

CANADA / JUDGMENT

Garmo v. Landry

2025 BCSC 1683

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2025 BCSC 1683 Garmo v. Landry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Garmo v. Landry,

2025 BCSC 1683

Date: 20250829

Docket: M222967

Registry: Vancouver

Between:

Kai Michelle Garmo

Plaintiff

And

Kathleen Landry

Defendant

Before: The Honourable Justice J. Walker

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

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Introduction

- [1] On December 10, 2019, the plaintiff Ms. Kai Garmo was the driver of a motor vehicle that was rear-ended by the defendant, Kathleen Landry while stopped at a stop light. After the plaintiff closed her case, the defendant admitted liability.
- [2] Ms. Garmo sues for damages she sustained as a result of the accident. Ms. Garmo suffered soft tissue injuries to her back, neck and shoulder, headaches, cognitive issues and psychological injuries. The defendant challenges the credibility and reliability of Ms. Garmo's testimony. She also argues that Ms. Garmo has failed to prove that all of her injuries were caused by the accident and that she failed to mitigate her damages.

The Plaintiff's Evidence

- [3] Ms. Garmo was 39 years old at the time of the accident and 44 years of age at trial. She is a single mother to a daughter who was born in 2012. At the time of the accident Ms. Garmo had been recently laid off from work and has not had any meaningful employment since. Ms. Garmo says that the accident has had life altering and devastating consequences to all facets of her life.

Pre-accident life

- [4] Ms. Garmo was born in the United States and grew up in California. She testified that she was very athletic in high school and academically successful. She attended Biola University in California and graduated with a bachelor's degree in 2004. During her university years, she played on the university tennis team and coached other sports teams.
- [5] After university, Ms. Garmo taught an adult art course and coached a high school sports team. She also taught a volleyball class in the physical education department of Biola University.
- [6] In 2002 Ms. Garmo married, and in 2005 she and her husband moved to Mission, BC. Her marriage ended in 2010.
- [7] In 2006, Ms. Garmo worked as a manager at a fitness centre for about one year. She then worked for a start up company for about 18 months to two years. In 2011, Ms. Garmo began working at BC Hydro. After her daughter was born in 2012, she did not work for two years. She re-entered the work force in 2014 working on contract with the Provincial Health Services Authority (PHSA), initially as a technology services coordinator and later as a business analyst.

- [8] In 2018, Ms. Garmo's contract work became permanent employment but In October 2019 she was laid off, receiving severance pay until February 2020.
- [9] In the years before the accident, Ms. Garmo testified that she was in excellent physical condition. She rode her bike to and from work three or four days a week. While working at the PHSA, she participated in lunch hour high-intensity interval training (HIIT) workouts at her workplace, three to four times a week. She also kayaked, hiked and went for long walks. In 2018 and 2019 Ms. Garmo attended weekly Ju-jitsu and kickboxing classes.
- [10] Ms. Garmo testified that she was in good health and had no pre-existing injuries before the accident. However, she did attend for registered massage therapy and for acupuncture for what she described as minor aches and pains that came from an active lifestyle. She said that these treatments were not required, but since they were covered by her employer's extended health plan, she took advantage of the benefits.
- [11] The benefits remained in place after she was laid off and while she was receiving her severance pay. She attended for acupuncture and massage therapy immediately before and after the accident. Prior to the accident she reported interrupted sleep and stress resulting in tension in her neck and shoulders. Ms. Garmo acknowledged that she was stressed after having lost her job and was concerned about how she was going to support herself and her daughter. She was solely responsible for the support of her daughter.

The accident and immediate post-accident condition

- [12] When the accident occurred Ms. Garmo and her passenger were on their way to have lunch. Ms. Garmo felt a jolt and was disoriented. She asked her passenger "what just happened?" Ms. Garmo was able to pull her vehicle over and exchange information with the other driver. She and her friend continued on and went for their lunch as planned, although Ms. Garmo said she was feeling disoriented and confused.
- [13] Ms. Garmo said that either on the same day as the accident or within the next day or two she noticed a bump on her head. She had pain in her neck and shoulders. She had limited mobility, headaches and migraines, and had trouble sleeping.
- [14] Ms. Garmo expected the symptoms to resolve in short order as she had sustained injuries in the past and recovered. When she attended for acupuncture the day after the accident, she did not mention the accident.
- [15] She went to see a doctor about one week after the accident, at the urging of her friends. Her neck was painful, super sensitive and had limited mobility. The bump on the back of her head was on the right side and her right shoulder was sore. The doctor she saw at a walk-in clinic diagnosed her with a concussion.

Treatment and symptom progression

[16] Ms. Garmo's concussion symptoms worsened, she noted brain fog and cognitive issues. She had dizziness and balance issues. Her memory was not as sharp, she was having word finding difficulties, and trouble remembering events. Her headaches persisted, they were severe, and she described them as migraines.

[17] She returned to the doctor on January 16, 2020, and was referred to the Advanced Concussion Clinic (ACC) where she could obtain physiotherapy, kinesiology, occupational therapy and counselling services in an interdisciplinary setting. She received treatment at the ACC from early 2020 until late 2023.

[18] In 2020, Ms. Garmo attended the following treatments:

- Acupuncture: 44 treatments
- General Practitioner: 4 appointments
- Massage Therapy: 19 treatments
- Physiotherapy: 2 treatments
- ACC: 25 appointments

[19] In 2021, Ms. Garmo attended for the following treatments:

- Acupuncture: 15 treatments
- General Practitioner: 2 appointments
- Massage Therapy: 15 treatments
- ACC: 17 appointments
- Optometrist: 26 appointments

[20] In 2022, Ms. Garmo attended for the following treatments:

- General Practitioner: 3 appointments
- Massage Therapy: 14 treatments
- ACC: 20 appointments
- Optometrist: 20 appointments

[21] In 2023, Ms. Garmo attended for the following treatments:

- General Practitioner: 4 appointments
- Massage Therapy: 11 appointments
- ACC: 8 visits

· Optometrist: 11 visits

[22] Ms. Garmo has not undergone any treatment since 2023 when her benefits through ICBC were terminated.

Present condition

[23] Ms. Garmo testified that she has seen significant improvement in her conditions since the accident. Her neck, shoulder and back pain has mainly resolved except for some flare ups. Her balance issues have also significantly improved.

[24] However, her headaches persist. Although they are less frequent, they still occur, and she experiences migraines one to two times a week. Ms. Garmo has learned that certain things trigger her headaches and with this knowledge she can at times prevent them from occurring. For example, bright lights are triggering, and Ms. Garmo often wears sunglasses as a result.

[25] Ms. Garmo's main issues are cognitive ones and fatigue. Ms. Garmo's cognitive issues are disabling. She testified that she still has brain fog, problems with word finding, memory issues and trouble concentrating. At times she cannot read or comprehend what she reads. Her sleep is improved, but it is not consistent. She never gets a full night of sleep and never feels refreshed when she wakes up.

[26] In terms of fatigue, throughout her testimony Ms. Garmo explained that her capacity to do things varies from day to day. At times, she can engage in physical exercise, but at other times she simply feels that she does not have the capacity.

[27] Additionally, Ms. Garmo has since the accident, experienced more mood swings, irritability and anxiety. She is anxious about the debt she is accumulating, her inability to provide for her daughter, that she cannot work, and that at times she cannot remember what she is doing.

[28] Ms. Garmo has gained about 60 pounds since the accident, and her active lifestyle has been dramatically curtailed. She no longer engages in the same level of physical activity as she did before. She is no longer able to keep her house as clean and as organized, and she struggles to make meals for her daughter.

Employment

[29] Ms. Garmo testified that from a young age she was interested in becoming a police officer, but did not pursue it, in part because her husband was not supportive. When she was on maternity leave, she took the written exam and did well on it. A retired police officer who had been involved in recruiting provided her with advice and guidance about the application process. During her maternity leave in 2013-2014 she practiced the physical test and got to the point where she could pass it. However, she did not apply because she understood that police forces look more favourably on applicants who have employment, so her goal was to

get employment and then reapply.

- [30] At around the time of the accident, she was thinking of applying but since she had lost her job, she did not. Her plan was to obtain new employment as soon as possible, work for about 8 months or a year and then possibly reapply.
- [31] Ms. Garmo was beginning to look for new employment at the time of the accident. She hadn't determined exactly what type of work she was interested in but was considering becoming a project manager. Immediately after the accident, because she thought her symptoms would resolve, she continued to look for work. Early in 2020, she realized that was not realistic.
- [32] In 2021, Ms. Garmo's friend hired her to do a project that she could do from home at her own pace. She was paid upfront and had six months to do it. Ms. Garmo testified that despite the flexibility, she was unable to complete it. She struggled with the screen time and concentration required.
- [33] Ms. Garmo has also tried and continues to try to do volunteer work. She was a board member of the housing cooperative where she lives, but she had to resign from that position because she couldn't handle the demands. She teaches Sunday school at her church once every three weeks but finds it taxing.
- [34] Ms. Garmo testified that she would like to work but considering her limitations she doesn't think she is employable. She also requires employment that provides her with a livable income.

