

CANADA / JUDGMENT

Hawkins v. Kumar

2019 BCSC 1896

COURT

Supreme Court of British Columbia

DECIDED

6 November 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 1896 Hawkins v. Kumar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hawkins v. Kumar,

2019 BCSC 1896

Date: 20191106

Docket: M163362

Registry: Vancouver

Between:

Catherine I. Hawkins

Plaintiff

And

Sanjeev Kumar

Defendant

Docket: M170602

Registry: Vancouver

Between:

Catherine I. Hawkins

Plaintiff

And

Jurgen Coblenz and

Centra Construction Group Ltd.

Defendants

Corrected Judgment: Counsel's name was added to the cover page of
the Judgment on December 4, 2019

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for Plaintiff:

S.E. Gibson

K. Gurlay

Counsel for Defendants:

L. Beukman

M. Baker

Place and Date of Trial:

Vancouver, B.C.

April 23-26, 29, 30, and

May 1-3, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 6, 2019

Table of Contents

I. Introduction. 4

II. Evidence. 4

A. Plaintiff's evidence. 4

1. Pre-Existing Medical Conditions. 8

B. Lay witnesses. 9

1. Mechele Iacobellis. 9

2. Celia Bond. 11

3. Tracee-lee Buziol 11

4. Glenn Dorey. 12

C. Physiotherapists. 13

1. Yasha Rabbani-Nejad. 13

2. Veronica Brykajlo. 14

D. Expert witnesses. 14

1. Dr. Jennifer Shaw. 15

2. Dr. Mihaela Lapuste. 17

3. Dr. Larissa Mead-Wescott 19

4. Dr. Andrew Travlos. 25

5. Dr. James Browning. 29

6. Functional Capacity Experts. 30

a) Alison McLean. 30

b) Sven Hartman. 31

III. Issues. 33

IV. Analysis. 34

A. What injuries did the plaintiff suffer in MVA #1 and MVA #2 and how have they affected her?. 34

1. The Injuries. 34

a) Traumatic Brain Injury. 34

b) Headaches. 36

c) Injuries to neck, shoulders, low back, and left leg. 37

d) Anxiety. 38

e) Summary of Injuries. 38

2. Affects on Life and Employment 39

B. What is an appropriate award for general damages?. 40

1. The Stapley Factors. 40

a) Age of the plaintiff 41

- b) Nature of the injury. 41
- c) Severity and duration of pain. 42
- d) Disability. 42
- e) Emotional suffering. 42
- f) Impairment of lifestyle, relationships and abilities. 42
- g) Stoicism.. 42
- 2. Authorities. 43

C. Is the plaintiff entitled to an award for past loss of earning capacity or past income loss and, if so, in what amount?. 43

D. Is the plaintiff entitled to an award for future loss of earning capacity and, if so, in what amount?. 49

E. What are the plaintiff's special damages?. 51

F. What is an appropriate award for the costs of future care?. 53

V. Disposition. 55

I. Introduction

- [1] These matters concern two motor vehicle accidents involving the plaintiff. The first accident occurred on August 3, 2014 and is the subject of Action No. M163362 ("MVA #1"). The second accident occurred on February 19, 2016 and is the subject of Action No. M170602 ("MVA #2"). Liability is admitted by the defendants in both actions.
- [2] In addition to liability, the defendants concede that the plaintiff suffered injuries in the collisions. However, they disagree on the extent of those injuries, particularly any cognitive impairments, and on the extent to which the injuries have negatively impacted the plaintiff's enjoyment of life and ability to work. The defendants allege that the plaintiff suffered from pre-existing migraines and anxiety. The defendants further allege that an unrelated hearing loss, a heart attack suffered by the plaintiff's husband in October 2015, and personal injuries suffered by the plaintiff's youngest son in 2016 are accountable for some or all of the plaintiff's symptoms.

II. Evidence

A. Plaintiff's evidence

- [3] The plaintiff is 55 years of age. She has two sons from a previous marriage who were 21 and 24 years of age, respectively, at the time of trial. She resides in North Vancouver, British Columbia together with her husband, Mechele Iacobellis and youngest son who attends Capilano University during the academic year. At the time of the accidents and the time of the trial, she was employed part-time by Westwind Leadership ("Westwind"), a consulting company, as an administrative assistant.
- [4] The plaintiff graduated from high school in 1982 and worked as a bartender and bar manager from 1982 until approximately 1989. She also took some night school courses in bookkeeping, accounting, and computers. From 1989 until 1994, she worked at Yorkton Securities, initially as a receptionist and later as an administrative assistant. In 1994, when she became pregnant with her first child, she left the workforce and devoted the next approximately ten years to raising her children. In 2005 she re-entered the workforce with Pharmasave, initially as a cashier and later as cosmetics manager. At Pharmasave she met her current spouse, Mr. Iacobellis. From 2007 through 2009 she was employed with RBC as a customer services representative. While employed at RBC, there were several dramatic incidents involving the plaintiff. On one occasion a man came to her teller's cage and pulled a knife. On another occasion a co-worker prevented her from leaving the workplace. On a third occasion she was forced to deal with an irate customer. After the third incident she was on short-term disability, was eventually diagnosed with post-traumatic stress disorder, and stayed out of the workforce for approximately one year.
- [5] In June of 2010, the plaintiff returned to the workforce as an administrative assistant with Westwind. Her duties at Westwind gradually increased such that by 2014 she was involved in researching potential customers for the company. Her evidence was that immediately prior to MVA #1 she was working for Westwind between 30 and 35 hours per week, spread over five days. She testified that it was her intention to increase her hours of work to full-time in 2016 once her youngest son completed high school.
- [6] MVA #1 occurred on August 3, 2014 at the intersection of Willingdon Avenue and Albert Street in Burnaby, BC. The plaintiff was a passenger in a vehicle owned and driven by Mr. Iacobellis. A vehicle owned and operated by Sanjeev Kumar failed to stop at a stop sign and struck the Iacobellis' vehicle causing it to spin. The estimated cost to repair the Iacobellis' vehicle was in the amount of approximately \$7,000.
- [7] The plaintiff had very little memory of MVA #1. She did not recall hitting her head in the accident. Her only recollections of the accident were of being on her hands and knees on the ground outside the vehicle after the collision, being put on a bench, feeling nauseous, and "not all there".
- [8] The plaintiff was asked by an ambulance driver if she wanted to go to the hospital. She testified that she did not want to go to the hospital because it was a long weekend and there would be a long waiting period in the hospital emergency ward. She and Mr. Iacobellis were

picked up at the accident scene by her son and driven home. The plaintiff could not recall anything of the remainder of the day except experiencing "fogginess". Over the next day or two she began having symptoms involving her head, neck, upper back, shoulders, and left leg. She could not recall the symptoms in any detail other than she knew she experienced pain.

- [9] Two days after MVA #1, the plaintiff went to see her then family doctor, Dr. Jennifer Shaw, and began physiotherapy and massage treatments. On the advice of Dr. Shaw she took time off work and attempted to limit the time spent working on computers. Her nausea and dizziness continued and she also began experiencing fatigue, double vision, and headaches.
- [10] She attended with Dr. Thompson, an optometrist, in October 2014 for her vision-related issues and was given special glasses to assist with her work on computers.
- [11] The plaintiff eventually returned to work at Westwind but worked only 20 hours per week over four days. Moreover, it was her evidence that following MVA #1 she struggled and made constant mistakes at work. She was forgetful, could not figure out excel formulas, and had difficulty with grammar in emails.
- [12] It was the plaintiff's evidence that in June of 2015, two of the three partners involved with Westwind left the company and that the remaining partner, Glenn Dorey, closed the physical office of Westwind. As will be seen, in fact, the two partners left Westwind in 2014 after the company lost a major client. In any event, after the physical office of Westwind was closed, Mr. Dorey and the plaintiff worked from their respective homes.
- [13] Throughout 2015 the plaintiff's nausea, dizziness, and headaches continued as did her struggles at work. The headaches were what she described as frontal headaches and were different from the migraines she had previously experienced. She also testified that she experienced heightened anxiety for example when in an elevator or riding as a passenger in a car. In March of 2015 her left shoulder began hurting.
- [14] In October of 2015, the week before the plaintiff and Mr. Iacobellis were to be married, Mr. Iacobellis suffered a serious heart attack. He was in a coma for three days and had a pacemaker and defibrillator implanted. Following his heart attack, he was not able to return to work for 18 months. This caused additional financial stress for the family.
- [15] The plaintiff testified that immediately prior to MVA #2, her problems with double vision had resolved as had her problems with her left shoulder. She was, however, still having constant neck and low back pain. She was also continuing to experience the frontal headaches. Her cognitive difficulties had improved somewhat by January of 2016 but they had not resolved. She was still struggling with computer work, multi-tasking, and organizing. The plaintiff also experienced an incident of vertigo in 2015 although she testified that it resolved in 2016.

- [16] MVA #2 occurred on February 19, 2016. The plaintiff was driving behind a van on Glenwood Avenue in North Vancouver. The van came to a stop and then reversed into the plaintiff's vehicle. The only damage to the plaintiff's vehicle was to her front bumper which needed to be replaced. The plaintiff readily admitted that MVA #2 was minor. Her only new injury from MVA #2 was to her right shoulder and arm which she thought was due to her trying to quickly put her car into reverse. She testified that her cognitive symptoms were not affected by MVA #2.
- [17] In August of 2016, the plaintiff's youngest son was involved in a motor vehicle accident in which he was seriously concussed. The plaintiff described the time after the accident as being "a horrible time".
- [18] In 2017, the plaintiff began looking for part-time employment in addition to her work for Westwind. She testified that she did so because she was struggling with working on a computer and hoped a more physical job would be more suitable. She eventually got a job with BC Ferries as a terminal attendant. However, she resigned after one weekend as she found it too stressful. She then obtained a temporary part-time job at Lonsdale Psychology working as a receptionist earning \$18 per hour. From October to December of 2017, she was working approximately 20 hours per week at Lonsdale Psychology and 20 hours per week at Westwind. In approximately December of 2017, she accepted a promotion to office manager at Lonsdale Psychology and a pay increase to \$24 per hour. Throughout 2018 and continuing into 2019, she worked at both Lonsdale Psychology and Westwind. She initially worked Tuesdays, Thursdays, and every other Friday at Lonsdale Psychology but found that difficult so switched to working Mondays, Tuesdays, and every other Friday. This too, she found too difficult so switched to working at Lonsdale Psychology on Mondays and Tuesdays. She eventually found that she was too fatigued working at both places and quit her employment at Lonsdale Psychology in 2019.
- [19] The plaintiff claims that she suffered a mild traumatic brain injury in MVA #1 as well as injuries to her neck, left shoulder, low back, left leg, and chronic pain. The plaintiff further claims the injuries to her neck, left shoulder, and low back were aggravated by MVA #2. She claims the injuries have caused pain and suffering, have negatively affected her enjoyment of life and her ability to work, and have caused a continuing loss of income or loss of capacity to earn income.
1. Pre-Existing Medical Conditions
- [20] The plaintiff had been involved in three motor vehicle accidents before MVA #1. These accidents occurred in 1984, 1988, and 2004. She testified that any injuries she suffered in those accidents had long since resolved by the time of MVA #1.
- [21] The plaintiff also testified to having periodic back pain prior to MVA #1 but it was infrequent and never stopped her from working. More significant was a history of migraine headaches that she had experienced since her twenties. These headaches had occurred approximately every three or four months. The most recent migraine before MVA #1 was at the end of 2013.

That migraine necessitated a hospital attendance and required that she take time off work. However, she further testified that she has not had a migraine-type headache since the onset of menopause.

