate how he arrived at an SMR of 6, apart from calling it an "educated guess".
- [94] While I appreciate that estimating life expectancy is not an exact science and much of it may very well be an "educated guess", the Court requires some explanation of the methodology employed in order assess the reliability of the resulting opinion.

- [95] These deficiencies impact the weight that I attach to the opinions of Dr. Elliott and Dr. Sehmer regarding the plaintiff's life expectancy. To be clear, I do not reject the entirety of their evidence.
- [96] Doing the best that I can with the evidence, I conclude that it is reasonable to estimate the plaintiff's life expectancy to be somewhere between 36 years as estimated by Dr. Sehmer and 41 years as estimated by Dr. Elliott. I find that the plaintiff's life expectancy to be an additional 38 years or up to the age of 70.

What Was the Plaintiff's Pre-Accident Level of Function?

- [97] The defendants submit that in assessing the plaintiff's future care needs, the Court needs to determine what care needs the plaintiff would have had in any event. They submit that the plaintiff experienced significant pre-accident disabilities and may not have been able to live independently in any event. The defendants argue that even without the accident, the plaintiff would have lived with her mother for the foreseeable future, relying on her for supervision and guidance to keep her safe. In support of their position, the defendants point to the plaintiff's PWD designation, poor decision-making, and degree of reliance on her mother before the accident.
- [98] The evidence in my view does not go as far as the defendants suggest. I accept that before the accident, the plaintiff had some form of learning disability that required accommodation in school, that she had mental health struggles and behavioural issues, and that at times she exercised poor judgment. However, this does not mean that she would not have had the ability to live independently as an adult. I do not accept the assertion that the plaintiff would have lived with her mother for the foreseeable future in any event of the accident.
- [99] In my view, it is important to view the plaintiff's pre-accident decisions, conduct, and dependence on her mother in the context of her youth. She was only 18 years old at the time of the accident. Despite her struggles, she completed grade 12 and maintained employment at McDonald's and Tim Hortons for a period of time.
- [100] Further, I accept the opinion of Dr. Cohen that there was no objective evidence that the plaintiff was developmentally or intellectually disabled. I also accept his opinion that the plaintiff would have at least maintained employment at her pre-injury level and would have been fully independent as an adult, absent the brain injury sustained from the accident.

What is the Appropriate Quantum of Damages?

Non-Pecuniary Damages

Legal Principles

[101] Non-pecuniary damages are awarded to compensate the plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities: *Langford (City) v. Matthews*, 2024 BCCA 214 at para. 44. The compensation awarded should be fair to all parties, and fairness is measured against awards made in comparable cases. Such cases, though helpful, serve only as a rough guide and damage awards in each case will vary to meet the specific circumstances of that case: *Howes v. Liu*, 2023 BCCA 316 at para. 26.

[102] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages:

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

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

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

- g) impairment of family, marital and social relationships;
- h) impairment of physical and mental abilities;
- i) loss of lifestyle; and
- j) the plaintiff's stoicism (as a factor that should not, generally speaking, penalize the plaintiff: *Giang v. Clayton*, [2005] B.C.J. No. 163 (QL), 2005 BCCA 54).

[103] An award for non-pecuniary damages is determined by a functional approach that depends not only on the gravity of an injury but also on the plaintiff's circumstances: *McCliggot v. Elliott*, 2022 BCCA 315 at para. 44;

Langford (City) at para. 44. Assessment of non-pecuniary damages is necessarily influenced by the individual plaintiff's personal experiences in dealing with his or her injuries and their consequences, and the plaintiff's ability to articulate that experience: *Dilello v. Montgomery*, 2005 BCCA 56 at para. 25.

Positions of the Parties

- [104] The plaintiff's counsel submits that this is a case that calls for an award of non-pecuniary damages at the upper limit as set out in the "trilogy" of cases decided by the Supreme Court of Canada in which the Court fixed an upper limit of \$100,000 for non-pecuniary damages. That amount, adjusted for inflation, is now approximately \$470,000.
- [105] The defendants emphasize the application of a functional approach to the assessment of non-pecuniary damages. They submit that the plaintiff is not entitled to an award in the upper limit because while the plaintiff's injuries are significant, she remains capable of happiness and enjoyment. Due to the severity of the plaintiff's brain injury, she lacks awareness and insight regarding her cognitive and physical challenges. By all accounts, she remains happy, with no evidence of personal distress or sadness from an awareness of her disabilities. Further, they submit that there is no evidence that a monetary award will make the plaintiff's life more tolerable, or ameliorate her current condition.
- [106] The defendants submit that an award in the range of \$425,000 to \$450,000 is appropriate.

Findings of Fact - Non-Pecuniary Damages

- [107] I find that the plaintiff sustained catastrophic injuries from the accident. As a result of her injuries which included a severe TBI, her cognitive function has been gravely impaired. This has negatively impacted her capacity to make decisions, as well as her capacity to plan and regulate behaviour. I accept the assessment of Dr. Cohen that the plaintiff's listening and comprehension skills are comparable to that of a four to five-year old child.
- [108] The plaintiff's language skills have also been severely impaired, and she cannot communicate in a meaningful way. While the plaintiff can walk, her movements are slow and unsteady, and she is predisposed to fatigue.
- [109] In terms of her day-to-day living, the plaintiff cannot function independently, and she is heavily reliant on the assistance of others in all aspects of her life. Based on the expert evidence, it is likely that the plaintiff has now reached her highest level of functioning. No further gains in her cognitive capacity is expected.

Discussion

- [110] In my view, the functional approach to the assessment of non-pecuniary damages does not necessarily preclude an award in the upper limit where a plaintiff may not have awareness or understanding regarding their injuries and condition.

- [111] In *Steinbach v. Fraser Valley Health Authority*, 2010 BCSC 832, the court dealt with a similar argument as that advanced by the defendants in the case at bar. In *Steinbach*, the five-year-old plaintiff suffered a severe or profound cerebral palsy caused by damage to brain tissue due to oxygen deprivation sometime prior to her birth. The trial judge found that this resulted from the negligence of a doctor and a nurse that attended to the plaintiff's mother during delivery.
- [112] On the issue of the appropriate award for non-pecuniary damages, the defendants submitted that although the plaintiff's injuries were extreme, her lack of cognition and ability to understand her condition should result in a lesser award.
- [113] The trial judge noted that there was no way of ascertaining what appreciation, if any, the plaintiff had or would have in respect of her circumstances. In awarding the rough upper limit for non-pecuniary damages, the trial judge focused on the plaintiff's capacity to enjoy positive experiences that make her life more bearable rather than her ability to appreciate her situation and loss. I find it helpful to refer to the judge's reasoning:
- [149] The evidence indicates, and I find, that Mirella's physical injury at birth was catastrophic. She cannot speak and is not likely to speak. She cannot swallow and must be fed and will always be fed by a gastronomy tube. Her respiratory capacity is severely impaired. It is likely that she will suffer a range of respiratory illnesses through her lifetime. Her motor ability is severely restricted. She will never be able to walk. She may be able to turn herself over but she cannot yet do so at age five. There is no way of knowing what appreciation, if any, Mirella has or will have of her circumstances. It is not likely that she will develop intelligence beyond that of a four-year old. There is no way of knowing whether she is in pain or whether she will experience pain in the course of her lifetime.
- [150] The only factor that could justify an award of less than the permitted maximum is acceptance of the fact that Mirella may not be able to appreciate the nature of her circumstances so as to be able to ask "what might have been?" Medical or any other science cannot provide a meaningful answer to that question.
- [151] I am not persuaded that it is appropriate to attempt to assess the level to which Mirella's cognitive development will permit her to sense pain, or to compare herself and her situation to that of her peers.
- [152] The evidence that has been adduced in this case by those who have observed Mirella indicates that she appears to derive pleasure from interacting with members of her family and enjoyment from being in the company of others. It is not an overstatement to say that interaction with others at a most basic level is likely to be the only enjoyment Mirella will experience in her life.