The Plaintiff's Lay Witnesses

- [35] Two of Ms. Garmo's friends testified on her behalf: Ms. Layda Gongora and Ms. Vanessa Thornber.
- [36] Ms. Gongora has known Ms. Garmo for about 13 years. Their daughters are close in age, and they became close friends when their children were very young. Before the accident, they would all go on day excursions to places like the beach or the aquarium for the whole day and typically would end up at Ms. Garmo's apartment for dinner. Ms. Gongora and her daughter would often then stay overnight. Ms. Gongora described how well-organized Ms. Garmo was and said that her apartment was very clean.
- [37] Before the accident Ms. Gongora described Ms. Garmo as more Type A, very athletic, competitive, and goal oriented. Ms. Gongora was aware that Ms. Garmo was doing physical training to become a police officer, rode her bike to work and had done significant hikes.
- [38] Since the accident, Ms. Gongora doesn't see Ms. Garmo as much, their friendship has changed a lot. Ms. Gongora knows that Ms. Garmo has limitations and doesn't want to burden her. They don't do activities anymore or have sleep overs, instead they now just have a coffee and visit together in quiet spaces. Ms. Gongora has observed that Ms. Garmo is not as active and struggles with many things. Ms. Gongora has suggested that they go

somewhere like a music event, but Ms. Garmo does not want to, and Ms. Gongora knows that it is not possible for her.

- [39] Ms. Thornber did not know Ms. Garmo before the accident, they met through their church, initially online during the COVID-19 pandemic. She sees Ms. Garmo at church on Sunday's, and they get together about one time per month. Usually, they hang out at Ms. Garmo's house or go for a walk nearby.
- [40] Ms. Thornber described Ms. Garmo as a positive person who always asks about others before talking about herself and she is not the type of person to complain. Ms. Thornber is aware that Ms. Garmo's energy level varies and if it is lower, sometimes Ms. Garmo will cancel their arranged meeting. Ms. Garmo is tired after their visits, advising that her capacity has been reached.
- [41] Ms. Thornber has noticed that it takes Ms. Garmo about 20 minutes to make coffee, and she can't talk to her while she makes it as she gets confused.

The Expert Medical Witnesses

Dr. Kaushansky

- [42] Dr. Kaushansky is a neuropsychologist who conducted a neuropsychological assessment of Ms. Garmo in January 2024, and had a follow-up phone interview with her in March 2025. His assessment of Ms. Garmo took place over two days: one day was testing and the second was an interview.
- [43] The testing results show that Ms. Garmo was presenting with Major Depressive Disorder, Somatic Symptom Disorder and features of Post-Traumatic Stress Disorder (PTSD). Dr. Kaushansky also concluded that Ms. Garmo has developed Cogniphobia: a fear of cognitively extending oneself.
- [44] Dr. Kaushansky opined that Ms. Garmo's level of dysfunction is likely not from a concussion but secondary to a constellation of physical, cognitive and psychological problems. These persistent physical, cognitive and emotional problems establish themselves in a chronic loop, where they become intertwined. Ms. Garmo's prominent psychological condition is Somatic Symptom Disorder that magnifies her constellation of perceived physical disabilities. Dr. Kaushansky testified that the fact that Ms. Garmo experienced childhood sexual abuse complicates her symptomology and the treatment of her conditions.
- [45] The defendant submits that no weight should be given to Dr. Kaushansky's opinion for numerous reasons. First, Ms. Garmo's test results should not be considered valid because Ms. Garmo testified that she only slept for three- and one-half hours the night before the testing, instead of her usual seven hours. Dr. Kaushansky agreed that Ms. Garmo's test results could have been affected by her lack of sleep and in an ideal world it would have been better for her to be re-tested.

- [46] Second, Dr. Kaushansky agreed that the clinical records he reviewed to write his report were stale-dated and having current records would be important.
- [47] Third, Dr. Kaushansky's opinion that Ms. Garmo suffered from Major Depressive Disorder cannot be relied on because he changed his evidence in cross-examination to a diagnosis of Dysthymia. He could not recall when he had made this new diagnosis, but explained that it was on the basis that he understood her mood had improved.
- [48] Fourth, Dr. Kaushansky's opinion that Ms. Garmo had features of a PTSD disorder cannot be relied on because she did not have the type of traumatic event listed in the DSM-V which is a prerequisite for PTSD.
- [49] Fifth, the defendant challenges Dr. Kaushansky's Cogniphobia diagnosis because he was unaware of a Cogniphobia scale explained in a journal article shown to him in cross-examination. The defendant says that the article defines Cogniphobia differently than Dr. Kaushansky and Dr. Kaushansky cannot point to any authority or medical journal that supports the basis for his definition and diagnosis.
- [50] I do not accept that no weight should be placed on Dr. Kaushansky's opinions. In my view, Dr. Kaushansky offered thorough and reasoned explanations in support of his diagnoses. Furthermore, he deferred to other clinicians and their more recent assessments. Dr. Kaushansky maintained, that at the time of his assessment, Ms. Garmo exhibited symptoms consistent with major depressive disorder; however, based on recent information, he acknowledged that a diagnosis of major depressive disorder was no longer supported. I note that he had received and reviewed Dr. Okorie's report after he assessed Ms. Garmo.
- [51] I do not accept the defendant's argument that Dr. Kaushansky's opinion that Ms. Garmo suffered from symptoms associated with PTSD cannot be relied on. Dr. Kaushansky did not suggest that Ms. Garmo suffered from PTSD. Regardless of whether or not Ms. Garmo experienced the type of traumatic event listed in the DSM-V, she has experienced symptoms associated with PTSD. A person can experience symptoms commonly associated to a disorder without experiencing the disorder itself.
- [52] I accept that Dr. Kaushansky's Cogniphobia diagnosis has been called into question; however, whether Ms. Garmo's symptoms are labelled as Cogniphobia is not critical. Throughout her testimony, Ms. Garmo frequently referred to her capacity or lack of capacity. It was apparent that her belief about her own capacity overwhelmed her thinking.
- [53] Dr. Kaushansky's diagnosis of somatic symptom disorder is consistent with Dr. Squire's diagnosis and the other experts generally. All of the experts agree that Ms. Garmo's present conditions are primarily psychologically or psychiatrically based rather than physical.

Dr. Squire

- [54] Dr. Squire is a pain medicine specialist. In her opinion, Ms. Garmo's symptoms are consistent with nociplastic pain (pain from the brain) in addition to the effects of her anxiety and depression.
- [55] Dr. Squire arrived at this diagnosis as a result of her physical examination of Ms. Garmo and Ms. Garmo's reported symptoms. The physical examination revealed palpable trigger points and fascial adhesions, objective symptoms of myofascial pain that affected the muscles of the front and back of the neck, the jaw, right shoulder, arm, elbow, and triceps muscle. Ms. Garmo reported visual difficulties, headaches, fatigue, neck pain, dizziness, insomnia, mood disturbance and cognitive distortions. She also noted that Ms. Garmo has difficulty with reading and is sensitive to light and noise.
- [56] Dr. Squire's report stated that based on Ms. Garmo's pre-accident attendance for massage therapy and acupuncture that Ms. Garmo's post-accident symptoms aggravated pre-existing chronic intermittent stress, fatigue, headaches, tension in the neck, upper back and trapezius muscles. However, but for the accident, Dr. Squire opined that Ms. Garmo would not have experienced an aggravation of these pre-existing symptoms. The accident caused anxiety, depression and nociplastic pain resulting in sensitivity to light and noise, dizziness, difficulty reading, problems with memory and multitasking.
- [57] The defendant submits that no weight should be put on Dr. Squire's nociplastic pain opinion because: it is a novel and highly complex diagnosis; Ms. Garmo did not meet the expected criteria of the condition; all testing methods were not pursued; and Dr. Squire assessed and diagnosed Ms. Garmo in one afternoon. The defendant further argues that Dr. Squire acted as an advocate for Ms. Garmo.
- [58] In cross-examination, Dr. Squire was shown a journal article on nociplastic pain that she indicated she was familiar with, and thought was a good article. However, when shown the part of the article that set out a number of assessment tools used to diagnose nociplastic pain that did not apply in Ms. Garmo's case, Dr. Squire would not agree with the propositions set out. Dr. Squire agreed: that further assessments might have been beneficial to confirm the diagnosis; Ms. Garmo did not present with many of the recognized symptoms of nociplastic pain described in the article; and although a nociplastic pain diagnosis takes time to make, she only spent one afternoon with Ms. Garmo. Nevertheless, Dr. Squire steadfastly maintained her nociplastic pain diagnosis
- [59] While acknowledging that Ms. Garmo may have had a concussion, and that there is considerable overlap between concussion symptoms and nociplastic pain, Dr. Squire opined that Ms. Garmo had received the wrong diagnosis and therefore did not receive proper treatment. She didn't think that anyone at the ACC could have made a diagnosis of nociplastic pain as it is difficult to diagnose.

- [60] There is merit to the defendant's position. A diagnosis of nociplastic pain is somewhat novel and complex. However, Dr. Squire has considerable experience in the pain medicine field and the essence of her conclusion is that Ms. Garmo's symptoms are largely not physical which is similar to Dr. Kaushansky's somatic symptom disorder diagnosis. Indeed, Dr. Squire acknowledged that while a psychiatrist or psychologist would not be capable of making a nociplastic pain diagnosis they would likely make a DSM V diagnosis of what used to be called psychosomatic symptoms.
- [61] Therefore, I accept the essence of Dr. Squire's opinion that Ms. Garmo suffers from "pain from the brain".

