

CANADA / JUDGMENT

Gorval v. Quan

2023 BCSC 1757

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Supreme Court of British Columbia

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2023 BCSC 1757 Gorval v. Quan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gorval v. Quan,

2023 BCSC 1757

Date: 20231006

Docket: M1910973

Registry: Vancouver

Between:

Michelle Ann Marie Gorval

Plaintiff

And

Philip Robert Quan And Michelle Wai Quan

Defendant

Before: The Honourable Justice Tucker

Reasons for Judgment

Counsel for Plaintiff:

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R. Schubert

Place and Date of Trial:

Vancouver, B.C.

November 14-18, 21-24,

Place and Date of Judgment:

Vancouver, B.C.

October 6, 2023

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I. Introduction

[1] The plaintiff, Michelle Gorval, was the driver of a 2006 Pontiac sedan that was involved in a motor vehicle collision on November 15, 2017 (the "Accident"). The other vehicle, a Mazda 3, was owned by Michelle Quan and operated by Philip Quan (the "Quan Vehicle").

[2] Liability is admitted. The issues for trial were injury and damages.

II. Overview

[3] The plaintiff was 43 years old at the time of the Accident and 48 at the time of trial.

[4] The plaintiff testified and called the following as lay witnesses:

- a) Nasrin Kherani and Kristin Beauregard (her fitness class clients);
- b) Maryna Zimmerman (her bodybuilding trainer);
- c) Mark Simoes (the manager responsible for her bank branch);
- d) Dr. Kai Phan (family physician);

- e) Dr. Amber Eckel (chiropractor); and
 - f) Dr. Andrew Jamieson (naturopath).
- [5] Two expert witnesses also provided evidence. The plaintiff filed a report by Dr. Tony Giantomaso, a physiatrist. The defendants filed a report by Dr. George Medvedev, a neurologist.

III. Pre-Accident

- [6] Ms. Gorval has worked at least part-time as a fitness instructor since her teens. She attended university for two years, but did not graduate. She obtained ACE Certificates in Group Fitness and Personal Training in furtherance of her interest in fitness training.
- [7] In 2006, the plaintiff began working as a cashier (or Customer Service Representative or "CSR") at CIBC in a Windsor, Ontario branch. She continued to instruct classes, on a part-time basis, after joining CIBC. In 2008, she moved to British Columbia, transferring within CIBC to the Brentwood branch in Burnaby.
- [8] At the Brentwood branch, the plaintiff moved up to become a Financial Services Associate ("FSA"). An FSA provides clerical support services to financial advisors. The plaintiff continues as an FSA at the time of the Accident. After becoming an FSA and prior to the Accident, the plaintiff had applied for a position within commercial banking, but did not make the list of applicants granted interviews.
- [9] In 2010, the plaintiff started working part-time at the Brentwood location of Steve Nash Fitness World ("FW") as a fitness class instructor. She was working at FW in that capacity at the time of the Accident. While the plaintiff's testimony was some wavering on the point, I find that she was teaching three to four fitness classes a week in the months immediately preceding the Accident.
- [10] The plaintiff's classes were among the more challenging ones offered at FW (e.g., boot camp and kick-boxing) and involved high-impact movements and/or the use of weights. The plaintiff was a popular instructor and her classes were generally full or even "wait-listed".
- [11] But for her asthma, which she has had since childhood, the plaintiff was in excellent physical health at the time of the Accident. In addition to teaching her FW classes and working out, she also ran regularly. She had completed two half marathons in the year preceding the Accident.
- [12] In 2016, she had taken up bodybuilding. On August 27, 2016, she participated in her first competition, the International Drug Free Athletics ("IDFA") British Columbia Classic ("2016 Show"). IDFA bodybuilding has different competition categories: i.e., bikini, fitness model, figure, and physique. The categories involve different degrees of muscle development: e.g., fitness requires more muscle than bikini, and figure requires more than fitness. At the 2016 Show, the plaintiff placed first in Masters Figure (an age-based subclass) and first in Novice

Figure (for first time competitors).

- [13] The training required for being "show ready" in a competitive bodybuilding fitness show, even for someone who is very fit, entails five to six months of intense, focused training and adherence to a strict diet. After the 2016 Show, the plaintiff's plan was to next prepare for an event scheduled in May 2018 ("2018 Show"). She testified that the almost two-year gap between the 2016 show and the 2018 Show was not due to any dearth of competitions, but because she had "other priorities".
- [14] Prior to the Accident, the plaintiff had chiropractic and massage therapy treatments routinely. She described these as "maintenance" treatments taken to address usual or expected transitory tightness and injuries of the kind encountered by any athlete pushing to perform at a high level.
- [15] The plaintiff testified that she has experienced the symptoms of seasonal affective disorder ("SAD") for 20 years or so, saying she regularly suffered the "winter blues" for some months of each year. She said she generally addressed her SAD by vacationing in Arizona in the fall or winter and, more recently, using a light therapy lamp.
- [16] In May 2017, the plaintiff was reporting mood issues to Dr. Phan. She reported difficulty sleeping, being easily annoyed, having little interest or pleasure in doing things, feeling anxious, feeling depressed or hopeless, and feeling that she was letting everyone, including herself, down. Dr. Phan diagnosed mild to moderate depression and anxiety. He prescribed an anti-anxiety medication. He recommended counselling and that she consider trying anti-depressant medication. The plaintiff did not pursue counseling nor try anti-depressants.
- [17] Dr. Phan confirmed that the plaintiff had also reported anxiety symptoms prior to 2017. In 2014, she had prescribed anti-anxiety medication.
- [18] The plaintiff testified that her CIBC career plan was to make her way into the commercial banking area and retire at the age of 65. She testified that she thought commercial banking would be interesting and challenging, but believed it would also involve working some overtime and travelling outside the branch to meet with clients.
- [19] She testified that her fitness career plan was to continue as a class instructor for as long as she was physically able and/or until she was 65. She testified that FW has fitness instructors who are older than she is (which, at the time of her testimony, was 48).
- [20] At the time of the Accident, the plaintiff was married. She lived with her husband in a three-story townhouse in Coquitlam. She contributed to the housework, including cooking, cleaning, laundry and vacuuming. She and her husband loved watching football and would travel to Arizona and other states to see games. They also enjoyed trying restaurants and socializing at friends' homes.

IV. The Accident

- [21] The Accident occurred when the plaintiff was driving to work in the morning of November 15, 2017. Both she and Mr. Quan proceeded north into the intersection, with the Quan Vehicle being in the lane to the left of the plaintiff's car. The plaintiff began to turn left in accordance with a left-hand turn signal, but the Quan Vehicle continued going north, striking the plaintiff's sedan in the area of the driver's door.
- [22] By evening, the plaintiff was sore. She was unable to sleep that night. She went to see Dr. Phan the next day (November 16th). She reported a headache and pain in her forearms, left shoulder, right lower back and neck. Dr. Phan's objective assessment revealed showed somewhat less rotation on the cervical spine to the left side and a full range of motion in her left shoulder, but with pain and signs of a rotator cuff injury.
- [23] On November 22, 2017, Dr. Phan assessed her again and diagnosed strain of the left shoulder, forearms and neck due to the Accident. He referred her for massage therapy and physiotherapy.
- [24] The plaintiff's forearms and knee pain fully resolved shortly after the Accident, but she continued to report headaches and pain in her left shoulder, back and neck. For a few weeks, her injuries prevented her from doing some basic daily activities, such as her household chores and washing her hair. She testified that she had also difficulty shoulder-checking when driving and difficulty sleeping.
- [25] In his ICBC medical report, Dr. Phan indicated that the plaintiff had suffered a neck and upper back "Grade 2 Soft Tissue Injury Classification".
- [26] The plaintiff missed eight days of work at CIBC. She received disability benefits from CIBC during this period of absence.
- [27] The plaintiff was medically cleared by Dr. Phan, to return to instructing fitness classes at FW, subject to certain limitations, on December 15, 2017.

V. Post-Accident

A. Anxiety and Depression

- [28] After the Accident, the plaintiff claims to have experienced increased anxiety and depression. Dr. Phan prescribed her with anxiety and anti-depression medications in December 2017 and January 2018. The plaintiff took the medication.