[153] A significant award of non-pecuniary damages will permit Mirella's family and caregivers to undertake activities that are family-centered and very likely different from what the family might otherwise have done in order to involve Mirella, thereby providing her with the greatest degree of companionship and comfort possible in the circumstances. The family should not be hindered because of economic constraints in the pursuit of family activities which involve Mirella and bring her any degree of pleasure.

[114] On appeal, the Court of Appeal referred to the above paragraphs from the trial decision and made the following comments at: *Steinebach v. O'Brien*, 2011 BCCA 302 at para. 35:

As I read this passage, the trial judge concluded that Mirella's capacity to experience pain and discomfort was indeterminate as was her capacity to appreciate her circumstances. Essentially he concluded that any answer to those questions would be speculative and he declined to engage in speculation. He noted that the award of non-pecuniary damages could be used to fund family activities that would be directed toward providing amenities for Mirella in the form of pleasurable companionship and comfort and Mirella would be capable of appreciating those amenities.

[115] The Court concluded that there was no basis to interfere with the trial judge's findings on this issue: para. 36.

[116] Similarly in *Woo v. Crème De La Crumb Bakeshop & Catering Ltd.*, 2019 BCSC 1752, the Court focused on the plaintiff's capacity to experience pleasure for his remaining years in determining an appropriate award for non-pecuniary damages. In that case, the plaintiff sustained catastrophic injuries when he fell from a ladder while working on the premises leased by the defendant. In discussing this head of damage, the Court stated:

[145] It is clear on the evidence (and indeed was agreed by the parties in the agreed statement of facts) that the plaintiff is in a permanent vegetative state and requires full-time care for all of his needs. He is non-verbal and unable to communicate his needs.

[146] There is also evidence, from Mrs. Woo and Sharine, that the plaintiff responds to them, particularly when they speak to him in Korean. Sharine testified that the plaintiff exhibits signs when he is in pain or discomfort. They provide him with physiotherapy and massage beyond what is available at Purdy. They also suction him and move him more frequently than what the hospital staff can do. Patricia Barry, who is a registered nurse and the resident care coordinator at Purdy, testified that while the hospital provides all medically necessary care, there are things that the family provides that the hospital cannot.

[147] In my view, this is a case like *Steinebach* in which it cannot be said with any degree of certainty the extent to which the plaintiff comprehends, or does not comprehend, his circumstances. While the medical evidence does paint a dire picture, it does not go so far as to undermine the evidence of Mrs. Woo and Sharine in terms of what they observe in the plaintiff. Paraphrasing what the trial judge said in *Steinebach*, interaction with his family is likely the only thing close to pleasure that the plaintiff will experience for the balance of his

life.

[148] In assessing non-pecuniary damages, it is useful to return to first principles, as articulated in *Andrews*, where Dickson J. again described such damages as "money to make life more endurable [by] providing more general physical arrangements above and beyond those relating directly to the injuries" (at 262). In *Lindal*, Dickson J. described the object of an award as being to "ameliorate the condition of the victim considering his or her particular situation" (at 637).

[149] Similarly, in *Dudas v. Munro*, [1997] B.C.J. No. 774 (S.C.), Mr. Justice Macdonald described an award of non-pecuniary damages in these terms, at para. 56:

It can make life more endurable and enjoyable by providing devices and activities not directly related to the injuries. It can "fill the gap" where some item does not fall within future care expenses and is disallowed.

[150] I note that in *Dudas*, Justice Macdonald found that the defendant was not liable, however he proceeded to assess damages "in general terms" (at para. 49) in the event his liability findings was reversed on appeal.

[151] Justice Macdonald's description of the purpose of a non-pecuniary award is particularly apt in this case. An award of non-pecuniary damages may be used to make the plaintiff's life more bearable and to "fill the gap" by providing an additional degree of personal care and attention that would not otherwise qualify as a recoverable future care cost.

[117] Since in *Woo* the plaintiff's life expectancy was estimated to be only 3.7 years, the Court declined to award the upper limit for non-pecuniary damages.

[118] In my view, the approach in *Steinebach* and *Woo* applies equally to the circumstances of this case. While it is uncontroversial that the plaintiff's capacity to appreciate her post-accident condition has been significantly compromised, in my view, it cannot be determined with any degree of certainty the extent to which she understands or does not understand her situation.

[119] None of the medical experts directly addressed the issue of the plaintiff's capacity to comprehend her post-accident circumstances. The expert evidence indicates that the plaintiff has "reduced" or "low" insight which suggests that she may have some. In addition, Ms. Vaughn testified that she observed the plaintiff's demeanour change from "upbeat" to "sad" in 2024 when Ms. McGillis was telling Ms. Wojczak about the accident in the plaintiff's presence. This may not mean anything, but it may also indicate some awareness.

[120] I do not agree with the defendants' submission that there is no evidence that a monetary award will make the plaintiff's life more tolerable or ameliorate her current condition. Because of her post-accident impairments, the plaintiff's capacity to participate in the types of social and recreational activities that would be typical for a woman her age has been profoundly reduced. However, the evidence clearly demonstrates that she is still very much

capable of happiness and joy. She appears to enjoy spending time with her family whether at home or out in the community. She appears to like watching television or videos. She seems to enjoy having meals with her family. According to both Ms. McGillis and Sheree, the plaintiff enjoys music and would tap her feet when she hears music. She also enjoyed attending the local fair, Vancouver Aquarium and Maplewood Farm. Ms. McGillis testified that she would like to bring the plaintiff to similar types of places including the Calgary zoo.

[121] As the Court noted in *Steinebach*, a significant award of non-pecuniary damages will allow the plaintiff's family and caregivers to undertake activities with the plaintiff that she would enjoy beyond what the family might otherwise have done. The family should not be hindered by economic constraints in pursuing activities that will bring the plaintiff pleasure and joy thereby making her life more endurable.

[122] Given the circumstances, I consider an award at the upper limit for non-pecuniary damages to be appropriate. I therefore award \$470,000 for this head of damage.

Past Loss of Earning Capacity

Findings of Fact

[123] I make the following additional findings of fact in assessing the plaintiff's past loss of income earning capacity:

- a) The plaintiff completed grade 12 and received a School Certificate of Completion;
- b) The plaintiff worked at McDonald's part-time while attending high school for a period of between 10 months (based on her record of employment) to 14 months (based on a letter provided by the employer);
- c) She worked approximately 15 hours on a bi-monthly basis at McDonald's at \$9.52 per hour;
- d) The plaintiff worked at Tim Hortons for approximately five to eight months while attending high school and after graduation until approximately November 2010;
- e) She did not have regular employment between approximately November 2010 and the accident;
- f) The plaintiff began receiving PWD benefits in around 2011; and
- g) Based on available tax documents, the plaintiff's income for taxation years 2008 to 2013 were as follows:

Tax Year

Employment Income

CPP/QPP benefits

Social Assistance

Total Income

2008

\$2,719

\$2,448

\$5,167

2009

No information

2010

\$6,641

\$6,641

2011

\$1,966

\$3,383

\$5,349

2012

\$1,175

(source unclear)

2013

\$7,638.06

\$7,638.06

Legal Principles

[124] Compensation for past loss of earning capacity is to be based on what the plaintiff would have earned but for the injury that was sustained: *Hartman v. MMS Homes Ltd.*, 2023 BCCA 400 at para. 64 citing *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[125] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for only his or her past net income loss. This means that in the ordinary course the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62.

[126] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey* at para. 27; *Dornan* at para. 94.

Positions of the Parties

[127] The plaintiff claims \$282,424 in past income loss based on Mr. Benning's net of tax calculations.

[128] The defendants argue that Mr. Benning's calculations do not apply as they are based on the average full-time earnings of British Columbia females with a high school diploma. The defendants dispute that the plaintiff's earnings would have been comparable to this group because, among other things, she did not graduate with a Dogwood diploma.