Dr. Medvedev

- [62] Dr. Medvedev is a neurologist whose March 15, 2023 report was admitted into evidence. It was prepared for ICBC's consideration of Ms. Garmo's Part 7 benefits claim.
- [63] In his report, Dr. Medvedev stated that Ms. Garmo's headaches had improved, but were still occurring several times a week and could last for several hours. He noted they were heightened with sensitivity to light and noise, Ms. Garmo's cognitive symptoms had worsened, and that she suffered from sleep disturbance, anxiety, and depression.
- [64] Ms. Garmo's current physical symptoms were post-traumatic headaches, and soft tissue sprain / strain. He noted that her symptoms appeared unusual for a concussion and that her cognitive complaints were probably multifactorial related to general stress, aggravated by pain from the headaches and psychiatric conditions which to that point seemed to be underrecognized.

Dr. Okorie

- [65] Dr. Okorie is a psychiatrist called by the defendant. He assessed Ms. Garmo on February 15, 2025, and found that if Ms. Garmo had suffered a concussion in the accident, the effects would be resolved by now. As a result, he concluded that Ms. Garmo's reported cognitive issues are more likely related to her residual headache and pain, sleep disturbance and emotional distress.
- [66] Ms. Garmo's anxiety, mood swings, irritability, sleep disturbance, fatigue, reduced motivation, worrying, driving anxiety, subjective memory, attentional and language problems satisfy the diagnostic criteria for unspecified anxiety disorder. In his opinion, but for the accident Ms. Garmo would not have developed an anxiety disorder.
- [67] Based on his review of the records and his February 15, 2025 interview of Ms. Garmo, in his opinion Ms. Garmo was not suffering from depression, although he conceded that depression can be episodic. Depression and anxiety are very closely related, and he recommended that Ms. Garmo undergo antidepressant therapy for her anxiety disorder.

- [68] I accept Dr. Okorie's opinion that Ms. Garmo is not presently suffering from depression, but is suffering from a generalized anxiety disorder. His opinion is consistent with Dr. Kaushansky's testimony at trial.

Dr. van den Berg

- [69] Dr. van den Berg is a registered psychologist and certified vocational rehabilitation consultant who assessed Ms. Garmo at the request of the defendant. Dr. van den Berg concluded that Ms. Garmo has sustained a reduction in her vocational capacity, range of jobs and competitive employability as a result of her symptoms and functional limitations from the accident. Dr. van den Berg noted that although Ms. Garmo's symptoms had improved, she is precluded from returning to full time work as a result of the range of physical and cognitive symptoms she experiences.
- [70] Dr. van den Berg opined that Ms. Garmo is capable of working part-time in a select range of occupations. She will require a job that is slower in pace, allows for some schedule flexibility and the ability to take micro-breaks particularly from sustained computer and cognitively demanding work. She will be precluded from jobs that: have frequent deadlines, require processing large amounts of complex information, require a high level of multi-tasking, require frequent complex new learning, and involve shift work.
- [71] Dr. van den Berg provided several recommendations to support Ms. Garmo's rehabilitation and reintegration into the work force including attendance at a pain program, vocational rehabilitation, occupational therapy, and participation in a driver rehabilitation exposure program.

Credibility and Reliability

- [72] Ms. Garmo argues that she was a credible witness: she described her symptoms without embellishment, and in her testimony, she made reasonable concessions that do not support the defendant's theory that her evidence was motivated by financial gain.
- [73] The defendant submits that credibility and reliability are central issues in this case and makes extensive arguments in support of their position that Ms. Garmo's evidence was not credible nor reliable. The defendant says that Ms. Garmo failed to display a firmness of memory, changed her testimony in cross-examination, and did not concede many points contrary to her interest. Further, there were several instances where Ms. Garmo's evidence seemed to be unreasonable, implausible or unlikely and her evidence about the extent of her injuries is not credible considering how little she pursued treatment. Overall, the defendant submits that Ms. Garmo has exaggerated her symptoms and tailored her recovery and evidence to support her claim.

- [74] As a preliminary matter, the defendant relies extensively on Ms. Garmo's statements made to various clinicians documented in the clinical notes tendered as an exhibit at trial. The defendant relies on many of these statements for their truth, and not just for the fact that they were made, to impugn Ms. Garmo's credibility and to argue that Ms. Garmo failed to mitigate her damages.
- [75] Unless the statement was put to Ms. Garmo and she adopted it, the statements are not admissible for their truth: First, in accordance with the document agreement made between the parties, these statements are not admissible for the truth of their contents. Second, many of the statements were not put to Ms. Garmo, contrary to the principle in *Browne v. Dunn* (1893), 1893 CanLI 65 (FOREP), 6 R. 67 (U.K.H.L.), which requires counsel seeking to impugn a witness' credibility to have afforded the witness an opportunity to address the purported contradictory statement. Third, there is insufficient context surrounding the making of these statements to permit the court to assess what if any weight to give them. Statements in clinical records are only a brief summary or paraphrase, with no record of anything else that may have been said, which might explain, expand on or qualify a particular note.

The law

- [76] The assessment of both credibility and reliability is context-specific and multi-factorial. Factors that inform the assessment include: the opportunity and capacity of the witness to observe or perceive the events; the ability to remember those events; whether, or the extent to which, a witness can resist being influenced by an interest in a particular outcome when recalling those events; inconsistency in the witness' evidence at trial or between prior accounts; whether the witness' evidence harmonizes with, or is contradicted by, other reliable evidence; whether the evidence seems unlikely, unreasonable, or improbable in light of the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [77] As is generally the case in personal injury actions, the most important witness is the plaintiff herself. Once an assessment of the credibility and reliability of the plaintiff is assessed, the court is generally in a position to determine causation, usually with the assistance of medical opinion evidence. A plaintiff who accurately describes her symptoms and circumstances without embellishment will generally be found to be credible and reliable: *Henry v. Fontaine*, 2022 BCSC 930 at paras. 54-55.
- [78] In cases, such as this one, where the claim is based on soft-tissue injuries and headaches, credibility weighs heavily. A court must be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods of time extending beyond the usual recovery: *Padgham v. Ram*, 2024 BCSC 72 at para. 7. The failure of a plaintiff, who describes debilitating pain symptoms, to pursue promising treatments in the face of described symptoms speaks not only to mitigation, but also to

credibility: Franklin v. Coco, 2022 BCSC 1929 at paras. 91-93.

Discussion

- [79] I find, for the reasons that follow, that Ms. Garmo was a credible witness. Ms. Garmo provided responsive answers to the questions posed to the best of her ability. She was not argumentative, nor was her evidence contradicted in a material way. Ms. Garmo was an honest witness.
- [80] Much of the defendant's submission focussed on Ms. Garmo's poor memory. For example, she argues that Ms. Garmo's inability to recall details such as the number of hours of sleep she gets per night and what cardiovascular activity she was doing in 2024 is not credible.
- [81] The defendant challenges the truth of Ms. Garmo's assertion that she associates weight gain with the accident because she cannot remember why she stopped receiving injection treatment for it, despite it providing some success. If Ms. Garmo was truly concerned about weight gain from the accident she would be better informed about why she stopped a successful post-treatment method.
- [82] The defendant also argues that when Ms. Garmo indicated in cross-examination that she could not recall the details of what was being suggested to her, it was in circumstances where conceding the points put to her were contrary to her interest.
- [83] In my view, Ms. Garmo's inability to recall specific events or details do not mean that she was not a credible witness. Throughout her testimony, Ms. Garmo repeatedly indicated, and I accept, that her memory has been adversely affected since the accident. In her testimony she was careful to indicate that she had a poor memory of specific dates and times, and the exact progression of her symptoms. Importantly, Ms. Garmo's lack of detailed recollection was consistent, she did not display selective memory. She was also unable to recall events that may have assisted her claim. I do not accept that Ms. Garmo's lack of recall adversely impacts my assessment of the truthfulness of her testimony.
- [84] I accept that the reliability of some of Ms. Garmo's evidence is called into question as a result of Ms. Garmo's acknowledged memory issues. However, for the most part, specific dates and times are not significantly probative of the issues I need to decide. For example, there is no dispute about when Ms. Garmo first saw a doctor following the accident and the treatment she underwent because there are records that can be cross-referenced to her testimony.
- [85] The defendant contends that Ms. Garmo changed her evidence in cross-examination. For example, the defendant says that Ms. Garmo testified in her examination in chief that she had only ever had one migraine headache before the accident, but the clinical records show that she had reported them before the accident. When confronted, in cross-examination, the defendant says Ms. Garmo acknowledged the change in her evidence. However, in advancing this submission the defendant ignores all of Ms. Garmo's evidence. Ms. Garmo

explained that while she had referred to headaches she experienced before the accident as migraines, given the debilitating headaches she has experienced since, what she called a migraine before the accident was not a migraine at all.