- [29] In January 2018, the plaintiff had a counselling session through her employee assistance program. The counselling notes indicate her that her primary concerns were issues with her husband, although anxiety following the Accident was also raised. On cross-examination, the plaintiff agreed that the counselling session was primarily focussed on issues with her husband. She agreed that the issues with her husband pre-dated the Accident, but described them as being of greater degree after the Accident.
- [30] The plaintiff drove herself to Dr. Phan's office the day after the Accident. She resumed her daily driving once she returned to work at CIBC. For a while after the Accident, she sometimes drove an alternative route to work to avoid the Accident intersection as going through it made her anxious.
- [31] The plaintiff testified that after the Accident, she adjusted her start and finish work times at CIBC by 15 minutes so she could drive in lighter traffic. (Mr. Simoes testified that all branch employees have the option of choosing either 9:00 AM to 5:00 PM or 9:15 AM to 5:15 PM.)
- [32] In June 2018, the plaintiff told Dr. Phan that she felt her driving anxiety put her at risk of causing an accident and he prescribed a medication at that time to address driving anxiety specifically.
- [33] As of trial, the plaintiff was regularly driving through the Accident intersection. She testified that she continues to experience some anxiety at the intersection, especially if traffic is heavy or if a train is at the intersection.
- [34] At trial, when asked whether she presently had any issues with depression, she said "nothing significant".

B. Physical Treatment Recommendations

- [35] Dr. Phan was aware that the plaintiff routinely took passive chiropractic and massage therapy treatments for maintenance purposes prior to the Accident.
- [36] Dr. Phan testified that when he makes a referral for a passive therapy as a medical treatment, he specifically records that referral as having been made, as well as the number of sessions covered by the referral, in his clinical notes. His clinical notes are consistent with his testimony on this point.
- [37] Following the Accident, Dr. Phan referred the plaintiff for registered massage therapy, chiropractic treatment, physiotherapy and active rehabilitation with a kinesiologist. In January 2018, he referred her for physiotherapy and chiropractic treatment. In March 2018, he referred her for active rehabilitation. In May 2018, he referred her for further chiropractic treatment.
- [38] In October 2018, Dr. Phan himself began treating the plaintiff with acupuncture in relation to her Accident injuries.

- [39] The defendant did not allege that the plaintiff failed to mitigate her physical injuries. The evidence shows that the plaintiff made a concerted effort to recover from these injuries, including by passive treatment and active rehabilitation. There is, however, a dispute as to whether - and, if so, when - the plaintiff returned to her pre-Accident maintenance treatment routine.
- [40] Prior to the Accident, the plaintiff's regular chiropractic service provider was Total Therapy. The plaintiff had 54 chiropractic treatments at Total Therapy following the Accident:
- a) 2017: Nov 23, Nov 25, Nov 28, Dec 2, Dec 6, Dec 13, Dec 19, Dec 23, Dec 30;
 - b) 2018: January 6, January 13, January 20, January 27, February 3, February 10, February 27, March 13, March 20, April 3, April 17, April 24, May 8, May 22, June 6, June 20, July 19, August 2, August 23, September 13, October 4, October 25, November 15, December 6, December 20, December 29;
 - c) 2019: January 19, February 2, February 23, March 16, April 25, May 18, June 15, July 13, August 3, August 24, September 19, October 10, November 2, November 23, December 21;
 - d) 2020: January 9, January 30, February 20, March 12.
- [41] After Total Therapy relocated its offices, the plaintiff then began seeing Dr. Eckel at Aurora Integrative Medical Clinic for chiropractic treatments. She had attended 20 sessions there as of trial:
- a) 2021: June 4, June 14, July 9, August 16, September 14, October 12, November 11, December 14; and
 - b) 2022: January 11, February 8, March 8, April 5, May 3, May 9, May 31, June 28, August 2, September 6, October 4, November 1.
- [42] Dr. Eckel testified that as of November 1, 2022, there was a plan for the plaintiff to see her for chiropractic treatment once every four weeks for the next three months.
- [43] The plaintiff attended 22 active rehabilitation therapy sessions between November 2017 and August 2018.
- [44] She also attended 15 physiotherapy treatments in 2018: April 5, April 11, April 20, April 27, May 11, May 25, June 15, June 29, July 12, August 3, August 24, September 28, November 2, November 30, December 28.
- [45] On May 3, 2022, Dr. Eckel recommended the plaintiff try prolotherapy (non-steroidal trigger point injections) to address her muscle imbalance. On May 9, 2022, Dr. Eckel referred the plaintiff to Dr. Jamieson for five to six prolotherapy sessions for her left shoulder and right hip. The plaintiff saw Dr. Jamieson seven times between May 29, 2022 and September 22, 2022. She testified that this treatment did help loosen her shoulder and upper back. Her course of prolotherapy treatment had been completed prior to trial and she had not scheduled any further prolotherapy treatment.

C. Return to Household Chores

- [46] The plaintiff testified that she returned to being physically able to complete all of her normal household chores (with the exception of vacuuming, which is addressed below) within two years of the Accident. By trial, she not only was able to complete all her chores, she was able to do so at the same pace as prior to the Accident. She did not report any issues with respect to housework to either of the expert witnesses.
- [47] The plaintiff testified that she has issues with vacuum. She is not physically unable to vacuum. Rather, about one year after the Accident (i.e., 2018), she became dizzy while she was vacuuming. This experience caused her to become reluctant to vacuum and, in particular, to vacuum the stairs. The plaintiff testified that she again experienced some episodes of dizziness in the year before trial. She did not report any issues or concerns about dizziness to either expert witness.

D. Return to Work at CIBC

- [48] The plaintiff missed eight work days at CIBC and then returned on a full-time basis and without any requested accommodations. The plaintiff testified that for a brief time when she first resumed work, the financial advisors she worked for voluntarily did more of their own paperwork, which reduced her workload somewhat.
- [49] Her work as an FSA is largely performed at a desk, but the nature of the FSA position (and her subsequent positions) generally allows her to freely get up to stretch, move around and take breaks as she sees fit.
- [50] The plaintiff testified that she had difficulties focusing at work after the Accident and that sitting at work for prolonged periods aggravated her neck and back pain. The plaintiff had CIBC's in-house workspace assessor attend to make ergonomic recommendations regarding her FSA work space. The CIBC assessor recommended a number of adjustments to her existing work equipment. The plaintiff had an ergonomic chair at work both before and after the Accident.
- [51] There were no complaints about her work performance as an FSA and she was paid her usual full-time salary from her date of return. She continued to earn bonuses in line with her usual pre-Accident bonus earnings. She took advantage of the CIBC's flexible start and finish times to drive in lighter traffic, but Mr. Simoes testified that this is an option available to all. Her decision to move to the later option had no adverse employment consequences.
- [52] After the Accident, the plaintiff again applied for an open position in commercial banking. She did better than she did in her pre-Accident application, in that she made it to the interview stage. There is no evidence as to why she was not selected or how qualified she was in comparison to the other applicants or the successful applicant.

- [53] The plaintiff did, however, progress within CIBC after the Accident. She became a Senior Business Financial Service Representative ("FSR") in March 2020, and then an Associate Business Advisor in March 2022. Mr. Simoes testified that these two position changes, while perhaps more accurately described as lateral moves within CIBC's broad positioning bands, meant increased responsibility and more complex work. This is reflected in the corresponding adjustments to her base salary, with it being increased by \$4,000 with the 2020 change and then by a further \$9,000 with the 2022 change. The 2020 and 2022 salary increases were the largest the plaintiff had ever received during her time at CIBC.
- [54] When the plaintiff ceased to be an FSA, she was assigned a new office space. She did not ask to have the CIBC assessor review the ergonomic set-up of her new office space. She testified that she expected to be assigned a different office space yet again in the near future and was going to wait until that further move was made.
- [55] Following the Accident, the plaintiff's CIBC employee performance evaluations continued to be as positive as they had been before the Accident.
- [56] There is no credible evidence that she ever had, let alone continues to have, any issues with focus or concentration in performing her CIBC work.

E. Return to Work at FW

- [57] Dr. Phan cleared the plaintiff to return to teaching FW classes on December 15, 2017. This was subject to the limitation that she, herself, should perform only the warm-up portion of the class until she was further healed. Beginning in the second half of December 2017, the plaintiff returned to FW and was teaching three classes a week.
- [58] For a while after the initial "warm-up" only period, the plaintiff taught her classes in a manner different from her pre-Accident style, in that she either did not personally demonstrate - either fully or in part - the more intense exercises done in the class. Instead, she had experienced students demonstrate or fully demonstrate the exercise to be done and provided commentary as they demonstrated. She also used no or lighter weights for some exercises for a period of time. These modifications to her normal manner of instructing were confirmed by two class attendees, Ms. Kherani and Ms. Beauregard.
- [59] The plaintiff agreed that by at least March 8, 2018, she was teaching four classes a week.
- [60] As not all of the plaintiff's early 2018 pay stubs are in evidence, there is no evidence as to precisely when the plaintiff moved from three to four class a week. Nor is it possible to reverse engineer the number of classes she taught in this period from her annual income, as she received a retroactive salary payment during the same period and her testimony regarding the amount, timing and reason for the retroactive payment(s) was vague and unclear.