[129] The defendants submit that in all likelihood, the plaintiff would have remained on PWD benefits, earning sporadic income from low paying jobs. They submit that after deducting PWD benefits, the plaintiff's net past wage loss is in the range of \$50,000 to \$75,000.

Discussion

[130] The defendants did not specify how they arrived at these amounts. However, I agree with the defendants that Mr. Benning's calculations do not directly apply to the plaintiff.

[131] I note that there was evidence at trial regarding the requirements that the plaintiff would need to meet in order to obtain an adult Dogwood diploma. Ms. Charest testified that five courses would be required. As I understand it, these courses may include Math 11 and Communications 12 that the plaintiff had already taken which could be transferred over to the adult program. With respect to the remaining three courses, Ms. Charest testified that almost any grade 12 elective, such as art or woodwork, could qualify.

[132] There was also evidence of the plaintiff's interest in training to become a baker or a chef. Ms. McGillis testified that in the spring of 2011, she and the plaintiff went to the College of the Rockies in Fernie to inquire about its programs and pick up brochures.

[133] I conclude from the evidence that it would not be particularly onerous for the plaintiff to have obtained an adult Dogwood diploma, and I find that she had the capacity to do so. However, there was little evidence regarding whether the plaintiff was interested or inclined to pursue an adult Dogwood diploma. While I accept that the plaintiff had some interest in taking some type of a culinary program in the future, there was little information about the program and no evidence led as to whether admission to the program required a Dogwood diploma.

- [134] I consider the plaintiff's youth in assessing the evidence, and I recognize that just because she did not seem particularly driven to pursue regular employment or further studies, it does not mean that she would not have done so eventually as she got older and became more mature, but-for the accident. I accept the evidence of Ms. McGillis that she told the plaintiff that she needed to either pursue further education or find employment.
- [135] For the purpose of assessing the plaintiff's past income loss, I am satisfied that there is a real and substantial possibility of pecuniary loss resulting from the injuries sustained from the accident. In assessing the appropriate quantum, I am also satisfied that there is a real and substantial possibility that the plaintiff would have eventually obtained an adult Dogwood diploma and maintained full-time employment. However, given the plaintiff's various personal challenges, I assess this likelihood to be relatively low. I estimate it to be 30%.
- [136] Correspondingly, I assess the plaintiff's likelihood of earning past income comparable to the average full-time earnings of B.C. females with a high school diploma to be 30%. Adjusting Mr. Benning's calculations to reflect this likelihood, I assess the plaintiff's net past loss of income to be approximately \$85,000 ($\$232,424 \times 30\%$) before any deduction for PWD benefits received.

Future Loss of Income Earning Capacity

Legal Principles

- [137] The central task before the court in considering damages for loss of future earning capacity is to compare the likely future of the plaintiff's working life without the injury to their likely future working life with the injury: *Davies v. Penner*, 2023 BCCA 300 at para. 25; *Rab v. Prescott*, 2021 BCCA 345 at para. 65. A plaintiff is not entitled to an award for loss of earning capacity in the absence of any real and substantial possibility of a future event leading to income loss: *Ploskon- Ciesla v. Brophy*, 2022 BCCA 217 at para. 14.
- [138] The Court of Appeal issued a trilogy of decisions in 2021 regarding the proper approach to assessing a claim for damages for loss of future earning capacity: *Dornan*; *Rab*; and *Lo v. Vos*, 2021 BCCA 421. The Court identified a three-step process for assessing damages, described in *Rab* as follows:
- [47] 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* paras 93-95.

- [139] At the first step from Rab, there are broadly two types of cases involving the loss of future earning capacity: (1) more straightforward cases, for example, when an accident causes injuries that render a plaintiff unable to work at the time of trial and for the foreseeable future; and (2) less straightforward cases, for example, those in which a plaintiff's injuries have led to continuing deficits or exposed them to future problems, but the plaintiff's income at trial is similar to what it was at the time of the accident: paras. 29-30. In the former set of cases, the first and second step of the analysis may well be foregone conclusions. However, it will be necessary to assess the probability of future hypothetical events occurring that may affect the quantification of the loss, and the court may make allowance for positive and negative contingencies: Rab at para. 29; Ploskon-Ciesla at para. 11.
- [140] The second step of the analysis requires the plaintiff to prove there is a real and substantial possibility that the future event in question will give rise to pecuniary loss. Here, after determining that the plaintiff may suffer a loss of capacity, the court evaluates the likelihood that it will affect the plaintiff's ability to earn income. The standard of proof "is a lower threshold than a balance of probabilities but a higher threshold than that of something that is only possible and speculative": Gao v. Dietrich, 2018 BCCA 372 at para. 34; Ploskon-Ciesla at para. 15.
- [141] At the third step - the valuation stage - there are two possible approaches to assessing loss of future earning capacity, being the earnings approach and the capital asset approach: Davies at para. 28; Perren v. Lalari, 2010 BCCA 140 at para. 32. The earnings approach will generally be more useful when the loss is easily measurable: Lamarque v. Rouse, 2023 BCCA 392 at para. 38; Perren at para. 32. Where the loss "is not measurable in a pecuniary way", the capital asset approach is more appropriate: Perren at para. 12.
- [142] The approach taken to the assessment of loss must be based on the evidence: Rab at para. 75. The ultimate award is a matter of judgment as opposed to purely mathematical calculation: Rosvold v. Dunlop, 2001 BCCA 1 at para. 18. The assessment includes consideration of general contingencies as well as any specific contingencies relied on by the plaintiff or defendant: see Hartman at para. 71 citing Graham v. Rourke, (1990), 74 D.L.R. (4th) 1, 1990 CanLII 7005 (Ont. C.A.). Specific contingencies pertain to the plaintiff in particular and must be grounded in evidence establishing them as realistic possibilities: Dornan at paras. 92-95. To the extent possible, the plaintiff should be put in the position he or she would have been in but for the injuries caused by the defendant's negligence: Lines v. W & D Logging Co. Ltd., 2009 BCCA106 at para. 185.
- [143] The earnings approach assesses the plaintiff's estimated annual income multiplied by the remaining years of work and discounted to reflect the present value: Ng v. Corness, 2023 BCCA 185 at para. 18; Pallos v. Insurance Corp. of British Columbia, 100 B.C.L.R. (2d) 260, 1995 CanLII 2871 at para. 43 (C.A.).

- [144] The capital asset approach involves consideration of the factors described in *Brown v. Gola*, 26 B.C.L.R. (3d) 353 at 356, 1985 CanLII 149 (S.C.), including whether the plaintiff (i) has been rendered less capable overall of earning income from all types of employment; (ii) is less marketable or attractive as a potential employee; (iii) has lost the ability to take advantage of all job opportunities that might otherwise have been open; and (iv) is less valuable to himself as a person capable of earning income in a competitive labour market: see also *Ploskon-Ciesla* at para. 13. Though the capital asset approach is not a "mathematical calculation", the trial judge must still explain the factual basis of the award: *Dornan* at paras. 151, 158; *Morgan v. Galbraith*, 2013 BCCA 305 at para. 56.
- [145] Under the capital asset approach, the court may award the plaintiff's entire annual income for one to two years, or the present value of some nominal percentage loss per annum applied against the plaintiff's expected annual income: *McKee v. Hicks*, 2023 BCCA 109 at para. 80; *Pallos* at para. 43.

Positions of the Parties

- [146] Relying on Mr. Benning's calculations regarding future income loss based on the average full-time earnings of females in B.C. with a high school diploma, the plaintiff claims between \$911,535 and \$939,150 from the date of trial to an anticipated retirement age of 65 or 70 years old respectively.
- [147] The defendants dispute the applicability of Mr. Benning's calculations for the same reason articulated in the previous section. They submit that a capital asset approach is the most appropriate based on the available evidence given the lack of any meaningful earning history.
- [148] They further submit that in all likelihood, the plaintiff would have continued living in Spardell trailer park collecting PWD benefits and earning only modest sporadic income in the future, but for the accident. The defendants submit that an award with a present day value in the range of \$375,000 to \$425,000 is fair and reasonable.