- [22] The plaintiff also had an incident in January 2014 involving sudden onset of head pain and ultimately permanently lost hearing in her right ear. The cause of this incident and resultant hearing loss was not diagnosed with any specificity.

B. Lay witnesses

1. Mechele Iacobellis

- [23] Mr. Iacobellis testified that on the day of MVA #1, he was driving his 2008 Hyundai Tiburon with the plaintiff in the passenger seat. He stopped at the stop sign and then began to proceed through the intersection at Willingdon Avenue and Albert Street. As he did so he noticed a car that failed to stop and was proceeding towards him. He attempted to accelerate out of the path of the other vehicle but was not able to do so. The oncoming vehicle struck the rear driver's side tire of his vehicle which caused his vehicle to spin around. When his vehicle came to a stop he saw that the other vehicle was continuing to move. Believing the other vehicle was attempting to flee the scene, he exited his vehicle and gave chase. However, it appears that the other vehicle was merely attempting to clear the roadway as it stopped a short distance away and the driver exited and spoke with Mr. Iacobellis. Mr. Iacobellis then returned to his car. He saw the plaintiff crawl out of the car. He helped her to a nearby bench. He says that she was dazed and was not sure what had happened. Later, after the emergency crews arrived, a first responder talked with the plaintiff and asked her about the accident. Mr. Iacobellis heard her tell the first responder that she had been driving. He corrected her answer and told the first responder that he had been driving. He also recalled the plaintiff saying she had lost her sunglasses; that they had had fallen off of her head. However, he testified that she had not been wearing sunglasses. In the days following MVA #1, the plaintiff was groggy, dizzy, and nauseous.
- [24] Mr. Iacobellis had been the plaintiff's manager when she worked at Pharmasave. He testified that she had been a great employee and had been promoted to cosmetic manager. He and the plaintiff began living together about ten years ago. He confirmed that she did all of the inside housework and he did the outside work. He also testified that she was very involved in the lives of her two sons.
- [25] Mr. Iacobellis testified that prior to MVA #1, the plaintiff was a confident, active, and sociable person. He described a typical day before MVA #1 where the plaintiff would make breakfast, go to work, pick up her sons after school, take them to basketball or soccer, then come home and make dinner for the entire family. She would do this on a daily basis without any apparent fatigue. After MVA #1, there was a dramatic change. She would come home from work with a sore neck and shoulder and complain of pain, headaches, and dizziness. She was completely fatigued and short-tempered and would often go to bed and not do anything after work. She was no longer able to do the housework such that they had

to arrange for a cleaner. She was no longer able to do bigger projects around the house as she would get frustrated, overwhelmed, and just cry. Their social life also changed. Prior to MVA #1, the plaintiff loved to socialize with people but after the accident she no longer enjoyed being around people. He testified to going to weddings where they would leave early because she would have headaches. He also testified that she no longer attended birthdays of nieces and nephews.

[26] Mr. Iacobellis testified that he earned about \$72,000 per year, that he did not have a pension, and did not have the means to retire. He also testified that the plaintiff had no pension or RRSP. Accordingly, prior to MVA #1, the plan was for both him and the plaintiff to work for as long as they were healthy. He specifically confirmed that they had discussed the plaintiff returning to full-time work once the youngest son was finished high school.

[27] Mr. Iacobellis also testified to his various health issues. He confirmed that he had bypass surgery in 2011, after which he was off work for six weeks, a TIA attack in 2013, and a major cardiac arrest in 2015, following which he was off work for 18 months. During his time recuperating from these events, the plaintiff was key in helping him recover.

2. Celia Bond

[28] Celia Bond was a friend of the plaintiff for 21 years. Prior to MVA #1 she and the plaintiff were frequent companions. They would exercise together, hike the Grouse Grind two to three times per week from late spring to early fall, ski at Whistler, go to the beach with their children, go shopping, and go out to restaurants with a circle of friends. She described the plaintiff as very active and social and happy with her life and work. After MVA #1, she noticed a dramatic change in the plaintiff and testified to her being a different person. They attempted to do the Grouse Grind but the plaintiff experienced palpitations and pain and they never tried again. Thereafter, they limited their activities to one hour walks on the seawall. They no longer skied together or went shopping or went out for dinners together. She testified that the plaintiff always looked tired and would get dizzy. More concerning to Ms. Bond was that the plaintiff would often lose her train of thought, forget what she had been talking about or struggle to find words. She also testified that the plaintiff's home, which had been perfect before MVA #1, was now disorderly.

3. Tracee-lee Buziol

[29] Tracee-lee Buziol has been a friend of the plaintiff since high school. She testified that prior to MVA #1 she and the plaintiff often worked out together, did the Grouse Grind together, and went on walks together. They also socialized regularly as their husbands and children knew one another. She described the plaintiff as smart, quick, funny, and a "wiz with numbers". Following MVA #1, she noted a dramatic change in the plaintiff. She testified that the plaintiff is quieter, more irritable, easily confused, and often repeats herself, something she never did before. She also said the plaintiff is now terrible with numbers. Since MVA #1, she and the plaintiff have not done the Grouse Grind, no longer work out together, and only go for infrequent walks along the seawall.

- [30] In cross-examination, Ms. Buziol was asked if the plaintiff's condition had improved in the four and a half years since MVA #1. She responded that there had been some improvement but that the plaintiff was still not the same person she was before the accident.
4. Glenn Dorey
- [31] Glenn Dorey is the principal of Westwind, the plaintiff's employer. He testified that the plaintiff was hired in 2010 as an administrative assistant. Her job duties initially consisted of invoicing, collections, insurance, liaising with the company's accountants, checking invoices of contractors, and other assorted office duties. He described the plaintiff as being "tremendous" in her job, so much so that she was given additional duties in relation to researching potential new client leads. The plaintiff's salary when she first started at Westwind was \$24 per hour and was later increased to \$30 per hour. He also confirmed that the plaintiff had worked approximately 30 hours per week at Westwind and confirmed that the intention was to have the plaintiff work full-time once her children were finished school. He said this had been specifically discussed with the plaintiff whom he considered very valuable to their organization.
- [32] Mr. Dorey testified that after MVA #1, the plaintiff was off work for a month or so. When she returned to work, Mr. Dorey noted a dramatic change in her. Prior to MVA #1 he never needed to check the plaintiff's work. After the accident he found that he could not trust her numbers or words and that he had to double-check everything she did. He testified that he found this frustrating but when confronted with mistakes, the plaintiff would take full responsibility. He accepted that she was trying her hardest and never gave any thought to firing her. He felt he needed to stand by her and do everything possible for her. To address the plaintiff's difficulties, which persisted as of the date of the trial, they developed a system whereby all of the plaintiff's work product is double-checked by him before going out.
- [33] Mr. Dorey further testified that after MVA #1 the plaintiff worked many fewer hours at Westwind. He said this was because the plaintiff was not able to focus. He also noted the plaintiff was uncomfortable sitting for any length of time. It was his evidence that there was more work for the plaintiff if she was able to handle it. However, he was not specific as to how much more work might be available to the plaintiff. When specifically asked this question in cross-examination his answer was that he could not say. He also testified that the plaintiff was getting the work done that she needed to get done.
- [34] He was aware of Mr. Iacobellis' cardiac arrest in 2015 and the motor vehicle accident involving the plaintiff's son in 2016. His evidence was that other than booking some time off, these events did not affect the plaintiff's work.
- [35] He confirmed that at the end of 2018 the plaintiff's hourly rate was increased to \$35 per hour.

[36] Finally, Mr. Dorey testified that in 2014, the company was under financial pressure after losing a major client and that two of the three founding partners left the company. The following year, the company closed its physical office and he and the plaintiff began working from their respective homes. He admitted that the company's revenues never returned to what they had been in 2014 but nevertheless thought the prospects of the company were good.

C. Physiotherapists

1. Yasha Rabbani-Nejad

[37] Yasha Rabbani-Nejad is a physiotherapist at Village Physiotherapy in Edgemont Village. He first saw the plaintiff on August 18, 2014. At that time he noted the plaintiff's complaints as having suffered a concussion and as having headaches, dizziness, and injuries to her neck, upper, and lower back. She was having difficulty sitting and experiencing pain predominantly to the left side. She also had limited range of motion on a number of parameters. He testified that at the initial visit the plaintiff's neck and upper back were too sensitive to work on so he focused primarily on her low back. Thereafter, the plaintiff continued to attend regular physiotherapy sessions with him until April 7, 2015. By that time the plaintiff had improved but he was not able to say by how much.

2. Veronica Brykajlo

[38] Veronica Brykajlo is a physiotherapist who has been treating the plaintiff since March 2, 2016. Initially, the treatments were to address pain in the left sacroiliac joint and lumbar spine but later expanded to address right shoulder and neck pain. The frequency of the treatments varied between two treatments per week and two treatments per month. For the most part, the plaintiff received treatments once per week. In time the problems with the sacroiliac joint improved but treatments continued for the neck and lumbar spine. The treatments provided to the plaintiff consisted mostly of manual therapy and needling or intramuscular stimulation. Ms. Brykajlo testified that the purpose of the ongoing treatments is not curative but is simply to maintain the plaintiff's ability to work.

[39] In cross-examination, Ms. Brykajlo was asked whether she agreed that the amount of physiotherapy the plaintiff was receiving was in excess of what is normally expected. She conceded that the amount was in excess of what is normal but stated that it was necessary to keep the plaintiff working. She was also asked in cross-examination if the plaintiff's condition had improved to which she replied that the plaintiff had definitely improved but that it varies depending on her activities, in particular, her work activities.

D. Expert witnesses

[40] There were five medical-legal reports introduced at the trial, all of which were submitted by the plaintiff. In addition, there were two reports by occupational therapists, one of which was introduced by the plaintiff and the other by the defendants.

1. Dr. Jennifer Shaw

[41] Dr. Jennifer Shaw was the plaintiff's family physician from approximately 2006 until January 2016 when Dr. Shaw retired. Dr. Shaw prepared a report dated January 26, 2016. Dr. Shaw was not able to testify at trial for medical reasons. As a result, the parties entered into an agreement concerning the admissibility of her report and clinical records. The agreement insofar as it concerns her report provides.

3. Dr. Shaw's medical-legal report dated January 26, 2016 is admissible into evidence.

4. Dr. Shaw's unavailability for cross-examination by the defendants is a deficiency that goes to weight.

[42] As noted, Dr. Shaw's report is admissible but her unavailability for cross-examination is a matter that I may take into account in assessing the weight to be given to the report.

[43] In her report, Dr. Shaw briefly detailed the plaintiff's medical history before MVA #1. She noted the plaintiff was "a very fit individual in excellent general health". The plaintiff's prior medical problems were:

- Migraine headaches which typically occurred during her menstrual cycle or during periods of stress. Improvement in these headaches was noted with the onset of menopause in April 2015;

- In February 2014, the plaintiff experienced acute onset of severe right-sided hearing loss but with little tinnitus. The plaintiff "adjusted remarkably well to this hearing loss"; and

- The plaintiff was involved in three prior motor vehicle accidents in 1988, 1990, and 2004, at least two of which involved soft tissue injuries, and from which the plaintiff had made a full recovery.

[44] Dr. Shaw noted that the plaintiff's initial complaints were of nausea and aches and pains across the upper back/shoulder ridge area, neck, and lower back. It was further noted that the plaintiff complained of being "foggy" and "disoriented", of having difficulties with short term memory, of fatigue, and of pain in the area of the sacroiliac joints. Over the next six weeks, it was apparent the plaintiff was suffering from non-migrainous headaches/nausea which was accentuated by spending time on a computer, general fatigue, and multi-tasking such as driving at night.