- [86] The defendant submits that Ms. Garmo changed her evidence about whether or not she suffered a loss of consciousness in the accident. The defendant points to Ms. Garmo's examination in chief and her reports to Dr. Okorie and Dr. van den Berg where she indicated that she lost consciousness. The defendant contrasts this with answers on forms for the ACC in January 2020 and February 2020 where she indicated that she had not lost consciousness. In cross-examination, Ms. Garmo explained that she had reached the conclusion that she had lost consciousness as a result of events after the fact. The defendant suggests that Ms. Garmo created this evidence to advance her claim.
- [87] I do not accept the defendant's position. The defendant overstates Ms. Garmo's evidence in chief. Ms. Garmo testified that she thinks she may have blacked out because there are things she doesn't remember from when the accident happened. Further, I accept Ms. Garmo's explanation as to why she later indicated that she may have lost consciousness. It is reasonable that Ms. Garmo would come to this conclusion considering the extensive treatment she received for her concussion diagnosis. It is hardly surprising that Ms. Garmo put "two and two" together and in my view, doing so does not detract from her credibility.
- [88] The defendant says that Ms. Garmo's failure to identify any of her co-workers by name with whom she participated in HIIT workouts at her workplace prior to the accident is unreasonable and implausible. However, the defendant ignores that while the workouts took place in the building of her workplace and that the other participants worked in the same building, Ms. Garmo testified that the other participants were not people she worked directly with. She was not sure she knew them by name at the time, let alone years later.
- [89] The defendant argues that Ms. Garmo's description of her pre-accident treatments for minor issues and injuries mainly related to aches and pains from an active lifestyle is not credible. Primarily relying on Dr. Squire's description of Ms. Garmo's pre-accident conditions as "chronic", the defendant submits that Ms. Garmo failed to acknowledge that her pre-accident condition was much more serious than it was in order to advance her claim.
- [90] As I will later explain, the basis for Dr. Squire's use of the word "chronic" is questionable, since it was based solely on her review of treatment notes. I accept Ms. Garmo's evidence that her pre-accident treatments were for minor issues and I accept that she underwent treatment near the end of 2019 because she wanted to use her extended health benefits before they expired. I also accept Ms. Garmo's evidence that she did not consider her pre-accident treatments for her minor complaints as significant because her post accident injuries were entirely different in nature than her pre-accident conditions.

- [91] Ms. Garmo readily acknowledged that before the accident she had sought treatment for stress and anxiety. She was stressed and anxious about having lost her job and on a prior occasion had reported stress and anxiety relating to the death of a family member. I do not accept that Ms. Garmo intentionally denied any pre-accident treatment because she thought it would hurt her claim. I accept that Ms. Garmo's pre-accident condition was entirely different than her post-accident condition.
- [92] The defendant submits that because Ms. Garmo did not report her post-accident symptoms to her acupuncturist when she sought treatment on December 11, 13, and 18, 2019, her evidence that she had severe pain and discomfort the week immediately following the accident is called into question. The defendant notes that on December 18, 2019, Ms. Garmo sought treatment for foot pain, that was presumably unrelated to the accident.
- [93] Ms. Garmo acknowledged that she did not tell her acupuncturist about the accident. She explained that she was more concerned about having lost her job, and she did not know what would become of the accident. She did not expect that her symptoms would linger, and in the week following the accident, she was confused and suffering from brain fog.
- [94] I accept the defendant's position that Ms. Garmo's failure to advise her acupuncturist about symptoms she was experiencing from the accident calls into question the accuracy of her evidence about the immediate impact of the accident on her. I note that on December 11 and 13, 2019, Ms. Garmo received treatment for tension in her upper back and neck. Ms. Garmo testified that in the days following the accident she had neck and shoulder pain which limited her mobility. Ms. Garmo said she did not know why she did not tell the acupuncturist about the accident. In my view, it defies logic and common sense that Ms. Garmo would not mention that she had been in an accident.
- [95] However, I do not accept that Ms. Garmo intentionally provided erroneous information about the accident symptoms she experienced, and I do not accept that the whole of Ms. Garmo's evidence should be disbelieved. In my view, the reliability of Ms. Garmo's testimony about the impact of the accident in the week following it has been called into question, and I do not accept her account as accurate. Regardless of the precise timing of the intensity of her accident symptoms, nine days after the accident, Ms. Garmo's symptoms were severe enough that she attended a doctor and was diagnosed with a concussion.
- [96] The defendant submits that Ms. Garmo intentionally misled an expert witness because she denied that she had been sexually abused as a child when asked by Dr. Okorie. This, the defendant says, calls into question the veracity of all of the information she has supplied to her treaters and experts. Ms. Garmo acknowledged that she did not provide Dr. Okorie with this information because she did not consider it relevant.

- [97] I do not accept the defendant's argument. I accept that it was reasonable, although not correct, for Ms. Garmo to think that the childhood sexual abuse she had experienced was irrelevant to the symptoms she was experiencing. Furthermore, disclosing such highly sensitive personal information about a past traumatic event is obviously difficult and I decline to draw an adverse inference from Ms. Garmo's lack of candour about it.
- [98] The defendant also details Ms. Garmo's reports of the severity of her injuries, her physical capabilities, the frequency of bike riding, the amount of weight she was able to lift, and the difficulty she said she had performing household chores to submit that her reports were inconsistent and that she has exaggerated her limitations for the purpose of assisting her claim. The defendant suggests that Ms. Garmo's testimony about her present limitations are contradicted by her earlier reports to clinicians and experts that overall, her condition had improved since the accident.
- [99] In my view, any inconsistencies in Ms. Garmo's reporting of her symptoms and capabilities are to be expected. The symptoms, by their nature and her capability as a result will vary from time to time. It is a rare case of this kind where such inconsistencies cannot be found. By the time of trial, Ms. Garmo had provided information to numerous people on a number of occasions over a period of years. Very few people will have perfect and identical recollection on each of those occasions. There are no glaring inconsistencies that would call into question the veracity of Ms. Garmo's testimony.
- [100] Furthermore, Ms. Garmo readily acknowledged that her symptoms had significantly improved, and I find that they have. I find that Ms. Garmo attempted to provide an accurate picture of her condition and circumstances when she testified and when she provided information to the experts and to her treatment providers.
- [101] The defendant points to the surreptitious video surveillance taken of Ms. Garmo while she was in a gym, walking down a street and grocery shopping to argue that Ms. Garmo's testimony that she continues to struggle with bright lights and wears blue-tint glasses or sunglasses is unreasonable, implausible and unlikely. The defendant notes that for periods of time during the video Ms. Garmo is not wearing glasses.
- [102] I do not accept the defendant's argument. In fact, I find that the videos were entirely consistent with Ms. Garmo's evidence. The way she moved, exercised, when she wore her glasses or did not, was consistent with her description of her condition. I accept Ms. Garmo's evidence that she is adversely impacted by bright lights. She did not testify that she could never tolerate bright lights or that she wore glasses all the time. Ms. Garmo explained that she had been advised by her treatment provider to try to limit her use of glasses, and that is what she tried to do.
- [103] The defendant points to a calendar Ms. Garmo prepared as part of her rehabilitation therapy and to the volunteering she has done to submit that Ms. Garmo is much more capable than she acknowledges and is exaggerating her limitations. The submission ignores that Ms. Garmo testified that the calendar was aspirational and not a record of what

she actually did. I do not accept that Ms. Garmo has strategically positioned herself to advance her claim and when Ms. Garmo explained her current limitations, she consistently explained that her condition has improved overall.

- [104] The defendant urges the court to carefully consider Ms. Garmo's evidence because much of it is not corroborated. Where Ms. Gongora and Ms. Thornber do corroborate Ms. Garmo's evidence, the defendant suggests that the impact of their evidence is limited. I find that both Ms. Gongora and Ms. Thornber were credible witnesses and did corroborate Ms. Garmo's testimony. Ms. Gongora's evidence about the stark changes she has observed in Ms. Garmo since the accident was particularly compelling. Ms. Gongora's evidence about her observations of Ms. Garmo was not challenged in cross-examination.
- [105] While Ms. Thornber did not know Ms. Garmo before the accident, her testimony about her observations of Ms. Garmo were consistent with Ms. Garmo's own description. Her testimony on those points was not challenged.
- [106] The defendant submits that Ms. Garmo's failure to actively seek medical treatment in the last two years adversely impacts her credibility. She argues that if Ms. Garmo was suffering as much as she says she was, Ms. Garmo would have pursued further treatments, and at very least would have followed through with the recommendations made.
- [107] I do not accept that Ms. Garmo's failure to pursue further treatment or follow every recommendation impacts her credibility. Ms. Garmo did undertake a significant rehabilitative course of treatment and her symptoms essentially plateaued. As I have already noted, Ms. Garmo's condition has improved since the accident and in 2023 her benefits from the insurer were terminated, limiting her ability to access further treatment.

Conclusion

- [108] I accept Ms. Garmo's evidence as credible. I do not accept that Ms. Garmo tailored her treatment or evidence to advance her claim. While Ms. Garmo's lack of ability to recall details about dates, times and her symptoms calls into question the reliability of some of her evidence I do not accept that her evidence should be rejected as a result. I have carefully considered Ms. Garmo's evidence when reaching my conclusions, particularly on those points that depend on its accuracy.

Causation

- [109] Ms. Garmo argues that her conditions developed from the accident. She relies on the medical experts including the defendant's experts in support of her contention. The medical experts all agreed that her history and medical records showed no significant risk factors or prior mental disorders before the accident.