Discussion

- [149] As with past income loss, I am satisfied that there is a real and substantial possibility that the plaintiff's injuries from the accident will result in future loss of earning capacity and corresponding pecuniary loss.
- [150] In terms of assessing that loss, given the plaintiff's young age, the lack of any meaningful history of earnings, and the considerable uncertainty in the path that she would have taken but for the accident, I agree with the defendants that the capital asset approach is the more appropriate approach.

[151] As I found earlier, I am satisfied that there is a real and substantial possibility that the plaintiff would have obtained a Dogwood diploma and maintained full-time employment at some point. Although I had assessed this likelihood to be approximately 30% in respect of past income loss, I assess the likelihood to be slightly higher in respect of future income loss. The reason is that I consider it more likely that the plaintiff would have taken these steps and generally achieved more stability in life as she got older. I estimate this likelihood to be around 50%.

[152] Using Mr. Benning's estimate of \$911,535, I award \$455,000 in respect of the plaintiff's future income loss.

[153] I address briefly the defendants' argument that the plaintiff likely would have had at least two children by now and that it ought to impact the Court's assessment of future loss of income, I note that this factor is already accounted for as part of the labour market contingencies in Mr. Benning's calculations. I do not consider it necessary to make further adjustments in this connection.

Costs of Future Care

Legal Principles

[154] The plaintiff is entitled to compensation for the costs of future care based on what is medically necessary to restore the plaintiff to a position as though the accident had not occurred. When full restoration cannot be achieved, the court must strive to assure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the available medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch*, 49 B.C.L.R. (2d) 33, 1985 CanLII 179 (S.C.); *Quigley v. Cymbalisty*, 2021 BCCA 33 at para. 43.

[155] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence, and it must be fair to both parties: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58. For an award of future care: (1) there must be a medical justification for claims and, (2) the claims must be reasonable: *Milina*; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63; *McGuigan Estate v. Pevach*, 2024 BCCA 106 at para. 92 citing *Paur v. Province Health Care*, 2017 BCCA 161 at para. 109. Future care costs are "justified" if they are both medically necessary and likely to be incurred by the plaintiff.

[156] An award of damages for costs of future care is in part an exercise in prediction and prophecy: *Pang* at para. 58. However, the court must be satisfied of the following: first, that the plaintiff would, in fact, make use of the particular care item; second, that the care item is one that was made necessary by the injury in question and that it is not an expense the plaintiff would, in any event, have incurred; and, third, that there is no significant overlap in the various care items sought: *Pang* at para. 57.

- [157] It is not necessary that a medical expert testify to the medical necessity of each and every item of care that is claimed: Paur at para. 109.
- [158] The extent, if any, to which a future care costs award should be adjusted for contingencies depends on the specific care needs of the plaintiff. In some cases, negative contingencies are offset by positive contingencies and, therefore, a contingency adjustment is not required. In other cases, however, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: Gilbert v. Bottle, 2011 BCSC 1389 at para. 253.
- [159] An assessment of damages for cost of future care is not a precise accounting exercise: Krangle (Guardian ad litem of) v. Brisco, 2002 SCC 9 at para. 21; Pang at para. 58.

What is the Appropriate Model of Care for the Plaintiff?

Positions of the Parties

- [160] The plaintiff submits that it is in the best interests of the plaintiff to remain in the familiar environment of her home with her mother, with other family members close by, until such time as her function has deteriorated to the point where she can no longer meaningfully interact with her environment or those around her.
- [161] It is submitted that while she's residing at home, the plaintiff requires 24-hour care to be provided by multiple caregivers working eight or twelve-hour shifts with the aim of maintaining a small group of caregivers to give the plaintiff as much consistency as possible. The plaintiff's position is that a home care agency should be utilized to hire and manage the required caregivers.
- [162] It is submitted that the plaintiff would be transferred to a suitable residential care facility or group home when she has deteriorated to the point where she can no longer have meaningful interaction with those around her.
- [163] The defendants agree that it would be best for the plaintiff to remain at her home for a period of time before transferring to a residential care facility, however they disagree with respect to duration and at-home level of care.
- [164] The defendants submit that the plaintiff should reside at her home while Ms. McGillis is able to care for her, which they submit is likely between five to ten years given Ms. McGillis' own diagnoses of multiple sclerosis (MS) and fibromyalgia. In terms of level of care, the defendants submit that based on the evidence, Ms. McGillis is not likely to permit any additional outside assistance beyond the seven hours per week on average that Ms. Wojczak is providing. The defendants submit that this is the extent of future caregiver services that are likely to be incurred.

[165] The defendants submit that when Ms. McGillis is no longer able to safely care for her daughter, the best and safest plan is institutional care and not continued care in her home. They argue that it is not reasonable to expect the plaintiff to continue to live at home without a family member, and without Ms. McGillis there is no other suitable or available family member to care for the plaintiff. They submit that it is unrealistic to rely on Sheree despite her good intentions, as she works full-time and has four children. Further, they submit that it would not be appropriate for the plaintiff's uncle to take over care of the plaintiff.

Discussion

[166] I agree with the plaintiff's position. I find that it is in the plaintiff's best interests to remain living in her home and close to her family until she has deteriorated to the point where she could no longer interact meaningfully with those around her. At that time, she should be transferred to a residential care facility.

[167] This is supported by the opinions of Dr. Anton and Dr. Cohen that it would benefit the plaintiff to remain living in her "familiar home environment". It is also supported in part by the remarkable progress that the plaintiff has made since 2013, when she returned home from institutional care.

[168] Although Ms. McGillis has demonstrated resistance to outside assistance in respect of the plaintiff's care in the past, I do not find that it is necessarily determinative in predicting the future. Ms. McGillis testified that she hopes to have people come in and do what she has been doing in terms of caring for the plaintiff. She stated that she would have to teach them the plaintiff's daily routine. I accept her evidence. While it may be difficult for her to give up control over her daughter's care, which is understandable, I accept that Ms. McGillis realizes that it is necessary to permit others to take over the plaintiff's care, particularly in light of her own diagnoses of MS and fibromyalgia and general fatigue.

[169] Even though the process of getting Ms. Wojczak more involved in the plaintiff's care has been slow, there has been an increase in her weekly hours at the plaintiff's residence overall from when she started, and Ms. Wojczak's interactions with the plaintiff have also increased. Ms. Wojczak testified that she expects her involvement will increase after the trial. I accept that this is likely.

[170] The defendants submit that there is no real and substantial possibility that the plaintiff will find a suitable and reliable care team in the Sparwood area regardless of recruiting incentives. They submit that it is highly unlikely that this expense will be incurred.

[171] In support of their position, they point to Ms. Vaughn's evidence regarding the challenges that she encountered in finding a rehabilitation assistant for the plaintiff in 2024. Ms. Vaughn testified that she was fortunate to have found Ms. Wojczak and agreed with the characterization that Ms. Wojczak was a bit of a "unicorn".