- [61] The plaintiff testified that she felt that the modifications she made to her instruction style on her return to FW lessened the quality of her instruction as compared to pre-Accident, but agreed that her classes remained popular and very well-attended. Ms. Kherani and Ms. Beauregard testified that they continued to attend and to enjoy the plaintiff's classes, although they both felt that the plaintiff did not seem as "upbeat" or "bubbly" as she had seemed pre-Accident. The plaintiff received her normal remuneration during the period of these modifications.
- [62] After a period of about six months, the plaintiff gradually and steadily improved to the point where she was able to instruct in virtually the same manner as pre-Accident. As of trial, the only remaining issue was that the plaintiff still did not perform the full number of repetitions of certain particularly high-demand movements being done by class attendees. For example, while she had returned to doing jumping jacks and burpees along with class attendees, she did not do the full number of repetitions that the attendees did. Her classes continued to be popular and well-attended.
- [63] Neither Ms. Kherani nor Ms. Beauregard were able to speak to the plaintiff's manner of instruction as of the time of trial. The plaintiff's evidence at trial indicated that she had continued to improve in the period after Ms. Kherani and Ms. Beauregard had last attended her classes.

F. Bodybuilding and Running

- [64] When asked about the gap in time between the 2016 Show and her plan to train for the 2018 Show, the plaintiff testified that she had "other priorities" that she wanted to focus on. On cross-examination, it was put to her that she meant priorities in other aspects of her life such as, for example, a course she was taking in order to enable her to do certain CIBC work. The plaintiff responded that she had meant by that that she was going to focus on building up specific areas of her body, as a priority, before preparing to enter her next competition.
- [65] The plaintiff returned to running after the Accident and now regularly runs outdoors multiple times a week. However, she testified that she has not been able to return to running at her pre-Accident intensity and has been unable to meet certain time and distance markers that she achieved before the Accident.
- [66] The plaintiff provided differing testimony regarding the frequency of flare-ups in her left shoulder since January 2021. At her May 2021 examination for discovery she testified that her last flare-up was about six months prior. On cross-examination at trial, she testified that she has been having flare-ups about once a month for the past six months. In explanation of this change, the plaintiff said that the flare-ups had become more frequent with prolotherapy as the treatment loosened her shoulder, enabling her to do more activities and that the increased activities resulted in a corresponding increase in flare-ups.

- [67] Ms. Zimmerman testified about working with the plaintiff on her bodybuilding following the Accident. Pre-Accident, Ms. Zimmerman had only a passing acquaintance with the plaintiff in the plaintiff's role at FW. Following the Accident, Ms. Zimmerman agreed to act as the plaintiff's bodybuilding coach.
- [68] Ms. Zimmerman is a former bodybuilder, having competed in both the fitness and physique categories. Notably, Ms. Zimmerman was a successful bodybuilder notwithstanding that she suffered a significant injury in her youth and had to use some modified exercises in her own training.
- [69] Ms. Zimmerman testified that she and the plaintiff developed modified training exercises for the plaintiff's training to reduce the amount of overhead movement required. She observed that the plaintiff had difficulty focusing on training and would complain of discomfort during certain training exercises. Ms. Zimmerman also testified that the impacts of Covid-19 (which included repeated periods of gym closures) seriously disrupted the plaintiff's training efforts, in particular creating stops and periods of regression that stymied meaningful forward progress.
- [70] Ms. Zimmerman described the plaintiff as less bubbly and energetic during their training than she found her during their earlier, pre-Accident acquaintance.

IV. Expert Evidence

- [71] Dr. Giantomaso assessed the plaintiff on October 20, 2021 and provided a report dated October 26, 2021.
- [72] In Dr. Giantomaso's opinion, the plaintiff's pre-Accident treatment records do not disclose any chronic pre-existing pain condition.
- [73] He diagnosed the following as injuries causally related to the Accident:
- a) a cervical strain/ sprain injury, consistent with a WAD-II injury, with chronic impacts;
 - b) a thoracic strain/ sprain injury, grade 1-2, with chronic impacts; and
 - c) a mild left-shoulder impingement with chronic impacts.
- [74] Dr. Giantomaso concluded that as of October 2021, the plaintiff:
- a) had a maximal area of discomfort in her neck and upper back, mostly left-sided;
 - b) had consistent mild to moderate underlying pain in the neck and upper back areas with occasional flare-ups;
 - c) had some discomfort with overhead activities, sleeping on her left shoulder, and left shoulder activities and this discomfort impacted her ability to work out as intensely as pre-Accident;

- d) was independent in the basic and instrumental activities of daily living, but experienced pain with scrubbing, washing and overhead activities, and in activities requiring the use of her left shoulder; and
 - e) had occasional sleep disruption due to left shoulder pain when sleeping on her left side.
- [75] He noted her spinal range of movement as normal with the exception of some pain resulting from extension or over-extension of the cervical spine to the left. Her left shoulder disclosed some signs of impingement and rotator cuff tendinopathy, including some pain with some testing, but otherwise had a normal range of motion. His assessment revealed trigger points, greater on the left than right side, in her upper trapezius, levator scapulae and rhomboids down to the T8-T9 level. Her hip and her sacroiliac joint results were normal. There was no sign of neurological damage, including with respect to the upper extremities for sensory and strength response.
- [76] The impairment section of Dr. Giantomaso's report spoke of "some" pain in overhead and pushing and pulling movements, "discomfort" with intense exercise and "mild discomfort" in performing household chores. She is capable of full-time sedentary work, but "may benefit on occasion" from rest and possible therapies. He expressed the view that she may have reduced ability to work overtime hours as compared to someone without any chronic pain.
- [77] It is his opinion that if the plaintiff follows his recommendations, she may have decreased pain and increased function in the future. Those recommendations are as follows:
- a) a left shoulder ultrasound to identify any bursitis or tendinitis for treatment;
 - b) that an occupational therapy assessment of her worksite "could be considered";
 - c) while passive therapies are unlikely to improve her prognosis, these could be accessed "on occasion" to decrease the intensity and duration of a flare-up "if one occurs"; and
 - d) noting that it is outside the scope of his expertise, that she might consider cognitive behavioural therapy to address her driving anxiety.
- [78] The defendants rely on the evidence of Dr. George Medvedev, a neurologist. Dr. Medvedev assessed the plaintiff on May 6, 2022, and provided two reports, dated May 31, 2022, and August 18, 2022.
- [79] The plaintiff reported the following complaints to Dr. Medvedev on May 6, 2022:
- a) pain in the shoulder triggered by physical activity, described as left forearm pain and left triceps aching on awaking and a slightly sore left trapezius;
 - b) intermittent numbness in three left hand fingers, more noticeable in the morning and which can be aggravated by physical activity;
 - c) neck pain, particularly on the left, aggravated by stress and exercise;

- d) pain in her right sacroiliac joint with physical activity or prolonged sitting;
 - e) intermittent pain in the upper and lower back triggered by physical activity or prolonged sitting;
 - f) weekly headaches that may last several hours and for which she takes no medications; and
 - g) anxiety, particularly driving anxiety.
- [80] Dr. Medvedev found the plaintiff's neurological testing results to be normal, including on sensory examination of her left hand. She had a normal range of movement in her neck, but complained of some discomfort on rotation to the left. He diagnosed whiplash injury resulting in sprain and strain trauma to her neck, to her left shoulder in particular, and to her back.
- [81] Dr. Medvedev also diagnosed probable cervicogenic headaches that he described as relatively infrequent (once a week), low to moderate in intensity and not requiring any treatment.
- [82] Dr. Medvedev's prognosis for further improvement with respect to the impact of the plaintiff's injuries on her recreational activities was that there would be some further improvement over time, but that the possibility of a complete return to pre-Accident performance levels is uncertain.
- [83] Dr. Medvedev opined that the plaintiff's injuries had no impact on her employment. On cross-examination, he agreed that his opinion was based on the facts that she had returned to full-time work shortly after the Accident and had subsequently been awarded positions of increased responsibility.
- [84] He noted that the plaintiff reported no active difficulties performing housework. In his opinion, the plaintiff's present ability to perform her work duties and housework is not expected to decline in the future as a result of her injuries.
- [85] With regard to "the appropriateness of treatment or recommendations for treatment given to the plaintiff" to date, Dr. Medvedev states: "I believe that she was appropriately treated." Dr. Medvedev did not recommend any further treatment, but agreed that he would defer to a physiatrist's opinion as to whether further physiotherapy was appropriate.