- [110] She submits that the treatments she received prior to the accident for headaches, muscle tightness, and sleep disruption are qualitatively different from her condition after the accident. Her post-accident symptoms were nothing like the mild symptoms she reported prior to the accident, and she did not have any periods of disability before the accident.
- [111] Relying primarily on notes documenting Ms. Garmo's treatments she received before the accident and Dr. Squire's report, the defendant challenges Ms. Garmo's position that the accident caused entirely new injuries. The defendant submits that the extent of Ms. Garmo's pre-existing injuries were greater than she admitted and the defendant should not be required to compensate Ms. Garmo for any debilitating effects of those pre-existing conditions as she would have experienced them regardless of the accident.

The law

- [112] Causation is established when the plaintiff proves that the defendant caused or contributed to her injuries. The negligence need not be the sole cause of the injuries so long as it is a necessary cause, and causation need not be determined by scientific precision: *Emil Anderson Maintenance Co. Ltd. v. Taylor*, 2024 BCCA 156 at para. 130; *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-17; *Zenone v. Knight*, 2024 BCCA 200 at para. 55
- [113] The primary test for causation asks whether the plaintiff would have suffered the injuries but for the defendant's negligence. This 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; *Farrant v. Laktin*, 2011 BCCA 336 at para. 11
- [114] It is well accepted that the plaintiff must be placed in the position she would have been if not for a defendant's negligence, no better or worse. Tortfeasors must take their victims as they find them, even if the plaintiff's injuries are more severe than they would be for a normal person (the "thin skull" rule). 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 v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 32-35

Discussion

- [115] In my view, Ms. Garmo has proven that the accident caused soft tissue injuries to her neck, back and shoulder, post-traumatic headaches and migraines. The accident also caused psychological injuries, including somatic symptom disorder and generalized anxiety disorder. I accept that Ms. Garmo experiences pain symptoms to a higher degree than would be expected considering the nature of her physical injuries. It is not material as to

whether her symptoms caused by the accident are a result of a psychological condition or a diagnosis of nociplastic pain. As Ms. Garmo's counsel pointed out, all the medical experts identify the same symptoms and disabilities as having been caused by the accident.

- [116] Other than Dr. Squire's reference to Ms. Garmo's pre-accident conditions as "chronic" there is no medical evidence to support the defendant's contention that Ms. Garmo's pre-accident conditions would have developed into the same debilitating conditions that resulted from the accident.
- [117] Based solely on her review of the treatment records preceding the accident, showing that Ms. Garmo attended for acupuncture and massage 13 times in the two months prior to the accident, Dr. Squire described Ms. Garmo's headaches, muscle tension, insomnia and fatigue as "chronic". In cross-examination Dr. Squire said that she asked Ms. Garmo if she had chronic pain before the accident, and she thought that it was likely that Ms. Garmo denied it. Dr. Squire had not reviewed the treatment records when she interviewed Ms. Garmo. Dr. Squire did not know whether Ms. Garmo's pain was chronic soreness or chronic intermittent pain. Regardless of the description of Ms. Garmo's pre-accident condition, Dr. Squire did not opine that Ms. Squire's present condition would have developed but for the accident.
- [118] I do not accept the defendant's position that even if Ms. Garmo's neck, back and shoulder injuries were pre-accident conditions, she would have experienced the consequences she did regardless of the accident. I accept Ms. Garmo's evidence that her pre-accident complaints were categorically different than her injuries following the accident. There is no evidence that Ms. Garmo's pre-accident condition would have developed into her post-accident condition.

Duty to Mitigate

The parties' positions

- [119] The defendant submits that any damage award should be reduced because the defendant has proven that Ms. Garmo failed to mitigate her damages. It is submitted that Ms. Garmo failed to pursue psychological counselling and failed to follow other recommended treatment.
- [120] Ms. Garmo submits that the defendant has not proven that she has failed to mitigate her damages. She argues that in fact she underwent an immense amount of treatment and that while she chose not to pursue counselling, her decision was not unreasonable when all the circumstances are considered. Further, the defendant has not shown that had she undergone further treatment, including counselling, her damages would be reduced.

The law

[121] The onus is on the defendant to prove on a balance of probabilities that the plaintiff could have avoided all or a portion of her loss. In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended by her doctors, the defendant must prove:

- a) That the plaintiff acted unreasonably in eschewing the recommended treatment, and
- b) The extent if any to which the plaintiff's damages would have been reduced had she acted reasonably.

Chiu v. Chiu, 2002 BCCA 618 at para. 57; Haug v. Funk, 2023 BCCA 110 at paras. 56-58.

[122] The defendant accepts that she bears the onus of proving both branches of the Chiu test on a balance of probabilities: Haug v. Funk, 2023 BCCA 110, at paras. 55 and 61. However, she also notes that she does not need to prove the second part of the Chiu test with direct certainty, which is an impossible task in cases based on self-reported myofascial pain and headaches: Haug v. Funk, at para. 51.

Discussion

Counselling

[123] The defendant submits that Ms. Garmo acted unreasonably in repeatedly declining to undergo cognitive behavioural therapy as was first recommended in February 2020. Her decision was particularly unreasonable since she had successfully undergone counselling in her early 20's. Based on the evidence of Dr. Kaushansky, Dr. van den Berg and Dr. Okorie, the defendant submits that the court can draw an inference that it is probable that had Ms. Garmo undergone the recommended therapy she would have benefitted from it.

[124] In support of their position that it was repeatedly recommended to Ms. Garmo that she undergo counselling, the defendant largely relies on the clinical notes made by Ms. Garmo's treatment providers at the ACC:

- a) On January 16, 2020, the family doctor Ms. Garmo saw and who diagnosed her with a concussion recommended that she seek physiotherapy, kinesiology and counselling through the ACC.
- b) On February 20, 2020, Mr. Andrew Huber prepared a counselling report for ICBC wherein he recommended counselling through the ACC. He also noted that Ms. Garmo appeared motivated to engage in interdisciplinary treatment to support management of her post-injury symptoms.
- c) On February 20, 2020, Mr. Andrew Huber also recommended that Ms. Garmo attend four sessions of group-based mindfulness / movement group classes at the ACC to offer normalization / validation of symptoms and to practice self-management of symptoms.

- d) On February 20, 2020, Ms. Chantelle Cavazzon, an occupational therapist also saw Ms. Garmo as part of an interdisciplinary team evaluation and recommended three counselling sessions for neurocognitive testing, as part of the ACC's best practice model of care to track cognitive recovery. It appears that Ms. Garmo participated in this testing.
- e) On April 30, 2021, Ms. Zoe Smith, an occupational therapist noted that although "Ms. Garmo was previously approved for counselling sessions, however she has declined counselling services at this time". In her evidence, Ms. Garmo acknowledged that this was correct.
- f) On April 30, 2021, Ms. Zoe Smith again recommended three counselling sessions for neurocognitive testing, as part of the ACC's best practice model of care to track cognitive recovery.
- g) On July 5, 2021, Ms. Zoe Smith noted "Ms. Garmo was previously approved for counselling sessions, however she has declined counselling services at this time".
- h) On October 5, 2021, Ms. Zoe Smith noted: "Ms. Garmo was previously approved for counselling sessions, however she has declined counselling services at this time". She also noted that mood and anxiety will continue to be monitored on an ongoing basis by her occupational therapist.
- i) On April 5, 2022, Ms. Zoe Smith again noted "Ms. Garmo was previously approved for counselling sessions, however she has declined counselling services at this time". Ms. Zoe Smith also again noted that mood and anxiety will continue to be monitored on an ongoing basis by her occupational therapist. Engaging in counselling will be discussed again in the context of recent stressors / anxieties.
- j) On September 19, 2022, the identical notes again appear.
- k) On January 25, 2023, the identical notes again appear.

[125] Based on the foregoing, I do not accept the defendant's position that Ms. Garmo was repeatedly advised to seek counselling. It appears that the same note has been transposed several times. Ms. Garmo did not remember declining counselling multiple times although she acknowledged that she was aware that it was available to her.

[126] Ms. Garmo submits that because mitigation cannot be looked at with the benefit of hindsight, the context of her treatment and diagnoses is important when assessing whether the defendant has established that she failed to mitigate her damages. She emphasizes that from December 2019 to late 2024, she was being treated for concussion and post-concussion symptoms and had not been diagnosed with major depressive disorder or generalized anxiety disorder. It was only recently that it became apparent that Ms. Garmo's symptoms were unlikely to be emanating from a concussion.

- [127] Ms. Garmo acknowledged that after attending one or two counselling sessions, she decided not to attend further sessions because she did not think it was beneficial, and she did not connect with the counsellor. Ms. Garmo submits that this decision was not unreasonable.
- [128] The counsellor made available to her was only one part of her overall treatment at the ACC and Ms. Garmo submits that her decision not to continue with counselling was reasonable. Her decision should be considered in the context of the extensive treatment she was already undergoing for her concussion diagnosis. She found the other treatments she was taking through the ACC to be very beneficial. Furthermore, Ms. Garmo recalled, consistent with the clinical notes, that her mood and anxiety was being monitored by her occupational therapist.
- [129] Ms. Garmo relies on Dr. Okorie and Dr. Medvedev's opinions to support her position that the defendant has not proven a failure to mitigate. Dr. Okorie opined that Ms. Garmo received appropriate psychological and occupational therapies for her anxiety disorder, but had not received adequate antidepressant therapy. Furthermore, Dr. Okorie noted, based on his review of Ms. Garmo's history and medical records, that Ms. Garmo followed her recommended treatment plan. Dr. Medvedev, who assessed Ms. Garmo in 2023, opined that she had received reasonable treatment and recommended a psychiatric assessment.
- [130] Ms. Garmo further submits that the defendant has not proven that her condition would have improved more than it did had she obtained counselling, in light of the complexity of her diagnoses. Relying on Dr. Okorie's evidence, Ms. Garmo notes that her anxiety disorder in the context of her other diagnoses, combined with the complexity of her childhood trauma diminishes the prospect of success.