- [172] While I accept that there are increased challenges in finding suitable and qualified caregivers or personal support workers in the Sparwood area, in my view, Ms. Vaughn's difficulties in finding a rehabilitation assistant are not necessarily predictive of the prospects of finding a suitable care team for the plaintiff. I say this for the following reasons: First, the qualifications for rehabilitative assistance are arguably more onerous. Ms. Wojczak testified to her qualifications and employment history. Among other things, she holds a diploma in health care after completing a one-and-a-half-year program. She also completed a practicum course in a seniors' home and has experience working with individuals with a brain injury. Second, Ms. Vaughn testified that although she only interviewed eight people, approximately 100 applicants responded to her ad. I infer from this that there was a relatively large group of people that were interested in working in the Sparwood area. Third, based on Ms. Percy's evidence, there were at least two home care agencies (Nurse Next Door and Home Care Solutions) that were open to providing 24-hour care services in Sparwood. Finally, I accept that generally there is room for negotiation of employment terms depending on individual circumstances and that there are creative ways to provide incentives including financial incentives to attract suitable and qualified personnel.
- [173] Considering all the circumstances, I am satisfied that necessary caregiver services are likely to be incurred going forward and that it is likely that a suitable and qualified care team would be assembled.
- [174] I also find that it would continue to be in the plaintiff's best interests to reside at home even after Ms. McGillis has passed. In my view, the plaintiff would still benefit from being in close proximity to the rest of her family in Spardell trailer park. Sheree, Codty and their four children live only three trailers over. Darcy Funk also lives nearby. The evidence at trial was that the family gets together regularly and often. I accept that the plaintiff has a close knit and supportive family. Both Sheree and Darcy testified that they would do whatever it takes to support the plaintiff including after Ms. McGillis is gone. Sheree testified that it was important to keep up the plaintiff's routine and she said she would do it. I accept their evidence.
- [175] I accept that even after Ms. McGillis is gone, other family members will continue be closely involved in the plaintiff's life. As Sheree's kids get older, Sheree will likely not be as busy as she presently is. The plaintiff's nieces and nephew will also be able to more involved in supporting the plaintiff as they get older. I accept that being close to her family is critical to the plaintiff's well-being and happiness, especially as this is all that she has left.
- [176] I also accept that while living at home, the plaintiff requires 24-hour care to be provided by a small group of caregivers or personal support workers. I find that use of a home care agency is the most preferable option to ensure continuous care coverage through an insured and bonded company.

- [177] I do not find the use of private hire caregiving services to be suitable as it would impose too much of a burden on the plaintiff's family who would be responsible to find, hire and train new staff. In addition, there is less coverage in the event of illness or absences.
- [178] The defendants dispute the "actual level of care and supervision" required by the plaintiff regardless of whether it is in a home or institutional setting. They submit that although the plaintiff requires 24-hour care, she does not require 24-hour "specialized medical care". Rather she requires "cuing and supervision" which has been provided by her mother to date.
- [179] The defendants submit that the plaintiff's true function is greater than that described by Ms. McGillis, as shown for example in the "day in the life video" where the plaintiff could be seen getting out of bed on her own, walking around the home and going to the bathroom unaided, eating grapes and a burger without choking, and following simple directions such as "don't go too far" in the mall.
- [180] In addition, the defendants rely on Ms. Wojczak's evidence that she believes the plaintiff is capable of greater function, for example the plaintiff can put on her jacket with minimal assistance.
- [181] Despite taking the position that the plaintiff's risk of seizures significantly reduced her life expectancy, the defendants dispute the level of concern presented by the plaintiff's risk of seizures. They submit that the plaintiff has not had a grand mal seizure since 2017. While Ms. McGillis and Sheree have testified that the plaintiff continues to have "mini-seizures" during which she puckers her lips and her lips turn blue, the defendants argue there is no expert evidence that those were in fact seizures, and no one outside of the family members has seen it happen.
- [182] I do not accept the defendants' submission. There is expert evidence from Dr. Anton, which I accept, that the plaintiff has a post-traumatic seizure disorder and that she continues to be at risk for potentially life-threatening seizures. Although her risks are mitigated by taking anti-seizure medication, it is not eliminated. According to Dr. Anton, the plaintiff's caregivers should be able to recognize a seizure, provide basic first aid, and administer any medications prescribed for acute seizure management. I accept that this is required to ensure the plaintiff's safety.
- [183] Whether and to what extent the observed "mini-seizures" are in fact seizures do not in my view materially impact Dr. Anton's opinion, as it is undisputed that the plaintiff has had episodes of status epilepticus or "grand mal" seizures in the past. In any event, I accept that it appears that the observations attributed to "mini-seizures" are related to the plaintiff's seizure disorder, and I accept that they are concerning. Notably, the defendants' submission that no one outside of the family members has observed these "mini-seizures" is not accurate. Ms. Vaughn testified to having observed it in 2024.

[184] To the extent that the plaintiff's actual level of function may be greater than that described by family members, I find that this is marginal at best and does not have a significant impact on the mode and level of care required otherwise. To be clear, I do not accept the defendants' submission that the plaintiff's care needs are limited to "cuing and supervision", nor do I accept the characterization that this is the extent of care that Ms. McGillis has provided over the years.

[185] With these findings in mind, I address the plaintiff's claim for costs of future care below.

Current Medications - \$2,533.10 Annually

[186] The plaintiff claims an annual cost of \$2,533.10 for medication that she is currently taking. These are listed in Ms. Abdel-Barr's costs of future care report. This claim is not disputed. I am satisfied that this cost is necessary and reasonable. I award the amount claimed subject to coverage from other sources.

Therapies

OT / Case Management - \$8,130 Annually

[187] The plaintiff claims an annual budget of \$8,130 for case management services and ongoing occupational therapy as recommended by Dr. Cohen. Ms. Abdel-Barr recommends four to six hours a month or an average of 60 hours a year. Ms. Percy recommends 24 to 36 hours a year.

[188] I assess that five hours a month or 60 hours a year is appropriate to address the plaintiff's case management and OT needs. At an average rate of \$135.50 per hour, I award a total annual cost of \$8,130 for this service. I am satisfied that this expense is necessary and reasonable.

Speech and Language Pathology - \$4,500 One-time Expense

[189] The plaintiff claims a one-time expense of \$4,500 for speech and language pathology sessions as recommended by Dr. Cohen. This amount is for 20 sessions including the cost of the initial assessment. I am satisfied that this expense is necessary and reasonable.

Physiotherapy - \$5,040 Annually if Not Covered

[190] The plaintiff claims \$10,080 for physiotherapy sessions. It is undisputed that the plaintiff requires physiotherapy and is currently undergoing physiotherapy once a week. Ms. Abdel-Barr recommends that the plaintiff undergo physiotherapy twice a week or 96 sessions per year. Mr. Percy recommends once per month which is Dr. Anton's minimum recommendation. The defendants deny the reasonableness of this claim as the plaintiff currently attends physiotherapy free of charge.

[191] If for some reason, this expense will no longer be covered, I am satisfied that continuing with the status quo of one physiotherapy appointment per week or 48 appointments per year is appropriate. At a cost of \$105 per appointment, I find that a total annual cost of \$5,040 is necessary and reasonable.

Wheelchair - \$463 Annually

[192] The plaintiff claims an annual budget of \$1,173 for a wheelchair to be replaced every five years. It is not disputed that the plaintiff will require a wheelchair, however there is disagreement regarding when this expense should be incurred and whether future replacements will be required.

[193] Ms. Abdel-Barr recommends that the plaintiff purchase a new wheelchair in approximately three years' time with replacement every five years. Ms. Percy recommends that the plaintiff's current wheelchair does not need to be replaced until 2030, with replacement every five to seven years. The defendants submit that a one-time replacement of the present wheelchair is appropriate as there is no evidence to support a finding that the plaintiff currently needs one.

[194] While the plaintiff ordinarily does not need a wheelchair to ambulate, I find that she needs a wheelchair in good working condition to be available for her use particularly if it would be safer for her to use a wheelchair, given her unsteadiness on her feet and predisposition to fatigue.

[195] I also accept the evidence of both Ms. Abdel-Barr and Ms. Percy that wheelchairs have to be replaced periodically in order to ensure that it is in working condition and the plaintiff's safety.

[196] I assess that an annual cost of \$463 for this expense to be necessary and reasonable. In calculating this amount, I rely on Ms. Abdel-Barr's average cost for a wheelchair in the amount \$5,865 to be purchased at age 35 with replacements every five years while the plaintiff is living at her home, and assuming a life expectancy of 38 years [$\$5,865 \times 3 / 38$].

Walker - \$28.49 Annually

[197] The plaintiff claims an annual cost of \$28.49 for the purchase of a walker to be replaced every five years. Ms. Abdel-Barr and Ms. Percy are in agreement with a recommendation of a walker including the approximate cost and periodic replacements to ensure safety. I am satisfied that the plaintiff should have a walker available to her to assist her when needed.