V. Injury Findings

- [86] The parties concur that the decision in *Athey v. Leonati*, [1996] 3 S.C.R. 458, 1996 CanLII 183 remains the leading case with respect to causation. The defendant provided a fair and accurate overview of the principles found in paras. 17-35 of *Athey* in their submissions:

- a. Causation in fact is established where the plaintiff proves on a balance of probabilities that the defendant's tortious conduct caused or contributed to the injury. The general test for causation is the 'but for' test, which requires the plaintiff to show that the injury would not have occurred but for the negligence of the defendant. This is not to be applied too rigidly; scientific certainty is not required. Causation is a practical question proven through applying ordinary common sense.
- b. A plaintiff is not required to establish that the defendant was the sole cause of the injury. Even where there are other causes, the defendant will still be responsible so long as his or her tortious act (omission) was part of the cause of the injury even though his act alone was not enough to create the injury.
- c. Apportionment of singular injury between tortious and non-tortious causes is contrary to the fundamental principles of tort as the defendant would not only escape liability for damages caused or contributed to but the same would result in the plaintiff not being placed into the same position that he or she would have been but for the negligence of the defendant. However, in cases where there are multiple distinct injuries, a defendant will only be liable for those injuries that they in fact caused.
- d. The most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been if not for the defendant's negligence, no better or worse. 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). 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).

[87] The rules that govern causation of an injury should be distinguished from those used for the assessment of damages. In *Blackwater v. Plint*, 2005 SCC 58, the Supreme Court of Canada (per McLachlin C.J.C.) described the distinction as follows:

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

A. Mood Issues

- [88] The plaintiff was diagnosed with symptoms of anxiety and depression six months before the Accident. Further, pre-existing factors continued to impact her mood post-Accident, including SAD, her husband's own health issues, and stress in their marriage relationship.
- [89] A connection between the plaintiff's marriage relationship issues and the Accident was not made out on the evidence. While the plaintiff and her husband had a significant disagreement about the new vehicle she chose to buy to replace the one that was damaged in the Accident, on the evidence that was an argument about the appropriate spending of family funds. That evidence is not sufficient to tether the tension in their marriage to the fact of the Accident. Similarly, her husband had pre-existing health issues that had been aggravated prior to the Accident by recent deaths in his family. The fact that the Accident was a further stressor to the plaintiff does not mean their marital strife can be attributed to the Accident.
- [90] While the plaintiff's depression and general anxiety pre-exist the Accident, I do accept that being in the Accident was a factor that caused the plaintiff's mood symptoms to worsen post-Accident. After the Accident, she agreed to take medication and spoke with a counsellor on at least one occasion.
- [91] The plaintiff did not continue with counselling, nor did she take the medication for more than a few months. I find that her conduct reflected the fact that her mood symptoms were, in fact, improving and continued to improve. The plaintiff did not report any issues with depression to Dr. Giantomaso or Dr. Medvedev. At trial, she testified that depression was not a significant issue.
- [92] I find that although the Accident aggravated the plaintiff's pre-existing depression and general anxiety symptoms in the period immediately after the Accident, the aggravating effect dissipated quickly on treatment and the Accident ceased to be an actively contributing factor.
- [93] Ms. Zimmerman, Ms. Kherani and Ms. Beauregard testified that the plaintiff did not appear to be as bubbly or chatty to them after the Accident as she had appeared to be before. In my view, this is not evidence on which one could reliably conclude there was a mood issue. In any event, even if this evidence were to be relied upon, it is consistent with the fact that the plaintiff had mood issues prior to the Accident and thus would have been expected to continue to have baseline mood issues after the aggravating impact of the Accident dissipated.
- [94] With respect to driving anxiety in particular, I accept that this was due to the Accident, although it was also grafted on to the plaintiff's pre-existing generalized anxiety. The plaintiff continued to report significant driving anxiety to Dr. Phan as of mid-2018. However, she returned to driving regularly as soon as she returned to work at CIBC and I am satisfied that no later (and quite possibly earlier) than 2019, her driving anxiety was specifically

focussed on the intersection of the Accident. She was able to drive through that intersection fairly shortly after the Accident. Furthermore, her anxiety while passing through steadily improved thereafter and as of the time of trial was continuing to improve.

- [95] While she reported ongoing driving anxiety to Dr. Giantomoso in 2021 and Dr. Medvedev in 2022, as of trial, the plaintiff experienced significant anxiety in the intersection only when passing through in heavy traffic or while a train was also present. I am satisfied that the plaintiff's driving anxiety as of trial had minimal impact on her and will likely be even further reduced with time.

B. Physical Injuries

- [96] I accept Dr. Giantomoso's evidence that the plaintiff's pre-Accident treatment does not indicate a pre-existing chronic pain condition.
- [97] I accept Dr. Giantomoso's opinion that there was still some mild impingement in the plaintiff's left shoulder at the time of his examination (2021). This is consistent with Dr. Phan's observation immediately following the Accident. However, Dr. Medvedev did not observe any impingement in 2022, which in consonance with the plaintiff's evidence of continued improvement (including improvement after the date of Dr. Medvedev's assessment). I find on the evidence that the plaintiff had no meaningful shoulder impingement symptoms as of trial. As of trial, her shoulder issues were due to the soft tissue injury to her shoulder.
- [98] Given her complaints to Dr. Phan in 2017, and at physiotherapy in 2018, of mid-back tightness and occasional mid-back pain, I am satisfied there was a mild mid-back soft tissue injury also attributable to the Accident, but that it ceased to be symptomatic in or about 2018. She did not report it as an issue again until 2021. I am not satisfied on the evidence that any reported pain in or after 2021 can be tied to the Accident.
- [99] At trial, the plaintiff also testified that she had ongoing issues with her right hip (sacroiliac joint). Hip issues were not reported to any medical professional until years after the Accident. Further, she did not raise hip issues with Dr. Giantomoso or Dr. Medvedev even though the purpose of those assessments was to canvas her Accident-related injuries. Further, Dr. Giantomoso did, in fact, assess her hips as part of his musculo-skeletal examination and observed that she had normal hip movement. I am not persuaded that the plaintiff has any sacroiliac joint issues as a consequence of the Accident.
- [100] The plaintiff reports ongoing left-hand numbness and tingling in some fingers, generally at the time of awakening. Dr. Medvedev found no related sensory or neurological issues on examination. I find, based on Dr. Medvedev's neurological evidence, that there are no sensory or neurological issues relating to the Accident. In any event, the plaintiff's evidence did not indicate any negative impacts from the described effect, describing it as quickly resolving with movement.

- [101] The fact that the plaintiff sustained a soft tissue injury to her neck, upper back and left shoulder is not disputed by the defendants. I find that the plaintiff continues to be impacted by these soft tissue injuries to the following extent: some general stiffness; mild pain when required to maintain the same position for a prolonged period of time; some mild to moderate pain when actively engaged in high impact, very intense physical activity.
- [102] The plaintiff is now largely able to exercise pain-free with the exception of what are, by the plaintiff's standards, very intense activities. The triggering level of intensity is notable: e.g., not in running regularly, but in attempting to match pre-Accident competitive times; not in lifting weight per se, but in lifting weights in a manner and on a schedule aimed at making her "show ready" for a bodybuilding competition. With the caveat of not necessarily completing the full complement of the highest intensity moves done during each FW class, the plaintiff is successfully instructing high-level, high-impact fitness classes for four hours a week on top of her other physical activities.
- [103] The plaintiff gave inconsistent evidence as to how often she experiences flare-ups due to aggravation of the soft tissue injury to her shoulder. While the defendants characterized this evidence as indication of unreliability, I accept that the number of flare-ups did, in fact, increase as her shoulder movement improved and increased, including in correspondence with her prolotherapy treatment. That said, this reflects a pattern of improvement as opposed to an increasing propensity to aggravation. It would be more accurate to describe the increased flare-ups as "growing pains" encountered in the process of improvement. Thus, while I accept the plaintiff's testimony that her shoulder flare-ups increased somewhat in the last year or so, I do not find it indicative of a worsening baseline.
- [104] The defendants concede that the plaintiff experienced cervicogenic headaches after the Accident. I agree that this is the nature of her headaches. I note that they continued to drop in frequency as her soft tissue injuries, including her neck, improved. While she reported to Dr. Medvedev that she had headaches about once a week, at trial she testified that they now occur about once a month. They continue to be only a few hours in duration and require no treatment.
- [105] Finally, both experts opine that the plaintiff may improve further yet. Dr. Medvedev's opinion is that she will improve further, with the uncertainty being as to whether the improvement will enable her to fully regain her pre-Accident capabilities. Dr. Giantomaso's evidence is that she can likely increase her function and decrease her pain if she follows his "recommendations", but it is notable that his recommendations do not actually recommend the plaintiff do anything beyond having an ultrasound to see if bursitis or tendinitis treatment would be appropriate. On the whole, both the plaintiff's own testimony and the expert evidence persuade me that Dr. Medvedev's assessment should be accepted - the real uncertainty is full recovery, not further improvement.