Lack of medical treatment generally

- [131] The defendant submits that Ms. Garmo's preference to avoid prescription medications, and instead to occasionally take ibuprofen and to regularly take supplements recommended by her neuro-ophthalmologist, is unreasonable. The defendant argues that Ms. Garmo's stated desire to be treated holistically is at odds with the fact that she did not see a naturopath after the accident, despite seeing one before for dietary issues.
- [132] While Ms. Garmo did not have a family doctor, she had regular appointments with Dr. Liu, a physician she first encountered through a walk-in clinic. The defendant says that Ms. Garmo should have, through Dr. Liu, pursued more treatment.
- [133] The defendant also says that Ms. Garmo acted unreasonably by not following up to see a general ophthalmologist as recommended to her on August 29, 2023. Ms. Garmo testified that she did make the recommended appointment, but the doctor's office cancelled the appointment, and she forgot to rebook it.

[134] Ms. Garmo argues that she diligently pursued all recommended treatment. She was under the care of the ACC for extensive treatment for her concussion diagnosis and she diligently participated in all recommended rehabilitative efforts. Any failure to pursue further treatment was not unreasonable, and the defendant has not shown that her condition would have improved more should she have obtained more treatment.

Conclusion

[135] In my view, the defendant has not proven that Ms. Garmo failed to mitigate her damages on either branch of the Chiu test. It is easy to see with the benefit of hindsight possessed with knowledge of Ms. Garmo's present diagnoses that cognitive behavioural therapy was a course of treatment that might have assisted Ms. Garmo's recovery. However, at the time Ms. Garmo declined to attend further counselling sessions, she was undergoing significant treatment for the physical consequences of her concussion. The treatments were successful, and attending counselling to rehash past childhood trauma did not make sense to Ms. Garmo. In all the circumstances declining counselling was not unreasonable.

[136] Furthermore, based on all of the evidence, I am not satisfied that had Ms. Garmo attended counselling sessions her damages would be reduced. In part, I reach this conclusion because even today, the experts do not agree on Ms. Garmo's appropriate diagnosis. For example, if Dr. Squire's opinion is correct, the counselling that would have been made available to Ms. Garmo through the ACC (the only counselling recommended to her until recently) would not have assisted, because Dr. Squire's view was that Ms. Garmo was misdiagnosed. Further, until recently, Ms. Garmo did not know or could not have known that her situation was complicated by the impact of her childhood trauma.

[137] I see no merit to the defendant's position that Ms. Garmo ought to have more diligently pursued more medical treatment. Ms. Garmo attended for a great deal of treatment which by and large was successful until her condition plateaued, and her benefits were discontinued. While Ms. Garmo failed to follow up on every recommendation, including re-booking an appointment with an ophthalmologist that was cancelled, her memory problem is a symptom caused by the accident. A plaintiff cannot be found to have failed to mitigate damages where that failure stems from a condition that the defendant themselves has caused: *Kempton v. Struke Estate*, 2020 BCSC 2094 at paras. 196-197.

[138] Mitigation is not to be judged retrospectively nor to a standard of perfection. The possibility that having more appointments with her doctor or attending a naturopath or even attending counselling sessions does not mean that Ms. Garmo has failed to mitigate her damages. The defendant has failed to prove that Ms. Garmo acted unreasonably. It is common ground that treatment closer in time to the event is more likely to be successful; however, the defendant did not present sufficient evidence to prove that had Ms. Garmo been more diligent in pursuing treatment recommendations then her loss would have been reduced: *Martin v. Steunenberg*, 2021 BCSC 1411 at para. 255.

Non-Pecuniary Damages

The parties' positions

[139] Ms. Garmo seeks an award of \$250,000 and relies on the following cases in support of her position:

- *Burdett v. Eidse*, 2010 BCSC 219, aff'd 2011 BCCA 191 (\$200,000 or \$278,000 with inflation);
- *Adamson v. Charity*, 2007 BCSC 671 (\$200,000 or \$290,000 with inflation);
- *Pearson v. Savage*, 2017 BCSC 1435, aff'd 2020 BCCA 133 (\$175,000 or \$210,000 with inflation); and
- *Polos v. Cinnamon-Lopez*, 2016 BCSC 81 (\$180,000 or \$210,000 with inflation).

[140] Ms. Garmo emphasizes that her prognosis is guarded considering the overlapping diagnoses combined with the complication of her prior childhood trauma which makes successful treatment more unlikely. Based on Dr. Kaushansky's opinion, Ms. Garmo submits that there is a real and substantial possibility that her condition is permanent. Her present condition is likely her new "status quo".

[141] The defendant, noting that Ms. Garmo's condition has improved significantly, submits that an award between \$95,000 and \$115,000 would be appropriate. In support of her position, the defendant relies on the following cases:

- *Jamal v. Kemery-Higgins*, 2017 BCSC 213 (\$95,000 or \$119,000 with inflation);
- *Dhudwal v. Davis*, 2021 BCSC 374 (\$100,000 or \$116,000 with inflation); and
- *Roth v. Cape Scott Cedar Products Ltd*, 2024 BCSC 1431 (\$95,000).

The law

[142] 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.

[143] 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: *Langford (City) v. Matthews*, 2024 BCCA 214 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.

[144] 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).

Discussion

[145] In a general sense, considering my factual findings about Ms. Garmo's condition, I find that the circumstances of the plaintiffs in the cases relied on by Ms. Garmo are much more dire than her own. At the same time, the impacts of the accidents on the plaintiffs in the cases relied on by the defendants are less serious.

[146] For example, in *Burdett* the plaintiff continued to suffer significant consequences from his mild traumatic brain injury including severe cognitive impairments. He could no longer participate in activities that had given him pleasure, he was socially withdrawn and his relationships with his wife, family and friends had been negatively impacted. Significantly, Mr. Burdett ran his own successful business but was no longer able to do so impacting his own sense of identity, self-worth and emotional well-being. Similarly, in *Anderson*, the plaintiff was effectively totally disabled due to his chronic pain diagnosis and major depression. He suffered regular debilitating headaches emanating from his neck pain.

[147] The plaintiffs' circumstances in *Jamal*, *Dhudwal* and *Roth* are more similar to Ms. Garmo's; however, in each of those cases the plaintiffs' cognitive impairments were not as significant as Ms. Garmo's. Further, the plaintiffs were able to return to work, albeit in a different capacity or in a modified way.

- [148] Invariably, the circumstances of each case will differ including for example, the age of the plaintiff and the specific nature of their injuries. I am also mindful that other cases serve only as some guidance to my assessment of the inexhaustive list factors identified in Stapley and I am required to apply a functional approach in the assessment influenced by Ms. Garmo's individual personal experiences in dealing with her injuries and their consequences.
- [149] Ms. Garmo has suffered significant consequences as a result of the accident, notably in relation to her ability to parent her daughter. Before the accident, Ms. Garmo helped her daughter with her homework, played games and participated in physical activities with her. Ms. Garmo is no longer able to participate in these activities to the same extent. Ms. Garmo herself was a physically active person and participating in sports and other physical activity was a part of her identity.
- [150] At the same time, despite the challenges, Ms. Garmo appears to have a strong relationship with her daughter and has managed to maintain and cultivate a social life. For example, she was able to meet Ms. Thornber after the accident and develop a friendship with her.
- [151] Ms. Garmo's physical condition has improved a great deal since the accident, but I accept that she has ongoing mainly cognitive symptoms directly related to the accident along with significant psychological impacts.
- [152] In my view, considering the nature of her injuries, the severity and duration of her pain, the impact on her mental health, the impairment of her enjoyment of life along with the impact on her relationship with her daughter and friends, I assess Ms. Garmo's non-pecuniary damages at \$165,000.

Past Loss of Income Earning Capacity

- [153] Ms. Garmo relies on the evidence of Mr. Kevin Turnbull, an expert economist whose Loss of Earnings and Costs of Future Care report was tendered at trial in support of her past and future loss of income earning capacity.
- [154] Ms. Garmo submits that absent the accident, she would have returned to work in January 2020 and had she earned an income similar to her previous employment, her past loss of earnings to the date of trial (net of deductions) is \$252,587. Ms. Garmo submits that it would be reasonable to consider her loss based on the average income earnings of a British Columbia woman with a university degree, leading to a net loss of \$285,304.
- [155] Ms. Garmo submits that both estimates are conservative because they do not take into account the real and substantial chance that Ms. Garmo may have pursued a career in policing, thus she submits that the court should take into account the higher of the two estimates.