[45] Dr. Shaw's "working" diagnosis was concussion, soft tissue injury affecting the neck, upper back and trapezius, and soft tissue injury affecting the lower back, specifically, the sacroiliac joints and iliolumbar ligaments.

[46] For treatment of the soft tissue injuries, Dr. Shaw prescribed massage and physiotherapy which initially provided some benefit. However, the physiotherapy had to be interrupted due to onset of benign positional vertigo which was unrelated to MVA #1 but which persisted for many months. Dr. Shaw prescribed more aggressive physiotherapy to address the lower back issues, which had become "more chronic", and the ongoing issues with the trapezius muscles, especially on the left. Dr. Shaw expected that these issues were remediable in time.

[47] For treatment of the concussion issues, Dr. Shaw referred the plaintiff to an optometrist which resulted in changes to the plaintiff's computer screens and glasses which "proved very helpful". Dr. Shaw also recommended an occupational therapy assessment of the plaintiff's work station. Dr. Shaw noted that computer work "remains the biggest trigger for her ongoing non-musculoskeletal based concerns" and stated the plaintiff was not able to work more than three hours at a time. She noted that computer work precipitates the plaintiff's lower back issues and headaches.

[48] Dr. Shaw concluded her report with a "general overview" in which she noted that the plaintiff had improved but remained very frustrated. In particular, Dr. Shaw noted improvements in the plaintiff's physical abilities and sleep and postulated that physiotherapy would allow the plaintiff to return to her previous physical baseline. Unfortunately, Dr. Shaw's report is not particularly clear in relation to contributing causes of the plaintiff's concussive/cognitive symptoms. In this regard she wrote:

... Ms. Hawkins is an extremely personable and bright individual, very quick on the uptake and highly motivated and focussed. What has happened cognitively with her over the last 18 months has been profoundly disturbing for her - there is no guarantee that her faculties will return to their previously robust baseline, but it is too early to prognosticate definitely.

I have explained that within a relatively short period of time - her brain, used only to intermittent migraines - has been subject to a micro-vascular episode resulting in right-sided deafness, a concussion and then several months of positional vertigo. Added to that, her husband had a cardiac arrest and was resuscitated, albeit possibly with some ongoing sequelae.

[49] The defendants submit that I should give minimal weight to Dr. Shaw's report on the grounds that there is no factual basis for some of what is contained in the report, the report contains numerous examples of bias, and she opines on matters beyond her expertise. I do not accept these criticisms. I am of the view that there is more than an adequate factual basis for the opinions outlined in the report. I am also of the view that the report does not disclose a bias to the extent that the opinions should be disregarded. Further, I find that as a medical doctor, Dr. Shaw does have the expertise to opine on neurological/cognitive matters and whether the plaintiff suffered a concussion or traumatic brain injury. The fact that Dr. Shaw is a general practitioner is a matter that goes to the weight to be given to such opinions not admissibility. As to the weight to be given to the report in respect of the neurological/cognitive matters opined upon, I would have given it little weight by itself, however, it is generally consistent with and corroborative of the reports and opinions of Dr. Mead-Wescott and Dr. Travlos and, to that extent, is entitled to moderate weight.

2. Dr. Mihaela Lapuste

[50] Dr. Mihaela Lapuste was the plaintiff's family physician following Dr. Shaw's retirement. She prepared a report dated January 20, 2019 and testified at trial.

- [51] In her report, Dr. Lapuste summarizes the various visits of the plaintiff between November 3, 2015 and January 3, 2019. The plaintiff's injuries and symptoms consisted of right-sided neck tenderness, neck and back pain, left hip pain, headaches (sometimes referenced as severe migraines), dizziness (mostly associated with computer work), and sleep issues. The plaintiff also reported difficulties with multi-tasking and organizing, self-esteem issues, anxiety issues when driving on cable bridges and riding in elevators, spelling difficulties, fatigue, and a reduced desire to socialize.
- [52] Dr. Lapuste diagnosed the plaintiff as having muscle sprain and soft tissue injuries related to a motor vehicle accident (she did not specify which accident), right-shoulder tendinopathy, anxiety, and claustrophobia. She also appears to have presumed a diagnosis of concussion, although she did not expressly make any such diagnosis in her report.
- [53] The treatments recommended by Dr. Lapuste included physiotherapy, IMS to right shoulder, exercises, and stretching. She also prescribed anti-inflammatories and muscle relaxants, and zopiclone for sleep issues. Dr. Lapuste further recommended changes to the plaintiff's computer screen and reduced hours of work. The plaintiff was also referred to a psychologist to investigate possible post-traumatic stress disorder symptoms. An x-ray of the C-spine was conducted in early 2016 which indicated C5-C6 disc space loss but no C-spine instability. An MRI of the C-spine was done on April 1, 2018 which indicated minimal disc disease with bilateral osteophytes at C5-C6.
- [54] Dr. Lapuste concluded her report by stating that the plaintiff suffered headaches, neck, shoulder and back pain in the motor vehicle accidents, that there had been some improvement but that she continues to have pain and stiffness. Dr. Lapuste's prognosis was uncertain as the plaintiff's recovery had been slow. The "summary and prognosis" section of the report provided:

Mrs. Hawkins is a 54-year lady who suffered headaches, neck, shoulder and back pain after being in accidents on August 3, 2014 and February 19, 2016. She required physiotherapy, massage therapy, and anti-inflammatory/muscle relaxant treatment. She attended physiotherapy, massage treatments and learned to perform her own rehabilitation exercises. She suffered exacerbations of her pain on several occasions as indicated above, requiring further physiotherapy and investigations like imaging.

She made a slow improvement, but remains frustrated by the fact that she 'does not have her life back'. She continues to have pain and stiffness for which she may require more therapy sessions, home and rehab exercises. Her prognosis is uncertain, as her recovery thus far has been slow, fluctuating, and resistant to treatment modalities. Regrettably, the longer a chronic pain condition persists, the more likely it will continue.

In the matter for [sic] musculoskeletal injuries, the best recovery for musculoskeletal injuries sustained due to MVA happens within the first six months and some recovery happens in the 12 months post-accident. Most experts in this area agree that the persisting pain 12 months post MVA will be chronic residual pain, unless there is another reason for pain such as nerve

compression. It is expected that Mrs. Hawkins [will] suffer occasional exacerbation of her pain in the neck and back due to minor strains or viral illnesses, which would not normally cause body pain.

[55] During her examination-in-chief, Dr. Lapuste testified that she did not believe the plaintiff was malingering or exaggerating her symptoms. She also testified that the cardiac arrest suffered by Mr. Iacobellis had caused "a lot of convulsion and trauma". In cross-examination, she further confirmed that the cardiac arrest had caused stress and anxiety for the plaintiff.

3. Dr. Larissa Mead-Wescott

[56] Dr. Mead-Wescott is a registered psychologist specializing in the area of neuropsychology. She obtained her PhD in 1996 followed by a two year post-doctoral residency in neuropsychology at the Medical College of Wisconsin. Her career as a neuropsychologist has focused on brain injury assessments. She testified that she has conducted thousands of brain injury assessments.

[57] Dr. Mead-Wescott provided three reports dated September 6, 2015, February 20, 2017, and April 4, 2019. At trial, the defendants objected to the admissibility of these reports on several grounds and a voir dire was held. The defendants' objections included:

- The reports failed to identify the tests and other information upon which the opinions were based;
- The reports assumed the plaintiff's intellectual functioning was in the average range;
- The raw data of the assessments conducted by Dr. Mead-Wescott was not provided to the defendants or was provided late;
- The reports do not identify the names of other individuals involved in the assessments;
- The opinions expressed are beyond the expertise of Dr. Mead-Wescott; and
- Dr. Mead-Wescott assumed the role of an advocate for the plaintiff.

[58] After hearing full argument on the admissibility of the reports, I ruled that any deficiencies in relation to the earlier reports were corrected by the April 4, 2019 report, which was provided for the express purpose of addressing the objections made by the defendants in the month or so before trial. The one objection that was upheld related to the expertise of Dr. Mead-Wescott and, in particular, to whether a neuropsychologist could opine on the issue of a traumatic brain injury and the causes of such an injury.

[59] I was referred by the plaintiff to *Henbury v. Egilson*, 2019 BCSC 215, as authority for allowing a neuropsychologist to provide expert opinion evidence relating to a traumatic brain injury suffered in a motor vehicle accident. In contrast, the defendants referred me to *Sharma v. Chan*, 2017 BCSC 912; *Meghji v. Lee*, 2009 BCSC 1542; *Knight v. Fletcher* (1995), 58 B.C.A.C. 133 (C.A.); *Han v. Park*, 2013 BCSC 2296; *Liu v. Bipinchandra*, 2016 BCSC 283; *Warren v.*

Morgan, 2013 BCSC 708; and Cooknell v. Quinn, 2013 BCSC 1653, as establishing that a neuropsychologist could not provide such an opinion. Relying in particular on Sharma and Meghji, I ruled that Dr. Mead-Wescott was not qualified to give an opinion as to whether the plaintiff had suffered a mild traumatic brain injury in the motor vehicle accidents at issue. She was, however, qualified to give her opinion on the cognitive and behavioural sequelae of brain injuries and she could indicate the relative likelihood of any cognitive and behavioural abnormalities being the consequence of a traumatic brain injury. Put differently, she was entitled to give her opinion on whether test results, as evaluated by her, were of a nature, kind or quality seen in people who have been diagnosed as having had organic brain injuries.

[60] Dr. Mead-Wescott first saw the plaintiff on June 22, 2015 at which time a clinical interview was conducted and a battery of neurological tests were given. Her first report dated September 6, 2015 does not disclose the exact neurological tests given to the plaintiff or the detailed results of those tests. However, the April 4, 2019 report does provide a listing and explanation of the various tests administered on June 22, 2015. The tests conducted included embedded performance validity indicators designed to test whether the patient was giving sufficient effort during the testing. These performance validity indicators indicated that the plaintiff was giving a good effort throughout the tests. Dr. Mead-Wescott noted during her testimony that there were two test items where the plaintiff gave up easily but she explained that these were two items out of hundreds. She was confident that the plaintiff had given a good effort and that the test results were valid.

[61] Based on the neurological assessment conducted Dr. Mead-Wescott concluded that the plaintiff had suffered:

- mild to severe impairments on numerous measures of learning and memory;
- mild impairment of sustained vigilance or attention;
- mild weakness on measures of language and verbal ability; and
- mild weakness on measures of visuoperceptual and visuomotor ability.

[62] Dr. Mead-Wescott's opinion was that the plaintiff had suffered a mild traumatic brain injury in MVA #1 and that her current neuropsychological condition warranted a DSM-5 diagnosis of Mild Neurocognitive Disorder. She further opined that the results indicated the plaintiff is likely to be slower and less efficient in learning new information, that she may have greater difficulty than most people her age in maintaining vigilance or sustained attention (i.e. staying tuned into a conversation or listening for a specific piece of information), and that her expressive communication may be less precise. In her September 6, 2015 report, Dr. Mead-Wescott stated:

- 1) It is my opinion as a board-certified clinical neuropsychologist that Ms. Hawkins suffered a mild traumatic brain injury in the MVA on August 3, 2014. This conclusion is based on the presence of a brief period of post-traumatic amnesia or loss of consciousness at the time of

the event (the available information does not allow differentiation between these possibilities), a subsequent period of confusion (possibly lasting up to two hours, but with only hearsay evidence of this), and her subsequent experience of a range of typical post-concussive symptoms, documented by her physician within two days of the event.