VI. Non-Pecuniary Damages

[106] In *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46, the Court of Appeal set a non-exhaustive list of factors to be considered when assessing non-pecuniary damages. The recognized factors include: the plaintiff's age; the nature of the injury; the severity and duration of pain; disability; emotional suffering; loss or impairment of life; impairment of family, marital and social relationships; impairment of physical and mental abilities; loss of lifestyle; and stoicism (as a factor which generally ought not to penalize a plaintiff).

[107] As noted in *Moskaleva v. Laurie*, 2009 BCCA 260, the amount of the non-pecuniary award should compensate for more than just direct injuries:

[95] The underlying purpose of non-pecuniary damages is to "make life more endurable" and should be seen as compensating for more than just a plaintiff's direct injuries [citations omitted]. In *Lindal*, at 637, Dickson J. for the Court emphasized that the quantum of an award is determined through a functional approach and should not necessarily correlate with the gravity of the injury:

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

[108] The awards given in other cases provide a useful, albeit rough, guide. Non-pecuniary damages are to compensate for the pain and suffering experienced by a specific individual. The specific circumstances of the plaintiff must be considered.

[109] The plaintiff relies on the following cases, arguing that they include important parallels to her circumstances and generally involve previously active plaintiffs with chronic pain and associated emotional symptoms. She submits that these cases demonstrate a similar negative prognosis for any marked future improvement:

Grimm v. Young, 2019 BCSC 1549

[110] The plaintiff, who was 34 at time of injury and 37 at time of trial, had been a fitness industry employee. She suffered myofascial neck, upper back and shoulder pain and chronic headaches of six to eight hours duration that occurred four to six times a week. As of trial she had improved about 30% and appeared to have plateaued, with her prognosis for future improvement being guarded. She could continue work as a yoga teacher, but was unable to do certain poses. Her chronic pain and recurrent headaches rendered her unable to instruct high intensity fitness programs even with modifications to her personal

performance. Child care was more difficult for her and she was unable to do certain housework. She was less inclined to engage in her former recreational pursuits such as biking, softball, and dancing. She was awarded \$90,000 for non-pecuniary damages (\$98,470, as adjusted for inflation).

Hu v. Tan, 2016 BCSC 908

[111] The plaintiff was 38 at the time of injury and 41 at the date of trial. She was left with muscle stiffness, and myofascial neck, shoulder, and back (upper, mid and lower) pain, as well as anxiety and insomnia. Her most significant injury was headaches, which were described as debilitating and occurring most days each the week. She had children after the accident and was distressed by her inability to parent as she would have wished. She had an active recreational lifestyle prior to the accident, including cycling and hiking, but her former activities now aggravated her symptoms. She had suffered mood changes that had, in turn, affected her relationships. She was awarded \$90,000 for non-pecuniary damages (\$106,283 as adjusted for inflation).

Rich v. Hamilton, 2022 BCSC 1134

[112] The plaintiff was 43 when injured and 47 at trial. She suffered injuries to her sacroiliac joint, hip and lumbar spine, impairing her range of movement and causing significant ongoing pain. It was likely that some or possibly all of her symptoms as of trial would continue. The ongoing symptoms restricted her to performing light work duties with significant accommodation, including needing to work at home as necessary. She was unable to return to her prior level of recreational activities, which had included horseback riding, snowshoeing, hiking, biking, sailing, camping, canoeing, and travel. The level of pain she experienced with housework was noted to be significant. She was awarded \$145,000 for non-pecuniary damages (\$149,953 as adjusted for inflation).

[113] The defendants points to the following cases as comparable to the present circumstances

Deng v. Malhotra, 2022 BCSC 101:

[114] The plaintiff was 50 at injury and 54 at trial. He suffered soft tissue neck, shoulder, back and rib injuries as well as headaches following the accident. He had mood fluctuations, dizziness, anxiety (including driving anxiety), concentration issues and sleep disruptions. As of trial, he continued to experience pain from his soft tissue injuries and headaches, but both his pain and headaches were much improved. The more physical demands of his work as a chef caused pain on his return to work, but he was subsequently promoted to a position with reduced physical demands. The plaintiff did not establish any lasting impact on his ability to perform household work, nor was it shown that his injuries contributed to his marital problems. There were no post-accident restrictions on his pre-accident recreational activities. He continued to have some sleep disruption, was more tired and had some driving anxiety. He was awarded \$40,000 for non-pecuniary damages (\$42,600 as adjusted

for inflation), plus a separate award of \$7500 (\$7995 as adjusted for inflation) with respect to loss of housekeeping capacity.

Travelbea v. Henrie, 2012 BCSC 1532 :

[115] The plaintiff was 49 at the time of injury and 53 as of trial. Following the collision, she did not miss any work time as a retail cashier. She had a particular interest in physical exercise and endurance sports and trained up to six days a week before the accident. She suffered a mild to moderate soft tissue injury to her neck and upper back in the collision, resulting in a reduced range of motion. She initially returned to training and doing endurance events (e.g., triathlons, duathlons and half marathons), but experienced significant pain. The discomfort led her to reduce and then almost eliminate her endurance training. Most of the endurance events she participated in had a road bicycling component and the Court accepted that it was unlikely that she would ever be able to road cycle any appreciable distance again. She had become irritable and withdrawn. The plaintiff could initially complete her share of the housework but over time her capacity to do so diminished, particularly in relation to washing the floors, vacuuming, laundry, and other semi-annual cleaning tasks. Her condition would continue to improve, but she would continue to be restricted from participating in certain events she had previously done. She was awarded \$50,000 for non-pecuniary damages (\$63,600 as adjusted for inflation).

Kim v. Wood, 2021 BCSC 2135:

[116] This case involved an action for damages arising out of two motor vehicle accidents. The plaintiff was 47 at trial and 42 at the time of the accidents. She had been capable of continuing to work as a supermarket cashier and as a baker after the accident, albeit with pain and discomfort. Ongoing pain in her neck, shoulder, and back continued to impact her daily life and her ability to perform housework. She had headaches, but these were neither regular nor severe. She could not engage in recreational activities with her children in the same way she did before the accidents. She was now a more nervous driver, but it was not incapacitating and she regularly drove long distances. Her social activities had diminished somewhat. She found housework more challenging and other family members had taken over many of the household tasks she had done prior to the accidents. She was awarded \$70,000 for non-pecuniary damages (\$74,800, as adjusted for inflation).

Finding

[117] Here, as already set out above, the plaintiff suffered soft tissue injuries and some shoulder impingement, but has steadily improved. The impingement is now either resolved or of virtually no impact and her soft tissue injuries are vastly improved. Her headaches, which were never severe or of significant duration, and are now mild, of short duration and of less frequent occurrence.