- [156] The defendant recognizes that Ms. Garmo is entitled to an award for past wage loss, but submits that the amount should reflect that it was not assured that she would have returned to work so quickly. Although she had started to look for work, she had no concrete plans or offers. Furthermore, she was not interested in returning to the work she was doing and was looking for new opportunities, which likely would have slowed her job search.
- [157] The defendant does not accept that Ms. Garmo would have obtained employment that paid her a similar wage to what she had earned before the accident because she was looking for work in a different field, preferably project management work which pays less than Ms. Garmo was earning before the accident. As a result, the defendant submits that her net loss amounts to approximately \$168,000.
- [158] The defendant also submits that Ms. Garmo should have made all efforts to explore returning to work in 2021, and suspects that Ms. Garmo did not do so because she believed that working part-time would negatively impact her benefits.

Discussion

- [159] In my view, Ms. Garmo would have returned to work in the early part of 2020 and would have earned an income similar to the income she earned prior to the accident. Over her working career, Ms. Garmo proved herself to be resourceful and adaptable. Ms. Garmo clearly had the skills needed to obtain similar employment. As Ms. Garmo was the sole supporter of her daughter, I find that would be additional motivation to obtain employment as soon as reasonably possible. Considering that Ms. Garmo had not yet fully engaged in her search for new employment at the time of the accident, I consider it unlikely that she would have returned to work in January 2020. Rather, I find it more likely she would have returned in April 2020.
- [160] I do not accept that I should consider Ms. Garmo's past wage loss as anything higher than her pre-accident earnings because I do not accept that there was a real and substantial possibility that Ms. Garmo would have successfully pursued a career in policing. While I accept that Ms. Garmo had taken some steps to ensure that she had the necessary prerequisites to pass some of the application requirements, other than maintaining her physical condition, Ms. Garmo does not appear to have taken any concrete steps since 2014.
- [161] At the time of the accident, Ms. Garmo had not re-applied to any police force and did not at the time intend to. She said she had planned to first obtain new employment and then consider re-applying as she understood that would make her a better candidate. Since Ms. Garmo testified that it had been her intention to re-apply to a police force, I infer that she had previously unsuccessfully applied to be a police officer. There was no evidence about the circumstances of a prior application and there was no evidence as to whether Ms. Garmo's prospect of becoming a police officer was realistic.

- [162] I do not accept the defendant's position that based on Ms. Garmo's testimony she would have pursued employment that would have inevitably led to lower paying employment. While Ms. Garmo was interested in project management work, she testified that it was only one option, and if she chose to pursue it, she would have to undertake further training.
- [163] Neither do I accept that Ms. Garmo could have returned to work in 2021 and chose not to for fear of jeopardizing her benefits. Ms. Garmo did attempt to do some self-paced contract work in 2021, but testified that she could not complete it because she was unable to focus or concentrate well enough to perform the required work. I do not consider it to have been a real and substantial possibility that Ms. Garmo could have done any work of consequence from the date of the accident until trial.
- [164] Ms. Garmo has established that she is entitled to be compensated for her past loss of income earning capacity. Having concluded that she would have obtained employment in April 2020 and would have earned an income similar to what she would have earned prior to the accident, I find that Ms. Garmo is entitled to \$245,000.

Future Loss of Income Earning Capacity

The parties' positions

- [165] Ms. Garmo submits that there is a real and substantial likelihood that she will never be able to work again; therefore, there is a real and substantial possibility that she will suffer a pecuniary loss. Ms. Garmo relies on the evidence of Mr. Turnbull in support of her position that the loss, taking into account various contingencies, amounts to \$892,000, based on an assumption that absent the accident Ms. Garmo would have had a similar income to that which she had before the accident.
- [166] Ms. Garmo submits that there is a real and substantial possibility that she would have become a police officer, which would amount to a loss of \$1,823,692. Allowing for that possibility, Ms. Garmo submits that this Court should award her \$1,400,000 which is the midway point between the earnings of a police officer and the average earnings of a BC woman with a university degree.
- [167] In the alternative, if the court accepts that Ms. Garmo will return to the workforce on a part time basis, considering her condition at best she will only be able to earn 1/3 of her future earnings. Ms. Garmo submits that the relative likelihood of this happening is only about 25% and thus the reduction using the \$1,400,000 amount leads to an award of \$1,250,000.
- [168] The defendant does not accept that there is a real and substantial likelihood that Ms. Garmo will never work again. She submits if Ms. Garmo follows Dr. Okorie's treatment recommendations her conditions should improve and based on Dr. van den Berg's vocational assessment she should be able to return to full time work.

[169] As a result, considering that Ms. Garmo's likely salary as a project manager would have been lower than her before accident earnings, the defendant submits that her loss would amount to \$8,250 annually. Her total loss, assuming an earlier retirement date than Ms. Garmo suggests, would be \$148,000. The defendant submits that Ms. Garmo would retire at age 64, the average retirement age for women in Canada, instead of at age 70, the age Mr. Turnbull assumed.

The law

[170] 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.

[171] In 2021, the Court of Appeal issued a trilogy of decisions setting out the proper approach to assessing a claim for damages for loss of future earning capacity: *Dornan v. Silva*, 2021 BCCA 228; *Rab v. Prescott*, 2021 BCCA 345; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the court identified a three-step process for assessing damages 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 v. Golaiy*, 26 B.C.L.R. (3d) 353, 1985 CanLII 149 (S.C.)]). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring--see the discussion in [*Dornan v. Silva*, 2021 BCCA 228] at paras 93-95.

[172] At the first step, 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: *Rab* at paras. 29-30. In the former set of cases, the first and second step of the analysis may well be foregone conclusions: *Ploskon-Ciesla* at para. 11.

[173] 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. 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.

- [174] At the third step - the valuation stage - there are two possible approaches to assessing loss of future earning capacity: 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.
- [175] 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 a 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 v. MMS Homes Ltd.*, 2023 BCCA 400 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 she would have been in but for the injuries caused by the defendant's negligence: *Lines v. W & D Logging Co. Ltd.*, 2009 BCCA 106 at para. 185.
- [176] The earnings approach assesses the plaintiff's estimated annual income multiplied by the remaining years of work and discounted to reflect current value: *Pallos v. Insurance Corp. of British Columbia* (1995), 1995 CanLII 2871 (BC CA), 100 B.C.L.R. (2d) 260 at para. 43 (C.A.). The capital asset approach considers a number of factors, including whether the plaintiff has been rendered less capable overall of earning income from all types of employment; is less marketable or attractive as a potential employee; has lost the ability to take advantage of all job opportunities that might otherwise have been open; or is less valuable as a person capable of earning income in a competitive labour market: *Brown v. Golaiy* (1985), 1985 CanLII 149 (BC SC), 26 B.C.L.R. (3d) 353 (S.C.); *Ng v. Corness*, 2023 BCCA 185 at para. 18.
- [177] The parties agree that the earnings approach is the appropriate method to apply to assess Ms. Garmo's future loss of income earning capacity.

Discussion

- [178] The evidence clearly establishes that Ms. Garmo's ability to earn income has been substantially diminished as a result of the accident. Based on the expert evidence and Ms. Garmo's testimony, I accept that Ms. Garmo's capacity to work has been significantly impacted, and it is unlikely that she will be able to obtain similar employment as she had before the accident. Where the event giving rise to a future loss is "manifest and continuing at the time of trial, that evidentiary step is a given": *Steinlauf v. Deol*, 2022 BCCA 96 at para.

52.

- [179] I am also satisfied that the evidence demonstrates that as a result of Ms. Garmo's injuries, there is a real and substantial possibility that she will suffer a pecuniary loss. It is apparent that Ms. Garmo's previous employment relied on her organizational skills and ability to multi-task; abilities that she has largely lost as a result of the accident. Furthermore, I accept that Ms. Garmo's symptoms are aggravated by screen time and bright lights, which causes limits to her ability to find suitable employment or to perform work on a full-time basis.
- [180] In terms of quantifying her loss, for the reasons set out above, I find that Ms. Garmo was likely to earn a comparable income to what she was earning before the accident. I accept, relying on Mr. Turnbull's report that taking into account labour market contingencies and applying his multiplier, Ms. Garmo's total loss is \$892,000.
- [181] I accept that in this case, the assumption that Ms. Garmo would have worked to age 70 is a reasonable one. Given Ms. Garmo's work history, her age and the fact that she has a young daughter who she is solely responsible for supporting, assuming a retirement age of 70 is appropriate in the circumstances.
- [182] I am of the view that there is a measurable chance that Ms. Garmo will improve sufficiently to be able to return to the work force on a part-time basis. In order to do so, Ms. Garmo will likely require further rehabilitative treatment and vocational training. I accept Ms. Garmo's position that at best she may earn about 1/3 of her future earnings. Therefore, the \$892,000 loss will be reduced by \$297,000.
- [183] However, I also accept Ms. Garmo's submission that the relative likelihood of her successfully returning to part time employment is about 25%, reducing the \$297,000 deduction by \$74,250.
- [184] I find that the appropriate assessment for Ms. Garmo's future loss of income earning capacity to be \$817,750.

Diminished Housekeeping Capacity

- [185] Ms. Garmo testified, and I accept, that before the accident she kept her home very clean and organized. Since the accident, her home is disorganized and she is unable to keep it as clean, and she only performs the most necessary tasks. Ms. Garmo submits that as a single mother to young daughter, she has had no ability to lean on a family member to assist with housekeeping duties and given her financial circumstances she has been unable to hire anyone to assist. To deny her a pecuniary award because she could not afford to hire someone would be unfair.