- 2) It is my opinion that Ms. Hawkins' current neuropsychological condition warrants a DSM-5 diagnosis of Mild Neurocognitive Disorder due to Traumatic Brain Injury, based on her documented weaknesses in learning and memory, sustained vigilance, expressive language and visuospatial functioning. These deficits are out of keeping with her pre-injury vocational functioning and likely to impact her current job performance (see below). While it is not typical for neuropsychological deficits to persist longer than about three months following a single, uncomplicated mild traumatic brain injury, Ms. Hawkins' history of migraine headaches and the significant migraine-related neurological issues that she experienced in February 2014 may have put her at additional risk for complications from further neurological injury.
- [63] Dr. Mead-Wescott saw the plaintiff a second time on December 7, 2016 and provided a second report dated February 20, 2017. The second report was intended to provide clarification of the plaintiff's neuropsychological status, the implications of her neuropsychological status for employment, recreational, and everyday functioning and treatment options.
- [64] The findings in the second report were comparable to those in the first report. The major difference was that the plaintiff had improved on learning and memory from having a mild to severe impairment to having a mild to moderate impairment. It was also noted that the plaintiff had improved on a test of general knowledge and on a test of reaction times but had not done as well on tests of sustained vigilance or attention.
- [65] Dr. Mead-Wescott's opinion in the second report was that the plaintiff continued to exhibit mild to moderate deficits in learning and memory, mild difficulties on tests of sustained attention, mild weakness on measures of expressive language, and mild weakness on measures of visuospatial functioning. Dr. Mead-Wescott's opinion was that the plaintiff continued to qualify for a diagnosis of Mild Neurocognitive Disorder due to traumatic brain injury.
- [66] As to the effects of the plaintiff's deficits, Dr. Mead-Wescott opined that the plaintiff was likely to be slower and less efficient at learning new information, may have greater difficulty maintaining focus of attention, and may have greater difficulties with oral and written communication. She opined that these deficits would make her less efficient in the workplace and probably increase her levels of frustration. She also noted that ongoing accommodations in the workplace would be necessary such as reduced hours, frequent breaks, use of memory aids, and less demand for communication skills.

- [67] Dr. Mead-Wescott finally opined that the prognosis for further neurological recovery was poor given that two and a half years had passed since MVA #1.
- [68] Dr. Mead-Wescott's final report dated April 4, 2019 was in response to a request for a list of the specific tests administered during the June 22, 2015 assessment of the plaintiff. In this report she provided a detailed list of the tests administered and explained which test results were related to her various findings of the deficits/impairments suffered by the plaintiff. She provided no findings or opinions in this final report.
- [69] For the reasons given in the voir dire, and summarized above, I reject Dr. Mead-Wescott's opinion that the plaintiff suffered a mild traumatic brain injury in MVA #1. As a neuropsychologist she does not have the expertise to provide such an opinion. However, I accept her findings as to the cognitive deficits suffered by the plaintiff and disclosed in the battery of tests administered by her.
- [70] I reject the defendants' submissions that Dr. Mead-Wescott assumed a role as an advocate for the plaintiff. In my view, her reports do not indicate advocacy for the plaintiff and when giving her evidence at trial she appeared completely impartial. Her conclusions and opinions were based on the objective scientific tests that she administered or supervised.
- [71] I also reject the defendants' submission that Dr. Mead-Wescott's opinions should be given little weight because the last time she assessed the plaintiff was on December 7, 2016, more than two years before the trial. The defendants submit that the plaintiff's condition has improved since she was last assessed by Dr. Mead-Wescott and that, therefore, Dr. Mead-Wescott's opinions are outdated. In support of the submission that the plaintiff's condition had improved, they point to the evidence of Dr. Travlos and to the plaintiff's own evidence. In my view the evidence of Dr. Travlos does not indicate a significant improvement in the plaintiff's cognitive symptoms. Although Dr. Travlos did state that the plaintiff's cognitive complaints were less in November 2018 than in January of 2016, he diagnosed continuing and persistent cognitive difficulties and he agreed with Dr. Mead-Wescott that these difficulties were brain injury related. Further, I do not agree that the plaintiff's own evidence established a significant improvement in her cognitive symptoms.
- [72] The final objection raised by the defendants to Dr. Mead-Wescott's opinions relates to Dr. Mead-Wescott's assumption that prior to MVA #1, the plaintiff was in the average range of overall intellectual abilities. They say that Dr. Mead-Wescott did not review the plaintiff's school records which she admitted would have been useful in establishing a baseline for the plaintiff. I reject this submission for several reasons. First, there is absolutely no evidence that the plaintiff's intellectual abilities before MVA #1 were below average. Second, Dr. Mead-Wescott did not admit the plaintiff's school records would have been of use in establishing a baseline. This question was not asked of her. Finally, Dr. Mead-Wescott testified that the field of neuropsychology has developed a variety of techniques for determining pre-accident baselines. One such technique is called the "Test of Premorbid Functioning" and was utilized by her in establishing the baseline for the plaintiff. There is no evidence that this baseline

was invalid.

4. Dr. Andrew Travlos

[73] Dr. Andrew Travlos, a physiatrist, examined the plaintiff on January 25, 2016 and November 7, 2018 and provided two reports, one dated January 25, 2016 and the second dated November 7, 2018.

[74] In his first report Dr. Travlos made the following diagnoses:

- a) He diagnosed the plaintiff as having two distinct types of headaches. The first type was a migraine headache of the sort that the plaintiff had experienced prior to MVA #1. He stated that the frequency of these headaches had increased following MVA #1 but, as the plaintiff had not had a migraine in the nine months preceding her visit, he opined that any effects of the accidents on the migraines had resolved. The second type of headache he identified as frontal headaches which was related to stress or visual changes. He opined that these headaches were in part accident related due to the increased stress the plaintiff was under as a consequence of the accidents.
- b) The plaintiff's complaints of dizziness did not fall into any particular category and he was not able to connect dizziness to MVA #1 other than to say that there might be some visual-vestibular mismatch that reflects an injury from the accident.
- c) With respect to the plaintiff's neck injury, his examination showed some mild soft tissue pains in the paraspinal muscles of the back of the neck but the plaintiff did not have much in the way of mechanical dysfunction of the neck.
- d) The left shoulder pain he attributed to a rotator cuff impingement and, as it arose in March of 2015, he stated it was difficult to attribute it to the accident other than as an indirect effect of exercising.
- e) In regards to the plaintiff's low back and left leg complaints, he found a minor degree of mechanical low back pain and tenderness in the left hip which he attributed to MVA #1.
- f) With respect to the plaintiff's complaints of cognitive difficulties and fogginess, he noted that these could be caused by a concussion but that they could also be caused by severe pain, by medications or by other emotional challenges following an acute event. He noted that the cognitive symptoms had improved.
- g) He concluded that ongoing issues of cognitive difficulty, chronic pain and visual changes, and other symptoms were not at a level where they would substantially impact her cognition but they would likely interfere with her life and with her perception of ill health.

[75] Dr. Tavlos' prognosis was that the plaintiff would continue to improve, that her accident-related headaches would resolve, that her neck and shoulder symptoms and pain would "settle down", and that her cognitive difficulties would improve.

[76] Concerning the functional limitations of the plaintiff, Dr. Travlos opined that she was capable of doing home chores and activities with some difficulty but heavier work should be delegated. He recommended against the plaintiff returning to running as an activity but otherwise found no reason to restrict the plaintiff in recreational or social activities. Vocationally, Dr. Travlos opined that the plaintiff was capable of continuing to work and recommended that she gradually increase her hours of work. He expected that she would eventually be able to return to her regular work activities. However, he also noted that it is possible she might have some ongoing physical complaints or cognitive symptoms that could limit her ability to work the hours she wants.

[77] Dr. Travlos' second report dated November 7, 2018 addressed MVA #2 and the plaintiff's current condition as of that time. He noted that MVA #2 was relatively minor but that the plaintiff complained of an injury to her right shoulder and a "flare" of her other symptoms. He opined that she had suffered some injuries from MVA #2 but it was not clear how to separate those from her prior symptoms.

[78] Based upon his examination of the plaintiff on November 7, 2018, Dr. Travlos found a general improvement in the plaintiff's symptoms as compared to her first examination on January 25, 2016:

... Based on today's assessment, her cognitive complaints are less, her headaches have improved, her low back symptoms have essentially resolved, her pelvic pains and symptoms have resolved, her pelvic pains and symptoms have resolved, and her symptoms down the sides of her legs have also resolved. The left shoulder impingement problem has resolved, as well. Her neck examination today was perhaps slightly worse than when last seen, but it is my opinion that overall she is better than she was when last seen. This does not, however, mean that she has recovered, but simply that she is not as symptomatic as she was.

[79] Dr. Travlos made the following diagnoses in his second report:

- a) The plaintiff's complaints of dizziness did not appear to be related to middle ear pathology and he did not consider it to be related to residual neck symptoms. He concluded the dizziness was due to a brain injury noting that the complaints were more related to visual stimuli while working on a computer and he speculated that there is likely some sort of central neurologic processing problem. He also speculated that the dizziness reflected post-head injury difficulties managing stimuli and being cognitively overwhelmed.
- b) In relation to her neck and shoulder problems, he found that the mechanical component of pain appeared to have worsened but the soft tissue component was less. He also noted that her shoulder problems had definitely resolved. He recommended the plaintiff begin weaning herself off physiotherapy but that she continue exercising. He further recommended continuation of three or four kinesiology sessions per year and recommended nortriptyline for neck and shoulder pains.

- c) Concerning cognition and mental health, he noted that the plaintiff's situation was complicated by her husband's health issues and by her son's involvement in an accident. He stated that it was clear the plaintiff continued to have persistent cognitive difficulties and that he considered these to be accident-related. He accepted the conclusions of Dr. Mead-Wescott that these cognitive difficulties were brain injury related as he did not find "any other significant diagnostic entities" that would be causing such complaints.
- [80] Dr. Travlos' prognosis was that the plaintiff had essentially plateaued in her recovery. He was of the view that her symptoms would continue indefinitely. He expected that she would need ten visits with a psychologist per year, three or four visits with a kinesiologist, and ten visits with a physiotherapist per year. He also recommended elsewhere in his report that the plaintiff wean herself off physiotherapy.
- [81] Concerning the plaintiff's functional limitations, Dr. Travlos again considered that she was capable of doing home chores and activities but opined that having some assistance in the home would help her both physically and emotionally. In regards to vocational restrictions, he noted that he agreed with the functional capacity evaluation of Alison McLean that the plaintiff had persistent restrictions in her abilities and was not competitively employable. He stated that the plaintiff required an accommodating employer and was not capable of working full-time.
- [82] Dr. Travlos' testimony given at the trial essentially confirmed the contents of his two reports. Concerning the plaintiff's migraine headaches, he clarified that such headaches can have a hormonal basis and can escalate with menopause before stopping completely post-menopause. The fact that the plaintiff had not had any migraines for the nine months preceding her first visit was consistent with her migraines being hormonal in nature. With respect to the plaintiff's complaints of dizziness, he confirmed in his testimony that he could not say it was related to the motor vehicle accidents. He further testified that in his practice he uses neuropsychological testing to assess patients. Importantly, in cross-examination he stressed that he did not rely on Dr. Mead-Wescott's reports for a diagnosis of brain injury. He relied on her neuropsychological assessment to reach his own diagnosis that the plaintiff had suffered a brain injury.
5. Dr. James Browning
- [83] Dr. Browning has been the plaintiff's treating psychologist since August of 2017. He prepared a report dated January 24, 2019. His opinion is neatly summarized at page 13 of his report as follows:

Based on my most recent assessment interview, the questionnaire data, the collateral interview and review of available documents, I am of the opinion that Ms. Hawkins has residual anxiety symptoms in response to ongoing pain, cognitive symptoms and disability that meet the DSM-5 criteria for Adjustment Disorder with Anxiety (309-24). Her intermittent mild depressive symptoms do not meet the criteria for a psychological disorder. She also has some specific anxiety and avoidance behaviour related to being a passenger in a car that meet the DSM-5

criteria for Specific Phobia, Situational (300.29). ...