- [118] She is now able to do almost everything she used to do, including exercising without pain. She has been unable to match her former intensity in exercising, however, and experiences mild pain when she is maintaining one position for too long or engaging in certain activities with sufficient intensity to cause aggravation. She may experience occasional flare-ups due to aggravation. Her duties at CIBC and FW enable her to take steps, such as getting up and moving about at CIBC or personally performing less than a full complement of burpees in each class, to avoid aggravations. While she initially had challenges performing her housework, she has steadily improved. She is now able to perform housework as she did before the Accident, but may experience mild pain due to aggravation in performing certain activities.
- [119] Further, while her shoulder issues in particular caused some sleep disruption following the Accident, she testified that since early 2020, she has been able to get "a good 8 hours of sleep" more often than not. As her symptoms continued to improve with time, so has her sleep. I conclude that sleep disruption had ceased to have any significant effect on her by the time of trial.
- [120] She has returned to recreational exercising, including running, and instructing high intensity fitness classes. However, she finds she is unable to match the full intensity she was capable of pre-Accident, and may experience mild pain and potential aggravation in performing certain activities.
- [121] To the extent that the plaintiff suggested in testimony that her injuries from the Accident had somehow worsened her asthma because she feels that she has been using her inhaler more often, I find that no connection between her asthma and the Accident has been established on the evidence.
- [122] Turning to bodybuilding as a recreational activity, I am not satisfied on the evidence that the plaintiff is unable to resume this activity. She has improved further since her attempts at training with Ms. Zimmerman. Further, her training efforts with Ms. Zimmerman were seriously disrupted by Covid-19. Ms. Zimmerman's evidence is that it is feasible to train for bodybuilding using modified exercises and that she, herself, trained with modified exercises due to a childhood injury.
- [123] Even assuming the plaintiff was unable to resume bodybuilding (or, at least unable to resume in the fitness category), the plaintiff had only started to participate in bodybuilding fairly shortly before the Accident. The 2016 Show was the first show she had participated in and she did not plan to enter one again until May 2018. I find that when she said she had "other priorities" in explanation of her plan to next enter a show in 2018, she meant she had other priorities in life (e.g., work or her marriage). I expressly reject her testimony that by "other priorities" she meant that she wanted to focus on other areas of her training in preparation for her competition. While exercise and fitness in general terms are very important to the plaintiff and she has always prioritized these and regarded them as critical to her personal well-being, the same is not true of bodybuilding specifically.

- [124] Finally, it is likely that the plaintiff's physical symptoms will improve further yet.
- [125] The plaintiff had pre-existing depression and generalized anxiety. I find that the Accident was an aggravating factor in respect of these, but that it ceased to be an aggravating factor by the end of 2018 at the latest. A causal connection between the Accident and the plaintiff's marital issues was not established on the evidence.
- [126] The Accident did cause the plaintiff to suffer from driving anxiety, but she has steadily improved since the time of the Accident. At present, her driving anxiety has little impact on her and it is likely to continue to improve.
- [127] The plaintiff's comparator cases involve more serious injuries than those in this case. All three of the cases relied on by the defendants are reasonably good comparators. On the whole, I consider Travelbea to be the best comparator in terms of injury, impact and prognosis. Similar to this case, Ms. Travelbea was extremely physically active prior to her injury and suffered mild to moderate soft tissue injury to her neck and upper back in the collision. The court found that Ms. Travelbea was and would continue to be unable to compete in the type of endurance events she did in the past because she was now unable to road cycle long distances. Accordingly, Ms. Travelbea suffered both a more significant and more certain recreational loss than established here with regard to the plaintiff and bodybuilding. Further, Ms. Travelbea experienced significant pain performing household work, whereas the plaintiff in this case experiences only mild pain while completing certain household tasks. These are significant differences. On the other hand, the plaintiff was six years younger than Ms. Travelbea was at the time of injury, which weighs in favour of the plaintiff. Considering both the similarities and distinctions between the two cases, I conclude that the appropriate award here is \$50,000.

V. Loss of Earning Capacity

A. Past Loss of Income

- [128] A helpful summary of the relevant framework was provided by Justice Edelmann in *Hobbs v. Rozon*, 2022 BCSC 2178:
- [20] The principles applicable to a claim of past lost earning capacity are the same as the principles applicable to a claim of future lost earning capacity: *Grewal v. Naumann*, 2017 BCCA 158 [Grewal] at para. 46, citing *Smith v. Knudsen*, 2004 BCCA 613 at para. 29. The plaintiff must establish (i) impairment of earning capacity, and (ii) a real and substantial possibility of an event resulting in a loss: *Grewal* at para. 48.

- [221] While in many cases the actual lost income will be the most reliable measure of the loss, it is not the actual lost income but the lost capacity which is compensable (see *Ibbitson v. Cooper*, 2012 BCCA 249 at para. 19). That being said, compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.
- [22] The burden of proof of actual past events is a balance of probabilities. An assessment of loss of both past and future earning capacity involves consideration of hypothetical events. The plaintiff is not required to prove these hypothetical events on a balance of probabilities. The future or hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38. The Court of Appeal recently set out a three-part step process to assess damages for future loss of earning capacity (*Rab v. Prescott*, 2021 BCCA 345):
- (1) Does the evidence disclose a potential future event that could give rise to a loss of capacity?
 - (2) Is there a real and substantial possibility that the future event will cause a pecuniary loss to the plaintiff? and
 - (3) What is the value of that possible future loss, given the relative likelihood of it occurring?
- [129] Here, the plaintiff's injuries in the Accident did cause her to miss work time, both at CIBC and FW.

CIBC

- [130] The plaintiff missed eight days of work with CIBC following the Accident. She received short-term disability totalling \$1,082.03 from CIBC covering this period. CIBC is forgoing its right to subrogation. In closing argument, the plaintiff agreed that there is no past loss claim with respect the days she missed at CIBC following the Accident.
- [131] The plaintiff submits that it is "suspicious" that the plaintiff was not made an FSR until 2020. She suggests that she be awarded \$9,954 on the basis that the Accident delayed her promotion to the position of Associate Business Advisor by one year. There is no evidentiary basis for this submission. The plaintiff's FSR employee review and employee bonus following the Accident were consistent with those prior to it. Further, the plaintiff had been in the FSA position for years on end. There is no evidence suggesting she was on the cusp of a promotion at the time of the Accident, let alone that that promotion was delayed by the Accident.

FW

[132] The defendants concede that the plaintiff suffered a past loss of earning opportunity at FW. They agree that the plaintiff lost at least one month's worth of her usual income from teaching from mid-November to mid-December and concede that she also lost approximately an additional one-half of a month of her usual fitness class income because she only taught three classes in the second half of December 2017.

[133] As noted earlier, there is a gap in the evidence in that not all of the plaintiff's paystubs for early 2018 were put into evidence. Accordingly, the defendants submit that the plaintiff's FW loss should be calculated as follows:

90. The plaintiff testified that, prior to the Collision, she usually taught 4 classes/hours per week. While there is an indication that the average number of classes/hours taught by the plaintiff in the 4 months prior to the Collision was actually less than this 4 per week, if the 4 classes/ hours figure is used, it can be seen that two full pay periods of 8.66 hours were missed (mid-November to mid-December 2017) and 5.66 hours were missed for the periods from December 16 to 31, 2017. The total hours missed in this period equate to 23 (i.e. $(8.66 \times 2) + 5.66$). With the plaintiff's hourly rate being \$30 at this time, the gross loss is \$690.

91. With respect to a past loss of earning capacity after December 31, 2017, it is submitted that the same has not been proven on a balance of probabilities because the same is with regard to an event that in fact occurred (i.e. the income earned by the plaintiff teaching fitness classes). Besides the plaintiff confirming that, by at least March 8, 2018, she was back to teaching 4 fitness classes per week, the plaintiff also agreed that, prior the Collision the maximum number of classes she could regularly teach was 4 per week as, other than occasionally taking on a class as a substitute, she could not sustain any more classes more while also having a full-time job. Despite there being a number of pay statements missing from the first few months of 2018, the plaintiff says that she was by that point back to teaching her fitness classes. There is insufficient evidence to say, on a balance of probabilities, that, starting January 2018, the plaintiff was working fewer hours teaching her fitness classes than compared to before the Collision.

[134] The defendant uses an averaging approach based on pay stubs for past periods to propose \$690 (gross) as an appropriate amount to cover the plaintiff's FW wage loss from November 15, 2017 through December 31, 2017. The plaintiff then seeks the amount of \$3,500 to cover lost FW income from December 31, 2017 through to present date.

[135] The evidence does not justify the award sought by the plaintiff. The plaintiff gave inconsistent evidence as to whether she was teaching three or four classes a week in the months prior to Accident. She testified that it was not possible for her to teach more than four classes a week while working at CIBC other than possibly be asked by another teacher to substitute on occasion. She also testified that she was teaching four classes per week by early 2018. She failed to produce paystubs to show what she was actually paid in early 2018. I find she has failed to demonstrate any FW income loss in 2018.

[136] I therefore find that the plaintiff's loss of past income at FW is \$690, calculated for the period of November 15, 2017 through to December 31, 2017.