- [186] Ms. Garmo seeks an award of \$20,000 for her past loss and \$92,152 for her future loss of capacity. The amount is based on four hours of housekeeping services per week at \$20 per hour. The future loss assumes services will be required until age 75 and applies the multiplier set out in Mr. Turnbull's report.
- [187] The defendant submits that no award should be made because: there is insufficient evidence to establish that Ms. Garmo lacks the physical capacity to perform housekeeping tasks; Ms. Garmo has been performing her necessary housekeeping tasks regularly since the accident; the surveillance videos show that Ms. Garmo is physically active; Ms. Garmo's condition has improved and is improving; and Dr. Squire recommends that Ms. Garmo perform her household chores for therapeutic purposes.
- [188] In the alternative, the defendant submits that any established claim under this head is properly subsumed into an award for non-pecuniary damages.

The law

- [189] In some circumstances, it may be appropriate to augment a non-pecuniary award with an award for loss of housekeeping capacity. In *Ponych v. Klose*, 2023 BCSC 1504, Justice Blake summarized the principles relating to loss of housekeeping capacity awards:
- [328] A plaintiff is entitled to an award for loss of housekeeping capacity if they establish on a balance of probabilities such a loss: *Kim v. Lin*, 2016 BCSC 2405 at para. 189, *aff'd* 2018 BCCA 77. An award may be made under one or more separate heads of damage, including pecuniary, non-pecuniary, and cost of future care.
- [329] The principles applicable to the loss of homemaking capacity are:

Loss of housekeeping capacity may be treated as a pecuniary or non-pecuniary award. This is a question of discretion for the trial judge.

A plaintiff who has suffered an injury that would make a reasonable person in her circumstances unable to perform usual and necessary household work is entitled to compensation for that loss by way of pecuniary damages.

Where the loss is more in keeping with a loss of amenities or increased pain and suffering while performing household work, a non-pecuniary damages award may instead compensate the loss.

As the award is intended to reflect the loss of a capacity, the Plaintiff is entitled to compensation whether or not replacement services are actually purchased.

Evidence of the loss of homemaking capacity is provided by the work being performed by others, even if done gratuitously.

See: *McKee v. Hicks*, 2023 BCCA 109 at paras. 93-112; *Kim v. Lin*, 2018 BCCA 77 [Lin] at paras. 28-34; *Riley v. Ritsco*, 2018 BCCA 366 at para. 96-103; *Liu v. Bains*, 2016 BCCA 374 at para. 25-26; *McTavish v. MacGillivray*, 2000 BCCA 164 at para. 63

Discussion

- [190] In my view, the challenges Ms. Garmo has experienced and will continue to experience in performing her housekeeping tasks are appropriately taken into account in the assessment of the nonpecuniary damage award rather than reflected in a separate nonpecuniary award.
- [191] In *Kim v. Lin*, 2018 BCCA 77 at paras. 27-37, the court held that where the plaintiff continues to perform housekeeping work with difficulties or manages to get by without doing these tasks, the loss may be compensated for as part of non-pecuniary damages. A pecuniary award may be appropriate where the evidence demonstrates that a reasonable person in the plaintiff's circumstances should not be expected to perform the tasks in question due to their injuries.
- [192] Based on her evidence, Ms. Garmo has managed to get by performing limited housekeeping tasks. She can perform some housekeeping tasks with some difficulty, albeit not to the same standards as before the accident. The expert evidence does not suggest that there are any impediments that would prevent her from performing the tasks and the experts recommend that she do so. Nevertheless, I accept that as a result of the accident performing housekeeping tasks has been and will be challenging for Ms. Garmo, and that difficulty has been taken into account in the general damages I have assessed.

Costs of Future Care

- [193] Ms. Garmo seeks an award for the costs of her future care based on the recommendations provided by Dr. Squire, Dr. Kaushansky and Dr. van den Berg. Ms. Garmo submits that if this Court determines that there is a measurable risk that she will return to the workforce, then she should be awarded the costs of retraining and adaptive aids needed for employment.
- [194] The defendant submits that Ms. Garmo should be awarded the costs of future care items recommended by Dr. Okorie, Dr. Medvedev, and Dr. van den Berg; however, the defendant takes issue with some of the recommendations made by Dr. van den Berg.

The law

- [195] A plaintiff is entitled to compensation for the costs of future care based on what is reasonably necessary to restore her 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.

- [196] The test for determining the appropriate award 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. While it is not necessary that a medical expert testify to the medical necessity of each and every item of care claimed, there must be a medical justification for each item claimed, and the claim must be reasonable: *Milana* at para. 84; *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. Justification means the cost is both medically necessary and likely to be incurred by the plaintiff. The onus is on the plaintiff to show that there is a reasonable likelihood that she will use the suggested services. If the plaintiff has not used a service in the past, it may be inappropriate to include it in a future care award: *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.
- [197] An award of damages for costs of future care is partly prediction and prophecy. An assessment of damages for cost of future care is not a precise accounting exercise: *Pang v. Nowakowski*, 2021 BCCA 478 at para. 58; *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

Discussion

- [198] The experts all agree that Ms. Garmo's present symptoms are predominantly psychological or psychiatric and all recommend a form of cognitive behavioural therapy or treatment by a psychiatrist. Dr. Squire also recommends separate pain reprocessing therapy.
- [199] In my view, cognitive behavioural therapy and pain reprocessing therapy is medically necessary and there is a reasonable likelihood that Ms. Garmo will attend it. While Ms. Garmo did not find the counselling offered through the ACC to be helpful, she indicated a willingness to attend appropriate counselling.
- [200] Therefore, I find that an award of \$6,100 representing 20 cognitive behavioural therapy sessions at \$245 per session and eight pain reprocessing sessions at \$150 per session is a fair and just amount.
- [201] In addition to therapy sessions, both Dr. Squire and Dr. van den Berg recommend that Ms. Garmo attend a change pain program. I find that there is a reasonable likelihood that Ms. Garmo will attend such a program and that it is medically necessary. Therefore, based on Dr. van den Berg's testimony, I find that an award of \$10,000 is a fair and just amount.
- [202] Based on the evidence, I agree with Ms. Garmo and the defendant's submission that an award of \$1,200 for vocational therapy and an award of \$1,450 for driver rehabilitation exposure therapy are appropriate.
- [203] I accept that the sleep aids recommended by Dr. Squire to optimize Ms. Garmo's sleep are medically necessary and that there is a reasonable likelihood that Ms. Garmo will use them. Therefore, I award an annual amount of \$36.38 for melatonin and \$45.47 annually for magnesium.

[204] I also accept that an award of \$30.24 annually for Advil and \$19.96 annually for Tylenol is appropriate. Ms. Garmo testified that she takes Advil and Tylenol for her headaches.

Conclusion

[205] Using Mr. Turnbull's Loss of Earnings and Cost of Future Care report, the present value for the amounts I have awarded are as follows:

Item

Cost

Replacement

Present Value

Therapy

\$4,900

One time

\$4,848.34

Pain Reprocessing

\$1,200

One time

\$1,187.35

Pain clinic

\$10,000

One time

\$9,894.57

Vocational Therapy

\$1,200

One time

\$1,187.35

Driver Rehabilitation

\$1,450

One time

\$14,34.71

Melatonin

\$36.38

Annually

\$1,001.72

Magnesium

\$45.47

Annually

\$1,252.02

Advil

\$30.24

Annually

\$832.66

Tylenol

\$19.96

Annually

\$549.60

Total

\$22,188.32

Special Damages

[206] Ms. Garmo tendered evidence proving the amount of out-of-pocket expenses she has incurred for treatment expenses as a result of the accident. Of the \$44,912.80 expended, the insurer has reimbursed her \$40,703.95, leaving the amount claimed as \$4,208.85.

[207] In addition, Ms. Garmo seeks reimbursement for mileage to and from her treating practitioners. The amount claimed is \$5,094.45.

[208] The defendant does not dispute Ms. Garmo's claim, and I therefore find that Ms. Garmo is entitled to \$9,303.30 in special damages.

Tax Gross Up and Interest

[209] I accept that an income tax gross up is warranted in the circumstances and that assessment should be left to be agreed upon by the parties or to be assessed by the court.

[210] I also accept that Ms. Garmo is entitled to interest on her past wage loss award and special damages; the amount to be agreed upon by the parties or assessed by the court.

[211] If necessary, the parties may through Supreme Court Scheduling arrange to make further submissions.

Costs

[212] Ms. Garmo is entitled to her costs. If there are relevant settlement offers that would impact the costs award, the parties may through Supreme Court Scheduling arrange to make submissions.

Summary

[213] In summary, I find that Ms. Garmo is entitled to the following damages:

Item

Amount

Non-pecuniary damages

\$165,000

Past loss of earning capacity

\$245,000

Future loss of earning capacity

\$817,750

Costs of future care

\$22,188.32

Loss of housekeeping capacity

Included in non-pecuniary damages

Special damages

\$9,303.30

Interest

TBD

Tax gross up

TBD

Costs

TBD

Total

\$1,259,241.62

"Walker J."

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