[198] I find that an annual expense \$28.49 is necessary and reasonable for this item with replacements every five years while the plaintiff is living at home [$\$360.95 \times 3 / 38$].

Grab Bars - \$800 One-time Expense

[199] The plaintiff claims \$800 for four grab bars for the plaintiff's bathroom including installation. I am satisfied that this expense is necessary and reasonable.

Transfer Poles - \$55.54 Annually

[200] The plaintiff claims an annual expense for transfer poles. Ms. Abdel-Barr recommends floor to ceiling transfer poles to assist the plaintiff with standing from a seated position. She recommends three transfer poles replaceable every five years. I accept this recommendation, and I am satisfied that an annual amount of \$55.54 for this item is necessary and reasonable. This amount is based on the average cost of \$703.49 for three transfer poles replaceable every 5 years while the plaintiff is living at home [$\$703.49 \times 3 / 38$].

Bath Seat - \$20.52 Annually

[201] Ms. Abdel-Barr recommends either a shower chair or a bath seat for safety, to be replaced every three years. The defendants dispute the reasonableness of this expense in light of the evidence that the plaintiff does not like to take showers.

[202] I agree that the evidence establishes that the plaintiff does not like to shower, and that she prefers to take baths. I agree that a shower seat is not necessary, however I do accept the recommendation for a bath seat for added safety. I understand that the cost of \$129.99 in Ms. Abdel-Barr's report applies to either a shower chair or a bath seat. I am satisfied that an annual expense of \$20.52 for this item is necessary and reasonable. I have calculated this amount using the average cost of \$129.99 with replacements every three years while the plaintiff is living at home [$\$129.99 \times 6 / 38$].

Communication Devices - \$0

[203] The plaintiff claims an annual budget of \$1,250 for communication aids or devices. The defendants dispute this claim. I am not persuaded on the evidence that this expense will be incurred. The evidence is that the plaintiff has Samsung tablet but that she does not use it very much. Further, there is little evidence before the Court of the plaintiff's ability to use these types of devices.

Rehabilitation Assistant - \$72,000 Annually

[204] The plaintiff claims \$72,000 for services of a rehabilitation assistant. Both sides agree that the plaintiff would benefit from this. Ms. Abdel-Barr recommends 30 hours a week including 15 hours of travel time at a rate of \$50 an hour. Ms. Percy recommends four hours per week.

- [205] Based on the evidence, it is anticipated that this role would be fulfilled by Ms. Wojczak who had already started to spend time with the plaintiff at her home since October of 2024. Ms. Wojczak, who lived in Fernie at the time of trial, testified that she planned to move to Sparwood. She also testified that she could commit to working up to 40 hours a week.
- [206] The evidence suggests that Ms. Wojczak is a good fit for the plaintiff. The plaintiff seems to like her and refers Ms. Wojczak as her "friend". Ms. Wojczak also testified that she wants to explore many things with the plaintiff such as going to the pool, the library, baking, and enjoying nature. She also wants to help the plaintiff improve her level of personal care.
- [207] In my view, it would benefit the plaintiff to spend more (rather than less) time with Ms. Wojczak. Ms. Wojczak also testified that when she is with the plaintiff, she could provide respite for a live-in caregiver or personal support worker. It appears this could also serve to give them time to focus on other tasks around the home, depending on their work arrangement.
- [208] I am satisfied that an annual cost of \$72,000 for the services of a rehabilitation assistant is necessary and reasonable. To the extent that Ms. Wojczak may not require as much travel time if she has moved to Sparwood, this budget would allow her to increase her hours with the plaintiff.

Fitness Facility - \$510.17 Annually

- [209] The plaintiff claims the annual amount of \$510.17 for a fitness centre pass. Ms. Abdel-Barr and Ms. Percy agree that the plaintiff would benefit from having a pass to the local community fitness centre.
- [210] The defendants dispute the reasonableness of this expense. They submit that the plaintiff already attends physiotherapy for cardiovascular and weightlifting. There is no evidence that the plaintiff would either enjoy or incur this expense. She does not like loud noises or overstimulation and does not like being in cold water. They submit that a gym facility presents more risk than benefit.
- [211] I accept the evidence of the experts that the plaintiff would benefit from an annual pass to the local fitness centre. Ms. McGillis testified that the plaintiff used to swim before the accident. Although she had not tried swimming with the plaintiff post-accident, this was only because she did not have the training to ensure the plaintiff's safety. She testified that she would like the plaintiff to try using the pool.
- [212] In my view, the plaintiff would benefit from exploring other activities that she might like. This is consistent with Ms. Wojczak's evidence of what she envisioned doing with the plaintiff. To the extent that the plaintiff has an aversion to loud noises and overstimulation, these could be addressed or minimized by avoiding busy times. Overall, I am satisfied that this expense is necessary and reasonable.

24-Hour Care - \$10,665,300

- [213] I accept that the plaintiff requires 24-hour care and supervision for the rest of her life. I have found that the plaintiff should be cared for in her home by a team of care aides until such time as her cognitive function has deteriorated to the point where she could no longer meaningfully interact with those around her.
- [214] I also found that the use of a home care agency would be the most beneficial. Based on Ms. Abdel-Barr's report, a home care agency would handle all aspects of managing the required caregivers including training, hiring / firing, and payroll functions. She recommends two home care agencies: Commitment to Care and Nurse Next Door. The average hourly cost is \$44 or \$385,440 annually.
- [215] Ms. Percy recommends Home Care Solutions. This agency provides a live-in model of care for \$45 an hour for 12 hours plus \$1 per hour while the sleeping provided that there are no more than the occasional one or two interruptions. It also requires caregivers to have four hours off per day when working on a 24-hour basis. The annual cost for this service including coverage for 4 hours per day at 6 days a week is \$257,640. As I understand it, this cost assumes that the rehabilitation assistant will provide coverage for 4 hours per week when the caregiver is on a break on the seventh day of the week.
- [216] The defendants submit that the evidence does not establish that the plaintiff requires an overnight awake caregiver. The evidence is that the plaintiff sleeps well and is generally settled through the night, only occasionally getting up to go to the bathroom. She returns to bed on her own or follows her mother's verbal direction to go back to bed. The defendants submit in the circumstances that an awake caregiver is an unreasonable expense and would be disruptive to the plaintiff and Ms. McGillis in any event.
- [217] In my view, although the Home Care Solutions live-in care model has superficial practical appeal, when examined more closely it is fraught with complicating factors that render it potentially unworkable such that the plaintiff's safety may be compromised. Given that the plaintiff lives in a trailer, it seems likely that that the sleeping caregiver will be woken up if either the plaintiff or Ms. McGillis gets up in the night to use the washroom. Further, there is a risk that this model would rely on Ms. McGillis or other family members to "cover" the mandatory caregiver breaks of four hours, or risk having gaps in the plaintiff's care.
- [218] Further, I do not agree with the defendants' submission that an awake caregiver is an unnecessary expense in light of the evidence regarding the plaintiff's ongoing risk of seizures or falls, which could occur at night.
- [219] In the circumstances, I accept Ms. Abdel-Barr's recommendation of home agency services in the amount of \$385,440 per year.