B. Future Loss of Earning Capacity

[137] In *Honeybourn v. Aghdasidehaji*, 2022 BCSC 258, Justice Blok provided a summary of the more recent case law dealing with this category of loss:

[129] The law applicable to loss of future earning capacity was summarized as follows in *Villing v. Husseni*, 2016 BCCA 422:

[17] In order to receive an award for loss of earning capacity, a plaintiff must prove a real and substantial possibility that his or her earning capacity has been impaired: *Perren v. Lalari*, 2010 BCCA 140 at paras. 30-32 [Perren]. If the plaintiff has discharged the burden of proof, then the judge must turn to an assessment of damages. The assessment may be based on an earnings approach or a capital asset approach: *Perren* at para. 32. An earnings approach is most appropriate where the loss is more easily quantifiable. In general, a party may be forced to default to a capital asset approach where the loss is not easily quantifiable.

[130] In a trilogy of cases, the Court of Appeal recently clarified the law relating to the assessment of future losses of earning capacity: *Dornan v. Silva*, 2021 BCCA 228 [Dornan]; *Rab v. Prescott*, 2021 BCCA 345 [Rab]; and *Lo v. Vos*, 2021 BCCA 421. In *Rab*, the court articulated a three-step process:

[47] From these cases, a three-step process emerges for considering claims for loss of future earning capacity, particularly where the evidence indicates no loss of income at the time of trial. The first is evidentiary: whether the evidence discloses a potential future event that could lead to a loss of capacity (e.g., chronic injury, future surgery or risk of arthritis, giving rise to the sort of considerations discussed in *Brown*). The second is whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss. If such a real and substantial possibility exists, the third step is to assess the value of that possible future loss, which step must include assessing the relative likelihood of the possibility occurring - see the discussion in *Dornan* at paras 93-95.

[131] *Rab* states that the first step (i.e. the evidentiary inquiry) gives rise to the four considerations set out in *Brown v. Golaiy* [1985], 1985 CanLII 149 (BCSC), 26 B.C.L.R. (3d) 353 at para. 8 (S.C.) [Brown]. The questions are whether:

- 1) The plaintiff has been rendered less capable overall from earning income from all types of employment;
- 2) The plaintiff is less marketable or attractive as an employee to potential employers;
- 3) The plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to her, had she not been injured; and

- 4) The plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market.
- [132] In considering the second and third steps set out in *Rab*, hypothetical events are given weight according to their relative likelihood. A hypothetical possibility will be taken into consideration as long as it is a real and substantial possibility and not mere speculation: *Turner v. Dionne*, 2017 BCSC 1905 at para. 316, citing *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458 at para. 27. See also *Dornan* at paras. 93-94.
- [138] A plaintiff must always prove that there is a real and substantial possibility of a future event leading to an income loss to establish an award for loss of future earning capacity. A real and substantial possibility of a future loss may exist even where the plaintiff has returned to their employment. However, not being able to perform an occupation or occupy a position that was never a realistic alternative is not proof of a future loss. Future hypothetical possibilities must be real and substantial, not mere speculation.
- [139] The plaintiff submits that the lay and expert evidence establish that there is a real and substantial possibility that the plaintiff will have to retire earlier than planned from CIBC and as a fitness instructor as a result of her Accident-related injuries, symptoms, and limitations. It is submitted that there are significant concerns about the plaintiff's continued ability to work in a desk position requiring long periods of sitting. She also submits that the evidence shows that she would have been able to advance to a commercial banking position and beyond but-for the Accident.
- [140] I disagree with the assertion that the evidence has established any of these claims. The evidence does not disclose that there was a real and substantial possibility that the plaintiff would have been able to move into commercial banking but-for the Accident, nor that her chances of moving into commercial banking are in any way lessened by the fact of the Accident.
- [141] All of the CIBC positions addressed in evidence are desk positions and all enable the person in them to take breaks and move about freely and as needed. Mr. Simoes testified that CIBC has a separate division that deals with workplace accommodations and CIBC provided the plaintiff with an in-house ergonomic evaluation, as well as an ergonomic desk chair well prior to the Accident. As the plaintiff has neither requested a further in-house assessment since changing offices nor put in a request for a sit-stand desk notwithstanding having had Dr. Eckel's recommendation in hand for quite some time, it is reasonable to infer that whatever discomfort she is experiencing at work is minor. Her work reviews have remained as positive as they were prior to the Accident and she has twice been awarded positions of increased responsibility with corresponding salary increases.
- [142] Further, the evidence indicates that a move into commercial banking would not necessarily entail any increase in earnings. The plaintiff makes \$66,000 per annum as an Associate Business Advisor. Mr. Simoes testified that the salary range for a commercial banking associate is from \$50,000 to \$80,000. Further, while the plaintiff testified that she believes

that moving into commercial banking would entail overtime hours, no witness with actual knowledge testified that was the case. There is no evidence as to what, if any, overtime is required for the various positions within commercial banking, nor that there are any commercial banking positions for which the plaintiff would be a competitive applicant. Even if there were overtime required for a commercial banking position that the plaintiff might credibly apply for, there is no evidence that she could not perform in such a position due to her injuries. The only evidence on the point is Dr. Giantomaso's opinion evidence that a person with any degree of chronic pain has a reduced ability to perform overtime hours as compared to a person having none. The same is true with respect to the plaintiff's testimony that she believed commercial banking might require travelling outside the branch.

[143] I am satisfied that the plaintiff's claims that the Accident may have adverse impacts on her career path at CIBC are merely speculative.

[144] That being the case, the plaintiff's claim for future loss shall be assessed in accordance with *Brown v. Golaiy* (1985), 26 BCLR (3d) 353 at 8, 1985 CanLII 149 (B.C.S.C.)

CIBC

[145] The plaintiff does not require any significant accommodations at work and those that she requires (i.e., the need to move about freely on a regular basis) are readily tolerated by CIBC (and by most employers offering comparable positions). She has not demonstrated any ongoing limitation in her ability to satisfactorily fulfil her present and anticipated future workplace tasks at CIBC and at any likely future employers. There is no suggestion of any potential future change of career or employer. The plaintiff has been with CIBC for 16 years and has continued to receive positive performance reviews post-Accident. The fact that the plaintiff suffers some chronic discomfort in sitting at a desk is not sufficient in and of itself: *Williams v. Dolhan*, 2020 BCSC 136, at paras. 97-107. There is no evidence suggesting that taking the time to move and alleviate the discomfort arising from sitting for a prolonged period of time impairs her work efficiency.

[146] I am not persuaded on the evidence that there is any real and substantial possibility of loss of value as an employee here, nor any real and substantial likelihood that the plaintiff will have to retire earlier than 65 as a result of the Accident.

FW

[147] The plaintiff initially testified that she intended to work as a fitness instructor until she was 65. She testified that there were instructors at FW that were older than her age as of trial. In her closing submission, that plaintiff argued that the Court should find that the plaintiff would have continued to work into the fitness industry until she was 60.

- [148] The fact that there are some people working in the fitness industry is not meaningful absent evidence of how extraordinary or, alternatively, common that is or of the number of hours they are working. Even more significantly, the plaintiff is now recovered to the extent that she is fully able to run the same number of classes that she was instructing prior to the Accident. Dr. Giantomaso, notwithstanding having addressed employment impacts, did not opine that her injuries resulted in any restriction or limitations on her ability to continue to teach fitness classes as compared to pre-Accident.
- [149] I am not persuaded on the evidence that there is any real and substantial possibility of loss of value as an employee here, nor any real and substantial likelihood that the plaintiff will have to retire earlier from instructing fitness classes than she would have but for the Accident.

C. Finding

- [150] The plaintiff has suffered a past loss of earning capacity with respect to her fitness instructor work. That loss is valued as a gross loss of \$690.
- [151] The plaintiff has failed to establish any future loss of earning capacity, neither in respect of her full-time employment at CIBC nor as a fitness instructor.

VI. Loss of Housekeeping Capacity

- [152] The plaintiff seeks an award of \$10,000 for loss of housekeeping capacity.
- [153] Housekeeping capacity can be considered a separate head of damage, pecuniary or not: *Kroeker v. Jansen*, 4 B.C.L.R. (3d) 178, 1995 CanLII 761 (B.C.C.A.). In cases where the household tasks can be completed, but not as efficiently, slower and with difficulty, it may appropriately be compensated by a non-pecuniary damage award: *Kim v. Lin*, 2018 BCCA 77 at para. 33.
- [154] In this case, the plaintiff is now fully capable of doing her housework and completing it on the same timeline as prior to the Accident. Some specific tasks have the potential to aggravate her injuries, especially her shoulder, resulting in mild pain. In the circumstances, the plaintiff's quite mild housework challenges are appropriately dealt with under non-pecuniary damages.
- [155] I have taken her loss of capacity to perform homemaking chores into account in assessing her non-pecuniary damages. In *Travelbea*, increased challenges in performing housework was addressed as part of the non-pecuniary award. The same approach was also taken in *Kim* and, in using it as a comparable, I specifically accounted for the fact that the plaintiff here suffers only mild discomfort as opposed to Ms. *Travelbea*'s significant pain.
- [156] Accordingly, there will be no separate award under the head of housekeeping capacity.