[84] The defendants submit that Dr. Browning's report should be given little weight because he is the plaintiff's treating psychologist and, as such, he is not able to fulfil his duty to provide independent, impartial, and unbiased opinions. They also submit that he reaches a number of improper conclusions in his report regarding the ultimate issue in the case. I agree that because Dr. Browning is the plaintiff's treating psychologist his report must be scrutinized with care. However, I do not agree that this disentitles him from providing expert opinion evidence and the defendants have not provided any authority to this effect. I further do not agree that Dr. Browning has provided any opinion on the ultimate issue. He has merely opined that the plaintiff meets the criteria for Adjustment Disorder with Anxiety and Specific Phobia, Situational (300.29).

[85] Dr. Browning's testimony at the trial was not particularly illuminating beyond what is contained in his report. He did confirm in cross-examination that the plaintiff's anxiety symptoms had improved significantly and can now be classified as mild. He further confirmed that the plaintiff will largely recover from her Specific Phobia, Situational (300.29) with proper therapy which would take about six months.

6. Functional Capacity Experts

a) Alison McLean

[86] Alison McLean, occupational therapist, conducted functional capacity evaluations of the plaintiff on June 1 and 22, 2017 and provided a report dated July 20, 2017. She was retained by plaintiff's counsel. It was her opinion that because of the plaintiff's reduced physical tolerances she was restricted to part-time work of three to four hours per day.

It is my opinion that as a result of her reduced physical tolerances, Ms. Hawkins does not qualify for full-time work. She is restricted to part-time work, ideally no more than 3 to 4 hours per day consecutively or spread throughout the day, assuming that neither her work activities nor her non-work activities exceed her physical restrictions as summarized above, and she has the opportunity during the same day to carry out her symptom management strategies (including exercise, pacing, rest breaks, and avoidance of the types of visual stimulation that aggravate her symptoms).

[87] Ms. McLean further opined that the plaintiff was "non-competitively employable" because her physical restrictions limited her to part-time hours and required modified job duties or accommodations such as a "green-screen" over her computer monitor, optimal lighting conditions, and the ability to take short breaks and move around when needed.

[88] Importantly, Ms. McLean was also of the view that the plaintiff had given a full and consistent physical effort on both days of the assessment and it was her opinion that the results of the physical testing could be relied upon as being accurate.

[89] The defendants raise two objections to the report of Ms. McLean, both of which I reject. First, they say her report is outdated since she last assessed the plaintiff in June 2017. In the absence of any evidence of significant improvement in the plaintiff's overall condition, this objection is without merit. Second they say Ms. McLean provides opinions on matters outside her expertise. In particular, they say that she commented on the effects of the plaintiff's alleged mild traumatic brain injury. However, this is not what Ms. McLean did. She merely quoted from the report of Dr. Mead-Wescott. Ms. McLean reached her conclusions based upon the plaintiff's performance in the evaluation tests that she administered.

b) Sven Hartman

[90] The only expert called by the defendants was Sven Hartman, occupational therapist, who conducted a functional capacity evaluation of the plaintiff on January 11, 2019. His opinions are dramatically different from those of Ms. McLean.

[91] In summary, Mr. Hartman's findings were as follows:

- No functional limitations were noted with respect to reaching, handling, fingering, and upper limb coordination;
- No functional limitations were noted with general mobility and body dexterity;
- Concerning lifting, carrying, pushing and pulling, the plaintiff is capable of sedentary, light and partial medium strength demands;
- The plaintiff is functional for sitting for approximately 90 to 120 minutes which is functional for most jobs except jobs, such as truck drivers, that do not allow for occasional breaks; and
- The plaintiff's standing and walking ability are functional for most jobs.

[92] Mr. Hartman's opinion was that the plaintiff' musculoskeletal complaints had not affected the plaintiff's functional capacity:

The results of this evaluation did not reveal any functional impairment with respect to Ms. Hawkins' musculoskeletal complaints. Regarding her reported symptoms of dizziness and excessive fatigue with sustained computer screen use, no functional difficulties were noted with ~40 minutes of laptop use during this evaluation. There were no cognitive issues or symptoms of dizziness reported or observed during this 6.5 hour evaluation.

[93] He further opined that his evaluation did not disclose any impairments that would affect the plaintiff's ability to carry out her current job tasks or social functioning and that any pain she experienced did not adversely affect her functional abilities:

This evaluation did not reveal any impairments with respect to Ms. Hawkins' ability to carry out her current job tasks or social functioning.

Ms. Hawkins reports an inability to work the same number of hours as she used to, due to her impairments, although she is able to perform largely the same job tasks. An ICBC insurance claim application dated Feb. 23, 2016 indicates she worked about 20 hours a week pre-accident for Westwind prior to the 2nd accident. She reported to this evaluator that she likely worked about 30 hours a week prior to the first accident. Taking both of her current jobs into account, she is working 15 to 17 hours per week for the psychologists' office, and 5-7 hours per week for Westwind, totaling 20 to 24 hours per week. This is between 6 and 10 hours per week less than prior to the first accident.

While she reported increased musculoskeletal pain at the end of this evaluation, this pain did not affect her with respect to repeat testing of range of motion, speed of movement, and completion of a light handling task. Put another way, while she reported that the effects of the FCE testing significantly increased her pain, she did not exhibit adverse functional impacts of this increased pain. Therefore, objectively, there was no functional impact of the testing and other than her increased pain report, she appeared to tolerate testing well.

[94] Mr. Hartman finally opined that the plaintiff's physical condition did not limit the types of employment that she might do.

[95] As with Ms. McLean, Mr. Hartman considered that the plaintiff had given high levels of effort during the testing and was of the opinion that his results provided an accurate measure of the plaintiff's functional levels.

[96] In cross-examination, Mr. Hartman confirmed that his testing of the plaintiff was confined to musculoskeletal issues and that he did not consider or test for the cognitive aspects of the plaintiff's complaints. He also confirmed in cross-examination that in preparing his report he did not have access to any clinical records past 2016, he was unaware the plaintiff had been seen by Dr. Mead-Wescott and Dr. Travlos and he had not seen their reports.

[97] I reject the opinions of Mr. Hartman in favour of those expressed by Ms. McLean. My reasons are as follows:

- Mr. Hartman's conclusions are contrary to and inconsistent with not only the opinions of Ms. McLean but also the opinions of Dr. Mead-Wescott and Dr. Travlos.
- Ms. McLean's testing was far more expansive than the testing done by Mr. Hartman. More specifically, Ms. McLean included cognitive elements in her testing, such as a Valpar 8 test to assess dizziness, whereas Mr. Hartman did not.
- Mr. Hartman completely ignored the cognitive aspects of the plaintiff's complaints when conducting his assessment. Considering the fact that these complaints are the most significant, the failure to consider them renders Mr. Hartman's report virtually useless.

III. Issues

[98] The issues are:

- a) What injuries did the plaintiff suffer in MVA #1 and MVA #2 and how have they affected her?
- b) What is an appropriate award for general damages?
- c) Is the plaintiff entitled to an award for past loss of earning capacity or past income loss and, if so, in what amount?
- d) Is the plaintiff entitled to an award for future loss of earning capacity and, if so, in what amount?
- e) What are the plaintiff's special damages?
- f) What is an appropriate award for the costs of future care?

IV. Analysis

A. What injuries did the plaintiff suffer in MVA #1 and MVA #2 and how have they affected her?

1. The Injuries

[99] The plaintiff claims that she suffered a mild traumatic brain injury in MVA #1 as well as injuries to her neck, left shoulder, low back, and left leg, and associated headaches and chronic pain. The plaintiff further claims the injuries to her neck, left shoulder, and low back were aggravated by MVA #2. She claims the injuries have caused pain and suffering, have seriously negatively affected her enjoyment of life, have negatively affected her ability to work, and have caused a continuing loss of income or loss of capacity to earn income.

[100] The defendants accept that the plaintiff suffered injuries in the accidents, particularly MVA #1. However, they submit that the plaintiff has experienced significant improvement and that the headaches, hearing loss and anxiety are not accident related and contribute to her ongoing difficulties.

a) Traumatic Brain Injury

[101] The most serious complaint of the plaintiff relates to the traumatic brain injury allegedly suffered in MVA #1. The defendants deny that the plaintiff suffered any such injury.

[102] I am more than satisfied that the plaintiff suffered a mild traumatic brain injury in MVA #1 and that she continues to suffer from such an injury. Although there was no evidence of the plaintiff hitting her head in MVA #1, the evidence of the plaintiff and Mr. Iacobellis is that the plaintiff suffered an immediate loss of memory, nausea, and dizziness followed by headaches and double vision. The evidence of the plaintiff's friends, Ms. Bond and Ms. Buziol, and her employer, Mr. Dorey, also confirm the symptoms associated with a brain injury. They all described a dramatic change in the plaintiff following MVA #1. Ms. Bond confirmed the plaintiff suffered from dizziness, forgetfulness, and struggled to find words. Ms. Buziol testified the plaintiff was easily confused, repeated herself, and lost her facility with numbers. Mr. Dorey testified that the plaintiff's work product was not at the same high level it had been before the accident. When she returned to work after MVA #1, all her work

needed to be double-checked for mistakes.

- [103] Dr. Mead-Wescott found that the plaintiff suffered from several cognitive deficits, including in relation to memory, learning, and language. Although Dr. Mead-Wescott was not qualified to give a diagnosis of traumatic brain injury, Dr. Travlos was so qualified. In his second report, Dr. Travlos stated that the plaintiff's persistent cognitive difficulties were related to a brain injury suffered in the accidents. He was unable to find any other explanation for the plaintiff's ongoing symptoms. He further clearly stated in answer to a question posed in cross-examination that it was his diagnosis that the plaintiff suffered from a traumatic brain injury. He was not merely repeating Dr. Mead-Wescott's inadmissible diagnosis but was relying on her admissible neurological assessments for his own diagnosis of brain injury. Additionally, Dr. Shaw opined that the plaintiff had suffered a concussion in MVA #1.
- [104] The cognitive deficits of the plaintiff as identified by Dr. Mead-Wescott, and which I accept, include mild to moderate deficits in learning and memory, mild difficulties on tests of sustained attention, mild weakness on measures of expressive language, and mild weakness on measures of visuospatial functioning. As a consequence of these deficits, I further accept that the plaintiff is slower and less efficient at learning new information, has difficulty concentrating or maintaining focus of attention, and has difficulties with oral and written communication. In addition to these deficits identified by Dr. Mead-Wescott, I find that the dizziness experienced by the plaintiff is a consequence of the traumatic brain injury as opined by Dr. Travlos in his second report.
- [105] As to the effects of the plaintiff's cognitive deficits, Dr. Mead-Wescott opined that these deficits would make her less efficient in the workplace and probably increase her levels of frustration. She also noted that ongoing accommodations in the workplace would be necessary such as reduced hours, frequent breaks, use of memory aids, and less demand for communication skills.
- [106] The defendants submit that the plaintiff's cognitive issues had improved by the time of the trial. They say that the plaintiff admitted to improvement, that Ms. Bond testified to an improvement, and that Dr. Travlos indicated an improvement. The defendants' submissions, as far as they go, are correct. However, the improvement is not substantial. Ms. Bond testified to noticing an improvement only in relation to episodes of dizziness while on walks. Dr. Travlos did state in his second report that there had been improvement in the cognitive symptoms, however, he also stated that the plaintiff continued to have persistent cognitive difficulties. Finally, although the plaintiff did admit to some improvement such as the double vision resolving by 2016 and fewer episodes of dizziness, it was clear that the improvement was not substantial. She testified that her continuing cognitive problems include some episodes of dizziness when working at her computer, difficulties with multi-tasking and organizing, and continuing difficulties with concentrating and maintaining attention. She further testified to continuing memory problems stating in cross-examination that while at the gym she cannot remember

routines. She further testified that she generally continues to struggle at work. Mr. Dorey also confirmed that as of the date of the trial, the plaintiff's cognitive difficulties persisted.

b) Headaches

[107] The evidence clearly established that prior to MVA #1, the plaintiff had a history of migraine headaches. However, I accept the evidence of Drs. Shaw and Travlos that these migraine headaches were hormonal in nature and related to the plaintiff's menstrual cycle. I further accept that these migraine headaches stopped when the plaintiff entered post-menopause. The plaintiff's complaints of headaches following MVA #1 are of a different nature from the migraines she experienced before MVA #1.