- [220] Although Ms. Percy testified that when she contacted Commitment to Care, she was told that they were not interested in providing services or information, I do not give much weight to this evidence as there was little context and no reason provided for the company's response. In any event, both Nurse Next Door and Home Solutions were open to offering their services provided they were given lead time. In saying this, I assume that Home Solutions could also provide 24-hour awake care services.
- [221] With respect to duration, the expert evidence did not indicate when the plaintiff's cognitive decline might be expected to reach a point where she would not be able to appreciate or interact with her surroundings. According to Dr. Anton, some patients experience late cognitive decline several years after TBI. While it is difficult to predict the risk of late cognitive decline in a given individual, Dr. Anton opined that the plaintiff's relative risk is increased compared to that of the general population, although her absolute risk is "probably small". In addition, Dr. Anton opined that the plaintiff is "at risk for poor recovery and increased cognitive impairments should she have another TBI or another type of brain injury such as a stroke". Dr. Anton also noted that the plaintiff's risk for falls includes an associated risk of sustaining another TBI.
- [222] In weighing and balancing the plaintiff's risks, I assess that 20 years is a reasonable duration for at-home care. Therefore, I assess the cost to be \$7,708,800 [$\$385,440 \times 20$].
- [223] After 20 years, I find that it would be reasonable to expect the plaintiff to transition to a residential facility. I accept that Connect Lake Country would be appropriate. This facility offers residential care for individuals with moderate to severe TBI with staff who are experienced in managing seizure disorders and behavioral issues. The annual cost for this facility is \$164,250. The cost of the plaintiff's care at this facility until age 70 is \$2,956,500 [$\$164,250 \times 18$].
- [224] The total cost for 24-hour at-home and facility care for the plaintiff is therefore \$10,665,300.
- [225] The plaintiff seeks a 20% positive contingency to account for the "strong probability" that the plaintiff's behaviour and agitation will fluctuate over the years to come. It is submitted that changes in her surroundings and cognitive decline as the plaintiff ages will likely bring negative behaviours and aggression requiring additional care aides at various points. In addition, the added care cost that may be required in the form of "incentivizing" potential care aides to either relocate or travel to Sparwood must also be considered.
- [226] I accept that there is a real and substantial possibility that the plaintiff will experience negative behaviours and aggression in response to various changes in her life and health that may require increased care. However, I assess this likelihood to be relatively low. Based on the evidence, the plaintiff has not manifested aggression for many years now and appears to respond relatively well to spending time in the presence of unfamiliar people. I appreciate that there is a degree of unpredictability and care must be taken to avoid triggering a negative reaction to the extent possible. However, in considering the likelihood of added expense due to increased care needs, I also recognize that there may be delays in

implementing the new care model resulting in some cost savings at the outset. For example, it is recommended by the medical experts that onboarding of caregivers be implemented gradually to build trust and familiarity. Further, Nurse Next Door and Home Care Solutions have indicated requiring some lead time. There may also be some delay in finding suitable and qualified personnel.

- [227] Overall, in my view, the likelihood of added expense arising from increased care needs is offset by the likelihood of cost savings from delay in implementation of the new care model. To be clear, I have also considered the likelihood of added care costs to attract suitable and qualified candidates to Sparwood in this assessment.
- [228] The defendants suggest that the likelihood of Ms. McGillis terminating all care services at some point must also be considered as a negative contingency. I do not find that this is a real and substantial possibility in light of Ms. McGillis' evidence and her own health situation. To the extent that Ms. McGillis's tendency to be protective of Amber may inadvertently contribute to some delay in the implementation of care services, I consider this to form part of the offsetting exercise described above.
- [229] Ultimately, I conclude that no adjustment for contingencies is required.
- [230] The total cost of 24-hour care is \$10,665,300 subject to adjustments for present value and basic necessities.

Homemaking and Seasonal Cleaning - \$2000 Annually

- [231] The plaintiff claims weekly cleaning services at four hours a week and seasonal cleaning of 32 hours a year based on the recommendation of Ms. Abdel-Barr. The estimated annual cost is \$7,560. The defendants dispute this expense as there will be significant idle time where housekeeping is completed by caregivers.
- [232] I do not find the amount claimed to be reasonable. I agree that there will be significant idle time where housekeeping could be included in the duties of caregivers of personal support workers. I award \$2000 annually for seasonal cleaning involving tasks of longer duration that are not practical or feasible for care aides to perform, while the plaintiff is living at home. I am satisfied that this reduced amount is necessary and reasonable.

Interior and Exterior Maintenance - \$900 Annually

- [233] The plaintiff claims an annual expense of \$1,710 representing 30 hours of home maintenance, seasonal outdoor cleaning and snow removal.
- [234] The defendants dispute this expense. They assert that there is no evidence that the plaintiff would have performed maintenance tasks.

[235] In my view, the nature of the expense is reasonable but the amount is excessive. Although the plaintiff may not have personally performed these tasks, she may have hired someone to do them. I find that approximately half of this amount representing 15 hours is necessary and reasonable. I award an annual amount of \$900.

Yard and Garden Care - \$950 Annually

[236] The plaintiff claims \$2,375 for annual yard and garden care expenses based on 20 hours per year until she turns 35 and 30 hours per year thereafter.

[237] The defendants deny this award as there is no evidence of the type of yard work required if any. I note that Ms. Percy agrees with a budget of \$950 for 20 hours of basic yard work a year.

[238] I accept that \$950 per year while the plaintiff is living at home is reasonable and necessary. I note that there was evidence of a yard and grass outside the plaintiff's home.

Financial Management - TBD

[239] Submissions on the plaintiff's claim for costs related to financial management have been deferred pending release of this judgment.

In-Trust Award

Legal Principles

[240] In *Bystedt v. Hay*, 2001 BCSC 1735, aff'd 2004 BCCA 124, Justice D. Smith (as she then was) summarized the relevant principles to be applied in assessing an "in trust" claim as follows:

[180] From a review of these authorities one can construct a summary of the factors to be considered in the assessment of "in trust" claims:

- (a) the services provided must replace services necessary for the care of the plaintiff as a result of a plaintiff's injuries;
- (b) if the services are rendered by a family member, they must be over and above what would be expected from the family relationship (here, the normal care of an uninjured child);
- (c) the maximum value of such services is the cost of obtaining the services outside the family;
- (d) where the opportunity cost to the care-giving family member is lower than the cost of obtaining the services independently, the court will award the lower amount;
- (e) quantification should reflect the true and reasonable value of the services performed taking into account the time, quality and nature of those services. In this regard, the damages should reflect the wage of a substitute caregiver. There should not be a discounting or undervaluation of such services because of the nature of the relationship; and,

- (f) the family members providing the services need not forego other income and there need not be payment for the services rendered.

Positions of the Parties

- [241] The plaintiff claims \$2,000,000 in in-trust award for Ms. McGillis's past work in caring for her daughter. It is submitted that Ms. McGillis has spent 12 to 14 hours a day, 7 days a week, 365 days a year caring for and supervising the plaintiff since she returned home in December 2013.
- [242] The plaintiff submits that an appropriate approach to assess the value of services provided by Ms. McGillis is to set a "daily rate" for replacement care services as the courts have done in *Uy v. Dhillon*, 2020 BCSC 1302 and *James v. James*, 2018 BCSC 603. In those cases, the court set an amount of \$500 to reflect the cost of replacement services each day.
- [243] In the case at bar, the plaintiff submits that \$500 a day undervalues the services that Ms. McGillis has provided which they submit is valued at either \$616 per day based on \$44 an hour including overtime pay, or \$1,056 a day based on the annual cost of 24-hour care services of \$385,440, as provided for in Ms. Abdel-Barr's cost of future care report.
- [244] Based on these values, the plaintiff submits that \$600 a day would be a fair benchmark value for replacement of care services. Since Ms. McGillis has provided these services for a period of 11 years and two months to the date of trial or 4075 days, the total value is \$2,445,000. The plaintiff submits that a discount such as in *Uy* is appropriate, but the discount should be limited to 20% to reflect the intensive care and supervision required by the plaintiff. Applying a 20% discount, the amount claimed is \$2,000,000.
- [245] The defendants agree that Ms. McGillis is entitled to an in-trust award, however they argue that the amount should be significantly less. They submit that an in-trust award in the range of \$225,000 to \$275,000 based on \$30 / hour is fair and reasonable. In support of their position, they submit that:
- only the services provided from December 2013 to the summer of 2015 satisfies the requirement of an in-trust award. After that period, the plaintiff has required supervision and guidance but not specialized medical care;
 - determination of services provided by a family member that is "over and above" the usual "give and take" requires an analysis of the plaintiff's pre-accident function;
 - an in-trust award is not intended to, nor should it, exceed the family member's earning capacity to the point of becoming a windfall; and
 - Relying on *Simpson v. Teichrieb*, 2021 BCSC 210, the defendants submit that where the care provided by a family member is not "specialized" but rather akin to tending to a child's needs and welfare, the appropriate approach is to award damages reflecting foregone income.