VII. Cost of Future Care

- [157] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-accident condition, insofar as is possible, and to preserve and promote her mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 78, 1985 CanLII 179 (B.C.S.C.), aff'd (1987), 49 B.C.L.R. (2d) 99 (C.A.); *Spehar v. Beazley*, 2002 BCSC 1104 at para. 55, aff'd 2004 BCCA 290; and *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [158] The test is an objective one based on the medical evidence. An item of future care must be reasonable and medically justified - but not medically necessary - in order to appropriate. While evidence from various health care professionals can establish what is medically justified, an evidentiary link between a medical assessment of pain, disability, and recommended treatment and the care recommendations of a qualified health care professional is required: *Gregory v. Insurance Corporation of British Columbia*, 2011 BCCA 144 at paras. 38-39. No award is appropriate for expenses that the plaintiff would have incurred in any event.
- [159] In this case, Dr. Medvedev did not consider any further treatment to be required. Dr. Giantomaso opined that the plaintiff may benefit on occasion from passive therapies in order to "decrease the intensity and duration of a flare-up if one occurs". He also stated that an occupational therapy assessment of her workplace "could be considered".
- [160] The plaintiff submits that in 2022, she was incurring treatments once a month from the chiropractor, slightly more than once a month for prolotherapy, and slightly less than once a month for massage therapy. She submits that a reasonable future maintenance amount is \$3,000 per year, suggesting a range of \$35,000 to \$45,000 be awarded to take into account her remaining working life and negative contingencies.
- [161] The defendants submit that the plaintiff has not made out a case for a cost of future care award to be made with respect to any claimed item. They submit that she took chiropractic and massage therapy treatments as maintenance prior to the Accident and has now resumed that same pattern of treatment on the same basis.
- [162] They note that there is no evidence from the plaintiff, nor anyone else, that her current massage therapy has been to address flare-ups. With regard to chiropractic treatment, they note that Dr. Phan's clinical notes should that his last referral for chiropractic treatment was made on May 30, 2018.
- [163] With regard to prolotherapy, they note that there is no active referral for further prolotherapy, with the last referral being that made by Dr. Eckel on May 3, 2022. They note that even the May 3, 2022 referral is questionable given that Dr. Eckel has neither a clinical note nor a specific recollection of recommending that treatment prior to the plaintiff's counsel contacting Dr. Eckel to ask that the referral be made. They say there is no evidence that future prolotherapy treatments may be beneficial, the treatment referred by Dr. Eckel

has been completed and the plaintiff canceled and then did not rebook her most recently scheduled prolotherapy session with Dr. Jamieson.

- [164] The defendants also note that Dr. Phan last performed acupuncture on the plaintiff in November 2018 and that while Dr. Eckel gave the plaintiff a May 31, 2022, recommendation for a sit-stand desk, the plaintiff has never provided that recommendation to CIBC. They submit that it is unclear whether the relevant CIBC department would provide a sit-stand desk at CIBC's expense if one had been requested by the plaintiff or recommended by its in-house ergonomic assessor.
- [165] I agree with the defendants that the evidence indicates that the plaintiff had returned to her usual schedule of "maintenance" chiropractic treatment and massage therapy treatment prior to the trial and that this is treatment that should have been taken in any event. While Dr. Giantomaso has opined that passive treatments might provide a benefit should flare-ups occur, there is no evidence that the plaintiff has, in fact, taken treatment specifically for flare-ups.
- [166] I also agree that there is no medical justification for continued prolotherapy. The plaintiff has completed the sessions originally recommended by Dr. Eckel and cancelled and did not rebook the most recent follow-up session scheduled by Dr. Jamieson.
- [167] I am also persuaded, given that the plaintiff neither sought an in-house CIBC ergonomic assessment of her current office nor provided Dr. Eckel's recommendation for a sit-stand desk to the proper CIBC division, that an ergonomic assessment of her workspace by an occupational therapist is unnecessary. Mr. Simoes' evidence is that CIBC has an in-house division that deals these issues. The fact that the plaintiff did not find it worthwhile to provide Dr. Eckel's recommendation to CIBC indicates that her workspace is not actually problematic.
- [168] There will be no award for cost of future care.

VIII. In Trust Claim

- [169] The plaintiff advanced an in trust claim for the plaintiff's husband, but abandoned this claim in closing argument.

IX. Special Damages

- [170] It follows from my finding on future care costs that I am satisfied that the plaintiff had returned to her usual maintenance treatment program for chiropractic and massage therapy treatment prior to the date of trial.
- [171] The following special damages are claimed and not disputed, totalling \$5,483.69:
- a) \$374.54 in physiotherapy expenses (the full amount claimed);
 - b) \$85.00 in prolotherapy expenses (the full amount claimed);

- c) \$808.50 for active rehabilitation/ kinesiotherapy (the full amount claimed);
- d) \$1,484.25 for chiropractic treatment from the date of the Accident up to and including March 16, 2019 (the last of the treatment by referral having been given by Dr. Phan on May 31, 2018);
- e) \$1,800 for massage therapy treatment from November 30, 2017 up to and including November 17, 2018 (the last of the treatment by referral by Dr. Phan having been made on January 12, 2018 and being for 12 treatments);
- f) \$931.40 in transportation expenses incurred by the plaintiff to access the above treatments (based on the defendants' position regarding mileage compensation).

[172] As I understand it, the parties agree that the plaintiff had seen Dr. Jamieson prior to Dr. Eckel's referral for prolotherapy, but that this was not for treatment regarding her injuries from the Accident. If I am wrong in this regard, then I find as a fact that this earlier naturopathic treatment was not Accident-related, but rather dealt with general health concerns and SAD. There is no evidence to support the fact that these earlier treatments were related to the Accident.

[173] The remaining dispute is with respect to mileage for the plaintiff's transportation costs. The amount of mileage is not in dispute. The parties disagree as to the appropriate compensation per kilometre.

[174] The plaintiff seeks \$0.60 per kilometre relying on the decision in *Trafford v. Byron*, 2022 BCSC 1896. In *Trafford*, Justice Wilkinson said:

[120] The plaintiff further seeks mileage to attend treatments. The defendant agrees to this at a rate of \$0.50 per kilometre. The plaintiff seeks \$1.00 per kilometre. I have no evidence of the costs associated with wear and tear on a vehicle nor evidence of what vehicle the plaintiff used.

[121] The plaintiff asks the court to take judicial notice that the cost of operating a vehicle has increased since the \$0.50 rate was recognized in *Grewal-Cheema v. Tassone*, 2010 BCSC 1182 at para. 60. The rate of \$0.50 has been applied in a number of decisions of this Court as recent as 2018 as referred to me by the plaintiff. The plaintiff's treatments were in 2021 and 2022. I agree with the plaintiff that it is a notorious fact that automobile fuel costs and the price of vehicles generally have increased since 2018. In particular, in 2021 and 2022 fuel costs have significantly increased such that \$0.50 does not reflect reality. Without more evidence, I will set the rate at \$0.60 per kilometre. This award will be \$200.30.

[175] *Trafford* applies the \$0.60 rate specifically to the context of post-2021 fuel costs. On my findings above, the bulk of the plaintiff's mileage costs were incurred prior to the year 2021. I thus see no reason to veer from the \$0.50 rate usually applied to the time period in question.

X. Summary

[176] Liability having been admitted, the plaintiff is awarded the following under the heads of damage claimed:

- a) Non-pecuniary: \$50,000.00
- b) Loss of past earning capacity: \$690.00 (gross)
- c) Loss of future earning capacity: NIL
- d) Cost of future care: NIL
- e) Special costs: \$5483.69 (plus taxes if not included)

TOTAL \$56,173.69

[177] Unless there are further matters that should be brought to my attention, the plaintiff has been successful in this matter and will be entitled to costs. If either party wishes to make submissions regarding costs, they should do so in writing within 14 days of these reasons and the other party may have 7 days to respond.

"Tucker J."

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