[108] I find that the periodic frontal headaches suffered by the plaintiff are a consequence of MVA #1. There has been some improvement in these headaches but they still occur periodically, particularly with computer use.

c) Injuries to neck, shoulders, low back, and left leg

[109] The evidence amply discloses that the plaintiff suffered soft tissue injuries to her neck, shoulders, low back, and left leg and hip, all of which are attributable to at least MVA #1.

[110] The defendants correctly submit that the left shoulder impingement injury identified in March 2015 and referred to in Dr. Travlos' first report was not caused by MVA #1. Dr. Travlos stated that it was difficult to attribute this injury to the accident other than as an indirect effect of exercising. Accordingly, I find that this injury was not directly caused by MVA #1. However, I also note, that this injury resolved in January of 2016 and was, therefore, of relatively short duration.

[111] The plaintiff also suffered injuries to her right shoulder and arm in MVA #2 which had resolved prior to the trial.

[112] The injuries to the plaintiff's neck, shoulders, low back, and left leg and hip caused ongoing pain and required extensive treatments. All of the experts are in agreement on these injuries although they tended to focus on different aspects of the injuries. Dr. Shaw's report diagnosed soft tissue injuries affecting the neck, upper back and trapezius, and lower back. Dr. Lapuste diagnosed soft tissue injuries and associated pain to the neck, shoulder, and back. Dr. Travlos identified injuries and associated pain to the neck, low back, left leg, and left hip.

[113] The plaintiff's injuries to the neck, shoulders (excluding the left shoulder impingement injury), low back, and left hip required extensive and ongoing treatments. The treatments included multiple and continuous visits to her treating physicians, various medications, massage therapy in 2014, intramuscular injections, and regular physiotherapy sessions.

[114] There is some inconsistency in the evidence as to whether the low back injury and associated pain had resolved by the time of the trial. Dr. Travlos noted in his second report that the injuries involving the low back and left leg had resolved and that the neck pain was

worse. Dr. Lapuste, in her report of January 20, 2019, noted ongoing pain and stiffness and she specifically referred to complaints of neck and back pain in November of 2018. It was the plaintiff's evidence that she still experiences pain in her back and shoulders. I accept the plaintiff's evidence and find as a fact, that the plaintiff has ongoing pain associated with the soft tissue injuries to her neck and back.

d) Anxiety

[115] Dr. Browning, whose opinions I accept, diagnosed the plaintiff as having residual anxiety symptoms in response to ongoing pain, cognitive symptoms, and disability that meet the DSM-5 criteria for Adjustment Disorder with Anxiety (309.24) and further diagnosed specific anxiety and avoidance behaviour that meets the DSM-5 criteria for Specific Phobia, Situational (300.29). He testified that the anxiety symptoms had improved significantly and could now be classified as mild. He further testified that the plaintiff would largely recover from her Specific Phobia, Situational (300.29) with proper therapy.

[116] Although I accept that the plaintiff suffers from ongoing anxiety symptoms, primarily related to MVA #1, I also accept the submissions of the defendants that other factors unrelated to MVA #1 and MVA #2 have affected the plaintiff's anxiety and stress levels. Specifically, I find that the injury to her youngest son, the heart attack suffered by Mr. Iacobellis, and the financial strain put upon the family by Mr. Iacobellis' temporary removal from the workforce, all contributed to the plaintiff's stress and anxiety. However, the contribution of these events to the plaintiff's stress and anxiety had ended well before the time of the trial. I find that the ongoing stress and anxiety is solely due to MVA #1.

e) Summary of Injuries

[117] I find that the plaintiff has suffered the following injuries and symptoms in MVA #1:

- A mild traumatic brain injury with associated symptoms including vertigo, nausea, dizziness, headaches, double vision, weakness in learning, memory and concentration, and language difficulties;
- Residual anxiety symptoms that meet the DSM-5 criteria for Adjustment Disorder with Anxiety (309.24) and the DSM-5 criteria for Specific Phobia, Situational (300.29); and
- Soft tissue injuries to her neck, upper back, lower back, and trapezius, all with associated pain and sleep problems.

[118] The plaintiff's soft tissue injuries were mildly aggravated by MVA #2. In addition, the plaintiff suffered a soft tissue injury to her right shoulder in MVA #2 which resolved within a relatively short time frame. The plaintiff's cognitive symptoms were not affected by MVA #2.

[119] Since the date of MVA #1, the plaintiff's symptoms have improved. The vertigo, double vision, and sleep problems completely resolved in 2016. The frequency of headaches has improved and there has been some improvement in her cognitive issues. However, her continuing cognitive difficulties are dizziness, reduced concentration and attention,

memory problems, language difficulties, and reduced ability to multi-task and organize. She also continues to suffer pain and early onset of fatigue, primarily as a result of her low back, neck, and shoulder injuries. Her anxiety symptoms also continue although they are reduced.

2. Affects on Life and Employment

[120] The effects of the injuries suffered by the plaintiff have been dramatic and are ongoing. The plaintiff's evidence in this regard, as corroborated by the lay witnesses, was compelling. Prior to MVA #1 she worked out at the gym four to six days per week, hiked the Grouse Grind two to three times per week, skied at Whistler, had an active social life, did all of the housework, cleaning, shopping and laundry for her family, and worked at a job in which she excelled and in which she obviously took great pride and pleasure. Subsequent to MVA #1, her life changed dramatically due to pain, fatigue, and cognitive disabilities. She was no longer able to hike the Grouse Grind or ski at Whistler. Her social activities reduced dramatically. She was no longer able to do all of the housework she did before. Most significantly, her cognitive abilities have been adversely affected. She has a reduced ability to concentrate or maintain attention. She has memory retention issues. She experiences language difficulties. She has a reduced ability to multi-task and organize. These cognitive issues have had a very significant impact on her enjoyment of life and on her ability to work, have affected her self-esteem, and are the source of considerable frustration and anxiety.

[121] The defendants submit that the plaintiffs ongoing difficulties are due to other injuries or issues unrelated to MVA #1 or MVA #2. Specifically, they say the plaintiff's hearing loss, the cardiac issues of Mr. Iacobellis, and the motor vehicle accident involving the plaintiff's son in 2016 all contribute to the plaintiff's ongoing difficulties. I accept that all of these events would have had an impact on the plaintiff at the time they occurred and, indeed, the plaintiff admitted as much in her evidence. However, I do not accept that these various events contribute to the plaintiff's ongoing problems. With respect to the plaintiff's hearing loss, there is absolutely no evidence that this is an ongoing issue for her. She was specifically asked in cross-examination if the hearing loss caused difficulties in social settings or added to her stress. Her response was that it made it more difficult to hear everyone if she was at a large table of 20 but she denied it caused her any stress. It was simply something to which she adjusted. I accept the plaintiff's evidence in this regard. With respect to Mr. Iacobellis' cardiac issues and her son's motor vehicle accident, the plaintiff was clearly and understandably seriously affected by these traumas. However, there is no evidence that these events continue to adversely affect her.

B. What is an appropriate award for general damages?

[122] The plaintiff submits that an appropriate award for general damages is \$145,000. The defendants submit that the award should be in the range of between approximately \$65,000 and \$85,000.

1. The Stapley Factors

[123] Some of the factors to be considered when assessing general damages for pain and suffering are set out in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46:

[46] The inexhaustive list of common factors cited in *Boyd [v. Harris (2004)]*, 237 D.L.R. (4th) 193] 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).

[124] I intend to briefly address each of the Stapley factors.

a) Age of the plaintiff

[125] The plaintiff was 55 years of age as of the time of the trial.

b) Nature of the injury

[126] As set out above, the plaintiff has suffered cognitive impairments as a consequence of a mild traumatic brain injury, soft tissue injuries to her neck, back, shoulders, and anxiety. The most significant injuries are the cognitive impairments of reduced concentration and attention, memory problems, language difficulties, and reduced ability to multi-task and organize. These have had a profound and dramatic effect on the plaintiff. The soft tissue injuries are less significant but nevertheless serious.

c) Severity and duration of pain

[127] As a consequence of the soft tissue injuries, the plaintiff suffers from pain, which is now chronic, headaches, and fatigue. All of these symptoms are exacerbated by sitting for periods for more than one hour at a computer.

d) Disability

[128] The injuries have not rendered the plaintiff completely disabled but have dramatically affected her ability to work. The soft tissue injuries, chronic pain, and fatigue have reduced the hours she is capable of working. The cognitive impairments have adversely affected the plaintiff's work performance and have severely limited her occupational choices.

e) Emotional suffering

[129] There is no doubt but that the injuries suffered by the plaintiff in MVA #1 have taken an emotional toll on her. It is clear on the evidence that prior to MVA #1 she was a happy, outgoing, social individual who was successful in her occupation and enjoyed the respect and confidence of her employer. Subsequent to MVA #1, she has struggled with the limitations imposed on her by her injuries and has suffered from ongoing anxiety and severe frustration.

f) Impairment of lifestyle, relationships and abilities

[130] As I have indicated above, the effects of the plaintiff's injuries on her lifestyle and abilities have been dramatic and are ongoing. She can no longer enjoy all of the recreational activities she did prior to MVA #1. She is less active socially. She cannot do all of the housework that she did before. More importantly, the cognitive impairments from which she suffers have seriously negatively affected her self-esteem and confidence and her working abilities.

g) Stoicism

[131] I was impressed by the stoicism of the plaintiff. In my view, she has made and continues to make every effort to overcome her injuries. She has now reluctantly accepted that she must live within the limitations imposed by her injuries.

2. Authorities

[132] The plaintiff has referred me to *Gauthier v. Dubois*, 2018 BCSC 229; *Joel v. Paivarinta et al.*, 2005 BCSC 73; *Crozier v. Insurance Corporation of British Columbia*, 2019 BCSC 160; and *Benson v. Day*, 2014 BCSC 2224, as supporting a claim for general damages in the amount of approximately \$145,000. The defendants refer me to *Hardychuk v. Johnstone*, 2012 BCSC 1359; *Barr v. Accurate Transmission and Driveline*, 2016 BCSC 2432; *Mandra v. Lu*, 2014 BCSC 2199; and *Park v. Donnelly*, 2017 BCSC 778, as supporting a claim for general damages in the range of approximately \$65,000 to \$85,000.