Discussion - In-Trust Claim

- [246] I am satisfied that it is appropriate to award an in-trust claim for services provided by Ms. McGillis for her daughter's care. The award should be for the entire period of 11 years and 2 months. While I accept that the first 18 months from December 2013 were the most challenging in terms of the plaintiff's care, I do not agree with the defendants' characterization that the nature of care provided after the summer of 2015 was limited to "supervision and guidance". For example, Ms. McGillis has continued to perform tasks related to the plaintiff's hygiene, such as brushing her teeth and bathing her beyond 2015. I accept that the services that she has provided are clearly "above and beyond" the usual "give and take" between family members.
- [247] With respect to the defendants' reliance on Simpson, the court's decision to undertake a "foregone income" approach in that case was mostly driven by the evidence of lost income resulting from Ms. Simpson's care of her son. In my view, the case does not stand for the broad proposition alleged by the defendants. Further, the facts in the case at bar are different. Ms. McGillis has no "opportunity cost". She is a widow who is dependent on a widow's pension and social assistance benefits.
- [248] I find that the "daily rate" assessment approach as in Uy and James is appropriate. In James, the Court endorsed the approach taken in Brennan v. Singh, 1999 CanLII 6932 (B.C.S.C.):
- [155] In a general sense I agree with the approach taken by Harvey J. in Brennan. It is my conclusion that the appropriate benchmark to use is \$500 per day and to adjust that by 40% to reflect the very limited opportunity cost and reality that the defendant was not providing compensable services 24 hours a day because some of the time he was not providing care beyond that reasonably expected by family members.
- [249] In Uy, the Court followed the approach in James. It also applied the "benchmark" amount of \$500 per day but found that a 30% discount was reasonable given the challenges involved.
- [250] In the case at bar, I also find that a benchmark amount of \$500 per day is reasonable. I do not agree with the plaintiff that this amount undervalues the services provided by Ms. McGillis. In my view, it is reasonable to infer that the value of substitute care services during the most intensive period (i.e. between December 2013 to the summer of 2015) would have been significantly less than the present values relied upon by the plaintiff. In addition, to the extent that the plaintiff relies on the cost of 24-hour caregiver services, I find that it has limited application as Ms. McGillis was not providing 24-hour care.
- [251] As in Uy, I find that a 30% discount is reasonable and fair, considering the very limited loss of opportunity cost as well as the challenging and labour-intensive nature of care involved.
- [252] In conclusion, the total in-trust award is \$1,426,250 [\$500 x 4075 days less 30%].

Special Damages

- [253] It is well-established that an injured person is entitled to recover the reasonable out-of-pocket expenses he or she incurred as a result of an accident. This is grounded in the fundamental governing principle that an injured person is to be restored to the position he or she would have been in had the accident not occurred: *X. v. Y.*, 2011 BCSC 944 at para. 281; *Milina*.
- [254] The plaintiff claims special damages in the amount of \$370,362.68. The bulk of this is for home renovations performed before the plaintiff returned home and the purchase of a new trailer in the fall of 2024.
- [255] The defendants agree that \$11,346.56 of the special damages claimed is appropriate. This amount represents the following expenses incurred as a result of the plaintiff's injuries:
- a) Hotel and fuel charges - \$972.15;
 - b) Medical supplies: peg tube - \$179;
 - c) Dental charges - \$375.87;
 - d) Occupational therapist and rehabilitation assistant - \$9,221.11;
 - e) Thermometer, safety supplies and baby monitor - \$255.18;
 - f) Medication - \$28.94; and
 - g) Safety items, handrail, buckets, building materials - \$314.31.
- [256] I am satisfied that these expenses are reasonable and necessary, and I award the amount of \$11,345.56 for these special damages.
- [257] The plaintiff claims the amount of \$5,800.24 for notary fees and travel expenses related to independent medical examinations. The defendants dispute these expenses on the basis that they are disbursements and not special damages. I agree. I decline to make this award.
- [258] The plaintiff claims the amount of \$4,080 related to an OT assessment by Ms. De Beer dated November 11, 2022. The defendants dispute this expense because the purpose of the assessment is unclear, therefore necessity has not been established. Further, they submit that this expense is not reasonable as Ms. Abdel-Barr also conducted an assessment around that time.
- [259] I decline to award this expense as there is an insufficient evidentiary basis upon which the Court could conclude that this expense is necessary and reasonable. I agree with the defendants that the purpose of the assessment is not clear on the evidence.
- [260] The plaintiff claims the amount of \$5,500 for "mileage" for the period October 3, 2011, to January 29, 2025. The defendants dispute this expense as there was no evidence on what the mileage was for. Further, it appears to be an "estimate" provided by counsel.

- [261] I decline to make this award. There were no details provided to permit the Court to assess the necessity and reasonableness of this claim.
- [262] The plaintiff claims the amount of \$36,070.18 for work done on the plaintiff's home in July of 2013. The defendants submit that the plaintiff has failed to provide sufficient evidence to determine the reasonableness and necessity of this work. Further, it appears the plaintiff's insurer had paid for this work.
- [263] I agree with the concerns raised by the defendants. There is insufficient evidence to assess the necessity and reasonableness of this expense. The evidence establishes that prior to the accident, the plaintiff, Ms. McGillis and Sheree lived in a trailer that consisted of a main trailer and an "addition". At the time of the accident, the addition consisted only of a bedroom that Ms. McGillis occupied and the rest of it was unfinished. It had no heat, electricity or water. This claim relates to work performed on the addition shortly before the plaintiff returned home.
- [264] Although the renovations included adding a bathroom with grab bars, lift, and ramp, as well as making the doors wider to accommodate a wheelchair, other work was also performed. Given the "unfinished" state of the addition, it is difficult to determine on the evidence which work was incurred because of the accident and which would have been incurred in any event. Further according to the evidence, the renovations were funded by ICBC, therefore there is no basis for this claim.
- [265] In the circumstances, I decline to make an award for this claim.
- [266] The plaintiff claims the amount of \$307,564.70 related to the purchase of a new mobile home in November 2024. The defendants submit that this expense is unreasonable. They assert that the addition was not habitable before the accident. The new home was purchased in late 2024 when the plaintiff was staying in her original bedroom. In the defendants' submission, the purchase of an expensive and unnecessary asset is not supported by the law.
- [267] In my view, the plaintiff has not demonstrated that the new mobile home was incurred as a result of the accident. From 2017 to 2024, the plaintiff had been living in the main trailer. According to Ms. McGillis, the main trailer did not have issues of leaking or mold. The plaintiff was able to walk up the stairs with some assistance and the hallways were narrow enough that the plaintiff could use the walls to support herself. Ms. McGillis also testified that there was "nothing wrong" with that part of their home when the renovations to the addition were undertaken. Further, it appears that the new trailer has many of the same limitations as the old trailer, for example there are no guardrails, and the tub does not have a lift or a door.
- [268] Overall, the evidence does not establish that the new trailer was necessary and reasonable at the time it was purchased. Therefore, I conclude that it is not compensable as a special damage.

[269] The total award for special damages is \$11,346.56.

Conclusion

[270] In summary, I award the following damages subject to appropriate adjustments:

Non-pecuniary damages: \$ 470,000.00

Past income loss: \$ 85,000.00

Future income loss: \$ 455,000.00

Costs of future care: To be calculated based on findings, pending adjustments.

In-trust claim \$ 1,426,250.00

Special damages: \$ 11,346.56

[271] The parties may speak to the following matters after receipt of these reasons if they cannot agree: income tax gross-up, management fees, pre- and post-judgment interest, basic necessities and present values of costs of future care, any other appropriate adjustments, and costs.

"Laurie J."

[1] The plaintiff was 31 years old at the time of calculation.

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