[133] I have reviewed all of the cases referred to me. I do not consider that the authorities relied upon by the defendants are helpful in determining a range of acceptable damages. In *Hardychuk*, the Court found no ongoing concussion or post-concussion symptoms. In *Barr* and *Park*, although the Court found the respective plaintiffs had suffered a mild traumatic brain injury and symptoms of a post-concussion syndrome, the symptoms were much less severe than in the present case. In *Mandra*, there was no finding of a traumatic brain injury

or of cognitive disorders. In contrast, the cases relied upon by the plaintiff are more comparable to the matter before me. In particular, *Gauthier*, where the plaintiff was awarded \$145,000 in today's dollars and *Joel*, where the plaintiff was awarded \$140,000 in today's dollars, are the most comparable. However, although the fairness of an award of general damages is measured against awards in similar cases, such cases are only a guide. Every case depends on its own facts.

[134] After considering all of the evidence and the cases to which I have been referred, I assess the plaintiff's general damages at \$140,000.

C. Is the plaintiff entitled to an award for past loss of earning capacity or past income loss and, if so, in what amount?

[135] The principles applicable to an assessment of loss of income claims are neatly summarized by Justice Dardi in *Carrillo v Deschutter*, 2018 BCSC 2134, as follows:

[111] An award of damages for loss of earning capacity, whether past or future, is compensation for a pecuniary loss: *Hardychuk v. Johnstone*, 2012 BCSC 1359 at para. 175 [Hardychuk]. The purpose of such an award is to restore, as best as possible with a monetary award, an injured plaintiff to the position he or she would have been in had the negligence not occurred. The Court must endeavour to quantify the financial harm accruing to the plaintiff over the course of his or her working career: *Pett v. Pett*, 2009 BCCA 232 at para. 19.

[112] The appellate authorities establish that the plaintiff must demonstrate both an impairment to his or her earning capacity and that there is a real and substantial possibility that the diminishment in earning capacity will result in a pecuniary loss. If the plaintiff discharges that requirement, he or she may prove the quantification of that loss of earning capacity either on an "earnings approach" or a "capital asset" approach: *Perren v. Lalari*, 2010 BCCA 140 at para. 32 [Perren]. The earnings approach is more appropriate when the loss is more easily measurable: *Perren*. Under either approach, the plaintiff always must prove that there is a real and substantial possibility of hypothetical events leading to an income loss: *Perren*, at para. 33; *Pololos v. Cinnamon-Lopez*, 2016 BCSC 81 at para. 133 [Pololos]; *Rousta v. MacKay*, 2018 BCCA 29 at para. 14 [Rousta].

[113] The Court in *Falati v. Smith*, 2010 BCSC 465 at para. 41, *aff'd* 2011 BCCA 45 [Falati], provided an instructive distillation of the principles which inform the assessment of loss of earning:

(i) The standard of proof is not the balance of probabilities. A plaintiff is entitled to compensation for real and substantial possibilities of loss, *Reilly v. Lynn*, 2003 BCCA 49 at para. 101. Hypothetical events are to be given weight according to their relative likelihood: *Athey* at para. 27.

(ii) The court must make allowances for the possibility that the assumptions upon which an award is based may prove to be wrong: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 79 (S.C.), *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.) [Milina].

- (iii) The court must assess damages for loss of earning capacity based on the evidence, taking into account all positive and negative contingencies. The task of the court is to assess the losses, not to calculate damages with mathematical precision: *Mulholland (Guardian ad litem of) v. Riley Estate* (1995), 12 B.C.L.R. (3d) 248 at para. 43.
- (iv) The overall fairness and reasonableness of the award must be considered: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 11.
- [114] To this list, I would add that evidence which supports a contingency must show a "realistic as opposed to a speculative possibility": *Graham v. Rourke* (1990), 75 O.R. (2d) 622 at 636 (C.A.).
- [115] A claim for "past loss of income" is properly characterized as a component of loss of earning capacity: *Falati*, at para. 39. It is subject to the same legal test as a claim for loss of future earning capacity. It is compensation for the impairment to the plaintiff's past earning capacity that was occasioned by his or her injuries: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30 [Rowe]; *Bradley v. Bath*, 2010 BCCA 10 at paras. 31-32.
- [116] While the burden of proof relating to actual past events is a balance of probabilities, a past hypothetical event will be considered in a damages assessment as long as it was a real and substantial possibility and not mere speculation: *Athey* at para. 27. *Rowles J.A.* in *Smith v. Knudsen*, 2004 BCCA 613, rejected the proposition that a claim for past loss of opportunity had to be established on a balance of probabilities. She clarified that the same test applies regardless of whether the court is considering hypothetical events in the assessment of past or future loss of earning capacity. She expounded at para. 29:
- [29] What would have happened in the past but for the injury is no more 'knowable' than what will happen in the future and therefore it is appropriate to assess the likelihood of hypothetical and future events rather than applying the balance of probabilities test that is applied with respect to past actual events.
- [117] In sum, the assessment of past or future loss of earning capacity requires the court to estimate a pecuniary loss by weighing possibilities and probabilities of hypothetical events: *Grewal v. Naumann*, 2017 BCCA 178 at para. 49 [Grewal]. The test to be applied to hypothetical events, past and future, is whether there is a real and substantial possibility that the events in question would occur or would have occurred absent the defendant's negligence: *Rousta* at para. 14. In advancing a claim for the loss of income-earning capacity, whether past or future, the plaintiff must always prove a real and substantial possibility of an income loss, as opposed to a theoretical one. In other words, the award cannot be based on mere speculation; *Grewal* at para. 48; *Rousta* at para. 17. While the onus on the plaintiff is not a heavy one, it must nonetheless be met in order to justify a pecuniary award. *Kim v. Morier*, 2014 BCCA 63 at para. 7.

- [136] The plaintiff submits that, as a consequence of the accidents, she has suffered a loss of income in the total amount of \$85,000. The defendants submit that the loss of income is in the amount of \$26,000.
- [137] At the time of MVA #1, the plaintiff was earning \$30 per hour at Westwind and was working approximately 30 hours per week for a total annual income of approximately \$40,000. This is confirmed by her income tax returns for 2012 and 2013 which disclose T4 incomes of \$40,600 and \$38,500, respectively. Subsequent to MVA #1, her tax returns for 2014 through 2017 disclose T4 earnings of \$29,600, \$26,900, \$31,300, and \$12,200, respectively. The plaintiff's tax return for 2018 was not entered into evidence at trial but her evidence was that she believed she earned approximately \$30,000 in 2018.
- [138] The parties each entered into evidence the report of an economist to address the loss of income claims. The plaintiff introduced a report dated January 23, 2019 prepared by Darren Benning. The defendants introduced a report dated March 4, 2019 prepared by Mark Szeleky.
- [139] The report of Mr. Benning calculates the plaintiff's gross past loss of income to the date of trial at approximately \$133,000. He then deducts income tax and employment insurance premiums to arrive at a net total past loss of income of \$98,517. His calculations assume that the plaintiff would have earned \$40,000 per year in each of 2013 and 2014 and \$60,000 per year from 2016 onwards. The increase to \$60,000 per year is due to a further assumption that the plaintiff would have started to work full-time at Westwind in 2016.
- [140] The plaintiff accepts that some deduction in the \$98,517 amount calculated by Mr. Benning is appropriate to take into account the possibility that the plaintiff's plan to work full-time for Westwind would not have materialized. The plaintiff submits that an appropriate deduction to take into account this contingency is \$13,500 reducing the total amount claimed for past loss of income to \$85,000.
- [141] The report of Mr. Szeleky calculates the past loss of income based on an assumption that the plaintiff would have continued to earn \$40,000 per year from 2016 onwards. In other words, Mr. Szeleky's calculation is based on the plaintiff continuing to work 30 hours per week. Under this assumption, Mr. Szeleky calculates the plaintiff's gross loss of income at approximately \$67,000 and her net loss after deductions for income tax and employment insurance premiums at \$52,301. However, the defendant submits that a further deduction from this amount must be made to take into account the fact that the plaintiff would have taken significant time off work in 2015 and 2016 to care for her husband after his heart attack and her son after his motor vehicle accident.
- [142] The table below summarizes the calculations of each of the experts

2014

2015

2016

2017

2018

2019 (prorated)

Totals

Actual Earnings

\$29,634

\$26,908

\$31,335

\$18,000

\$30,000

\$9,200

Gross Loss - Benning

\$10,366

\$13,092

\$28,665

\$42,000

\$30,000

\$9,199

\$133,322

Gross Loss - Szeleky

\$10,366

\$13,092

\$8,665

\$22,000

\$10,000

\$3,068

\$67,191

Gross Loss - Average

\$10,366

\$13,092

\$18,665

\$32,000

\$20,000

\$6,133

\$100,256

Net Loss -Benning

\$7,567

\$9,516

\$20,482

\$31,649

\$22,495

\$6,809

\$98,518

Net Loss -Szeleky

\$8,130

\$10,163

\$6,786

\$17,013

\$7,800

\$2,409

\$52,301

Net Loss -Average

\$7,848

\$9,839

\$13,634

\$24,331

\$15,147

\$4,609

\$75,408

[143] The first issue I must determine is whether there was a real and substantial possibility of the plaintiff working full-time at Westwind in 2016. This involves a consideration of two factors; first, whether the plaintiff truly intended to work full-time in 2016 and, second, whether there was full-time work available to her at Westwind. With respect to the plaintiff's intentions, both the plaintiff and Mr. Iacobellis testified that it was her intention to work 40 hours per week once her youngest son was finished high school. I accept this evidence as it is consistent with their financial circumstances. However, I have serious reservations as to the second factor. Westwind underwent a dramatic change in 2014. It lost a major client and two of the partners left the company. The following year the company closed its physical office and Mr. Dorey and the plaintiff commenced working from their homes. Mr. Dorey testified that the prospects of the company were good and gave evidence that there was more work for the plaintiff but he was not able to say how much more work was available for her. I do not accept this evidence or any implication from the evidence that Westwind would have hired the plaintiff to work full-time in 2016. Elsewhere in his evidence Mr. Dorey testified that with her limited hours, the plaintiff was getting the work done that she needed to do. This is not consistent with Westwind needing her services full-time. Additionally, the plaintiff's efforts to find alternative employment in 2017 and her accepting part-time work at Lonsdale Psychology is not consistent with Westwind needing her services full-time. She would surely have worked more hours at Westwind for \$30 per hour rather than accept employment at Lonsdale Psychology for \$18 per hour. Considering all of the evidence, I find there was not a real and substantial possibility that Westwind would have hired the plaintiff full-time in 2016 or at any time thereafter.

[144] To satisfy her intent to work full-time, the plaintiff would have had to secure additional employment hours with a company other than Westwind. However, it is likely that the plaintiff would have been paid between \$18 and \$24 per hour for that additional work, the rate of pay she received at Lonsdale Pharmacy. This would roughly translate to a gross annual income of between \$50,000 and \$55,000 per year from 2016 onwards, depending on the number of hours per week she worked at Westwind. Further, assuming an income earning capacity of \$50,000 per year from 2016 onwards, the plaintiff's gross loss of income to the date of the trial would have been approximately \$94,000. At \$55,000 per year her gross loss of income to the date of the trial would have been approximately \$113,000. These figures translate to a total net loss of income in an amount of between \$75,000 and \$90,000.

- [145] Further, I am of the view that a reduction should be made to take into account the possibility that the plaintiff would not have worked full-time. In my opinion this deduction should be in the amount of 10% which reduces the net loss of income range to between \$67,500 and \$81,000.
- [146] I am further of the view that an adjustment must be made, as the defendants submit, to take into account the fact that Mr. Iacobellis suffered a serious heart attack in 2015 and the plaintiff's youngest son was injured in a motor vehicle accident in August of 2016. It is absolutely certain that the plaintiff would have taken time off work to care for her husband and to care for her child. The evidence was that the plaintiff was an extremely devoted mother. She would certainly have taken whatever time was needed to care for her husband and son. In fact, Mr. Dorey testified that she took time off but did not say how much. The defendants apply a 50% reduction to Mr. Szeleky's total loss calculation for this contingency, or \$26,000. This equates to approximately eight months off work and is, in my view, grossly excessive. There is absolutely no evidence that the plaintiff took such a lengthy period of time off work. To take this contingency into account, I deduct \$7,000 which reduces the net loss of income range to between \$60,500 and \$74,000.
- [147] I am mindful that the assessment of past loss of earning capacity is not a precise calculation but an assessment. Considering all of the evidence, I am satisfied that \$70,000 is an appropriate award for past loss of income or past loss of earning capacity.
- D. Is the plaintiff entitled to an award for future loss of earning capacity and, if so, in what amount?
- [148] The plaintiff claims an award of \$300,000 for future loss of earning capacity. The plaintiff again submits that, but for the accident, she would have earned approximately \$60,000 per year until age 67 or 70. The plaintiff again relies on the report prepared by Mr. Benning who assumed the plaintiff will suffer an annual income loss of \$30,000 per year. According to his report, if the plaintiff retired at age 70, the present value of her income loss would be \$308,400 and, if she retired at age 67, the amount would be \$261,360.
- [149] The defendants accept that the plaintiff is entitled to an award for future loss of earning capacity but submit that the award should be in the amount of approximately \$24,000. The defendants again submit that the plaintiff would have earned no more than \$40,000 annually and further submit that she would have retired at age 60.
- [150] I note that both parties are in agreement that the plaintiff's future loss of earning capacity should be assessed using the earnings approach rather than the capital asset approach. Further, the parties agree that the plaintiff's actual earnings going forward will be in the approximate amount of \$30,000 per year, a figure which I accept and which is largely supported by the plaintiff's earning history since MVA #1.

- [151] The two main areas of disagreement between the parties relate to the plaintiff's earning potential had the accidents not occurred and to when she would have retired. The plaintiff's earning potential had the accidents not occurred has been addressed in the above analysis of the plaintiff's past income loss. For the reasons there set out, I find that, but for the accidents, there was a real and substantial possibility the plaintiff would have worked full-time from 2016 onwards and would have earned between \$50,000 and \$55,000 per year.
- [152] With respect to when the plaintiff would have retired had the accidents not occurred, the evidence on this point was not particularly extensive. The plaintiff testified that she had no retirement plans, that at the time of MVA #1 she thought she would be working for a long time and that she did not have the financial means to retire. Mr. Iacobellis similarly testified that he did not have the financial means to retire and that their retirement plan was to continue working as long as they were healthy. Based upon this testimony and the plaintiff's tax returns, which show a moderate income, I am satisfied that retirement at the age of 60 was not contemplated by the plaintiff and would not have been realistic. However, the evidence also falls short of establishing the plaintiff would work until age 67 or 70. In the circumstances, all that I am prepared to accept is that, absent the accidents, the plaintiff would have worked to age 65.
- [153] Thus, based on my findings above, the plaintiff's future loss of income will be between \$20,000 and \$25,000 per year until the plaintiff reaches age 65. Using the economic multiplier from Mr. Benning's report, this translates to a present value loss of between \$162,000 and \$202,000.
- [154] As in the calculation of past income loss, I am of the view that a reduction should be made to take into account the possibility that the plaintiff would not have worked full-time. Again, I am of the opinion that this deduction should be in the amount of 10% which reduces the future loss of income range to between \$146,000 and \$182,000.
- [155] I must also consider the possibility of other events occurring that could positively or negatively affect the plaintiff's future income loss. The contingences I should consider include: the possibilities that the plaintiff's condition might improve or deteriorate; and the possibilities that she might retire earlier or later than 65. In my view neither of these contingencies have a significant impact on the plaintiff's future income loss. Given the expert medical evidence, the plaintiff's recovery has plateaued and she is not likely to see either a marked improvement or deterioration. I also consider that the likelihood of the plaintiff retiring earlier than age 65 is the same as the likelihood of her retiring later than age 65.
- [156] Considering all of the evidence and keeping in mind that the assessment of future loss of capacity is not a precise calculation, I am satisfied that \$170,000 is a fair and reasonable award for loss of future earning capacity in the circumstances of this case.

E. What are the plaintiff's special damages?

[157] The plaintiff claims special damages of \$24,000 calculated as follows:

Item

Amount

Physiotherapy

\$9,067.80

Massage Therapy

\$500.00

Psychological Treatment

\$1,950.00

Physical Therapy/Fitness

\$6,473.50

Home Care Services

\$3,202.50

Other

\$2,924.94

Total

\$24,118.74

[158] The defendants submit that a claim for special damages must be fair and reasonable. They refer me to *Redl v. Sellin*, 2013 BCSC 581, where the Court stated the following:

[151] Generally speaking, claims for special damages are subject only to the standard of reasonableness. However, as with claims for the cost of future care (see *Juraski v. Beek*, 2011 BCSC 982; *Milina v. Bartsch* (1985), 49 BCLR (2d) 33 (BCSC)), when a claimed expense has been incurred in relation to treatment aimed at promotion of a plaintiff's physical or mental well-being, evidence of the medical justification for the expense is a factor in determining reasonableness. I accept the argument expressed through Dr. Frobb, that a patient may be in the best position to assess her or his subjective need for palliative therapy. I also accept the plaintiff's counsel's argument that in the circumstances of any particular case, it may be possible for a plaintiff to establish that reasonable care equates with a very high standard of care. In the words of Prof. K. Cooper-Stephenson in *Personal Injury Damages in Canada*, (2d ed., 1996) at p. 166:

Even prior to the Supreme Court's endorsement of the restitution principle [in *Andrews v. Grand & Toy Alberta Ltd.* and *Arnold v. Teno*], in the area of special damages the courts had been prepared to allow optimum care, and damages were awarded for expenses of a character that stretched far beyond the resources of even an affluent Canadian.

That being said, and while Dr. Frobb's paradigm of the patient becoming their own physician may have at least a superficial appeal, plaintiffs are not given *carte blanche* to undertake any and all therapies which they believe will make them feel good.

[159] The defendants specifically object to the claim for physical therapy or fitness expenses which is, in essence, for a personal trainer. I agree that this amount is not justified. The plaintiff regularly attended the gym prior to MVA #1 and would not have the need for a personal trainer other than possibly for a few sessions to address new exercises. Although Dr. Travlos recommended that the plaintiff exercise, he did not recommend that the plaintiff have a personal trainer. The expense of a personal trainer is not, in my view, justified.

[160] The defendants further object to the amount claimed for physiotherapy, which they say is excessive. I agree that the amount claimed is large but physiotherapy treatments were recommended by Drs. Shaw, Lapuste, and Travlos. Further, although Dr. Travlos recently suggested the plaintiff should wean herself off of physiotherapy, he nevertheless recommended that she continue for at least ten more sessions. Accordingly, I am satisfied the amount claimed for physiotherapy is justified.

[161] I allow \$17,645.00 for special damages.

F. What is an appropriate award for the costs of future care?

[162] The plaintiff claims \$65,000 for the costs of future care. The defendants submit that there is no basis for an award of future care.

[163] In *Manky v. Scheepers*, 2017 BCSC 1870, Justice Kent noted that the key elements applicable to an assessment of the costs of future care are that there be evidence of the amounts claimed, evidence of medical justification for the amounts and that the items claimed be reasonable:

[154] The principles applicable to the assessment of claims and awards for the cost of future care are summarized in *Kallstrom v. Yip*, but I will not repeat them here. Suffice it to say admissible evidence must be tendered to substantiate not only the amount that will be incurred but also the medical justification and the reasonableness of items claimed. No such evidence has been tendered and no award is made under this heading.

[164] In *Gao v. Dietrich*, 2018 BCCA 372, the Court noted that the medical necessity of future care costs could be established by medical practitioners other than physicians:

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

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

[165] The plaintiff claims that the ongoing costs of future care will be in the amount of \$5,862 per year as per the below table:

Treatment

Cost

Physiotherapy (10x/yr, \$70/session)

\$700

Kinesiologist (3.5x/yr, \$89.25/session)

\$312

Psychologist (10x/yr, \$205/session)

\$2,050

Housekeeping support (\$2,800/year)

\$2,800

Total Annual Costs

\$5,862

[166] The plaintiff further submits that these costs will be incurred for 20 years and that the present value of the expenses using a discount rate of 2% is in the amount of approximately \$95,850.

[167] The plaintiff claims ten physiotherapy sessions per year for 20 years. The plaintiff relies upon the second report of Dr. Travlos wherein he recommended ten sessions of physiotherapy per year. However, he did not recommend ten sessions per year for 20 years. In fact, he suggested that the plaintiff should wean herself off of physiotherapy. Accordingly, I allow ten sessions of physiotherapy at \$70 per session for a total of \$700.

- [168] The plaintiff claims \$312 per year for "kinesiology" for 20 years. However, this claim is, in fact, for a personal fitness trainer and is a claim that I have rejected in the discussion of special damages. I find that this amount is not justified and most certainly not for 20 years.
- [169] The plaintiff claims for ten sessions of psychological counseling for 20 years. Again this is based on a recommendation made by Dr. Travlos in his second report. However, once again Dr. Travlos did not recommend ten sessions per year for 20 years. More importantly, Dr. Browning, the plaintiff's treating psychologist, recommended the plaintiff attend a total of 24 sessions over a two year period. In my view, this is all that is justified. The present value of 24 psychology sessions using a 2% discount rate is \$4,776.
- [170] The final item claimed by the plaintiff is housekeeping care in the amount of \$2,800 per year. In his second report, Dr. Travlos recommended that the plaintiff continue with home care services. However, he again did not recommend that this would be necessary for 20 years. In my view, home care assistance should only be required so long as the plaintiff continues to work and, given that I have determined the plaintiff is likely to retire at age 65, she is only entitled to home care services for ten years. The present value of this amount using a 2% discount rate is \$25,151 ($8.9826 \times \$2,800$).
- [171] In total I award \$30,627 for the costs of future care.

V. Disposition

- [172] The plaintiff is entitled to the damages in the amount of \$428,272 calculated as follows:
- General damages in the amount of \$140,000;
 - Damages for past loss of income or past loss of earning capacity in the amount of \$70,000;
 - Damages for future loss of income or earning capacity in the amount of \$170,000;
 - Special damages in the amount of \$17,645; and
 - Costs of future care in the amount of \$30,627.
- [173] The plaintiff is further entitled to an award for prejudgment and postjudgment interest in accordance with the provisions of the Court Order Interest Act, RSBC 1996, c. 79. If necessary, the parties have liberty to speak to me on the matter of interest. The parties are also at liberty to speak to me on the matter of costs, if necessary.
- [174] Finally, it is to be noted that I have not attempted to apportion the damages between MVA #1 and MVA #2 as neither party made any submissions in that regard. The parties have liberty to speak to me regarding apportionment, if that is necessary.

"Giaschi J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/18/2019BCSC1896cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/hawkins-v-kumar-2019>

Prepared on 25 October 2026 · Esheria