
CANADA / JUDGMENT

Helgason v. Rondeau

2022 BCSC 1330

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Supreme Court of British Columbia

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2022 BCSC 1330 Helgason v. Rondeau

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Helgason v. Rondeau,

2022 BCSC 1330

Date: 20220808

Docket: M191673

Registry: Vancouver

Between:

Casey Lee Helgason

Plaintiff

And:

Marla Michelle Rondeau, Daniel Elner Pederson and

KC's Environmental Service Inc.

Defendants

And:

Marla Michelle Rondeau

Third Party

Before: The Honourable Justice Skolrood

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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Introduction

- [1] The plaintiff, Casey Helgason, claims damages for injuries suffered in a vehicle accident that occurred on January 25, 2018 (the "Accident").
- [2] The Accident involved three vehicles. Ms. Helgason was driving her vehicle east on Highway 1 near Golden, BC. She was stopped on the highway waiting to turn left to access a side road when she was struck from behind by a vehicle driven by the defendant Marla Rondeau. As a result of that impact, Ms. Helgason's vehicle was propelled to the right where it collided with a vehicle driven by the defendant Daniel Pederson and owned by the defendant KC's Environmental Service Inc., who was attempting to go around Ms. Helgason.

- [3] The usual heads of damage are in issue, however the most significant claim advanced by Ms. Helgason is for loss of future earning capacity. Ms. Helgason is a young lawyer who has only recently embarked on her legal career. She claims that the injuries sustained in the Accident have permanently impaired her ability to work full time in her chosen field, resulting in significant future losses.
- [4] The defendants were separately represented at trial, but took similar positions on the issues relating to damages. In terms of liability, Ms. Rondeau has admitted liability but Mr. Pederson has not. Mr. Pederson filed a third party claim against Ms. Rondeau which was heard at the same time as Ms. Helgason's claim.
- [5] I would add that Ms. Rondeau passed away prior to the trial, but her estate remained a party. I am advised that no personal representative has been appointed for the estate, but no party took issue with the estate appearing through counsel.

Background

- [6] It is worth noting at the outset that much of the lay evidence led at trial is not in dispute, particularly the evidence relating to Ms. Helgason's pre-Accident history. For this reason, I will describe the background facts in a relatively summary fashion, but will delve deeper into the evidence on the matters that are contentious.
- [7] I would add that many of the basic facts are taken from an agreed statement of facts helpfully arrived at by the parties.

The Plaintiff

- [8] Ms. Helgason was 24 years old at the time of the Accident and 29 at the time of trial.
- [9] She was born, raised and went to school in Kamloops, BC. She obtained both her undergraduate and law degrees from Thompson Rivers University ("TRU").
- [10] During her undergraduate years, she worked in various office and administrative jobs at Fulton & Company LLP ("Fulton"), a leading law firm in Kamloops. After her second year of law school, she obtained summer articles with the firm and then returned for full articles after graduating in May 2020. Ms. Helgason was called to the Bar in May 2021 and was kept on by Fulton as an associate lawyer.
- [11] Ms. Helgason is engaged to and lives with her partner Matthew Neis.

Pre-Accident Health, Activities and Employment

- [12] Ms. Helgason had no significant health issues prior to the Accident. She injured her back jumping on a trampoline in 2016, but the symptoms resolved quickly as did the headaches she experienced following a hiking fall in 2014. Ms. Helgason experienced some gastrointestinal issues during her undergraduate program that required her to withdraw for a semester, however those issues also resolved. She had no prior emotional/psychological issues.
- [13] Ms. Helgason was a straight "A" student in high school and was her class valedictorian. She has worked consistently since she was about 13 years old in a variety of jobs.
- [14] She followed high school with a successful undergraduate career at TRU, regularly making the Dean's List. She then applied to and was accepted into law school at TRU commencing in the fall of 2017. The Accident again occurred in January 2018, partway through Ms. Helgason's first year of law school.
- [15] In addition to doing well academically while maintaining regular employment, Ms. Helgason also has an impressive history of volunteer work, including as a Kamloops Ambassador and then a BC Ambassador in which she was involved in developing educational and related workshops for youth around the Province.
- [16] In terms of activities, Ms. Helgason led an active lifestyle. She golfed regularly and enjoyed hiking, jogging, snowmobiling and occasional skiing. She was also an avid gardener.
- [17] The various collateral witnesses called in Ms. Helgason's case uniformly described her as active, outgoing, social and very driven and career focussed.

The Accident

- [18] While I have provided a brief summary of the circumstances of the Accident, it is necessary to go into further detail given the dispute over Mr. Pederson's liability.
- [19] On January 25, 2018, Ms. Helgason was driving her Jeep Cherokee from her home in Kamloops to a house located near Golden that she had rented with some friends for a ski weekend. The route travelled along Highway 1 through the Rogers Pass and took about four hours.
- [20] Shortly before Golden, Ms. Helgason intended to turn left off the highway onto Blaeberry School Road, which would take her to the rental house. Along that stretch, the highway had two lanes, one in each direction. The east bound lane in which Ms. Helgason was travelling was bordered on the right by a shoulder. The shoulder in turn had a snow bank on its right edge

- [21] Ms. Helgason said that she was driving at about 90 km/h. She believes the speed limit on the highway in that area was 100 km/h but she was being vigilant due to the winter conditions. The road was mostly bare and conditions were good, although the traction control light in her vehicle had come on three or four times during the trip, suggesting some slippage. Visibility was good but it was starting to get dark as dusk was approaching.
- [22] She knew that she had to turn left off the highway onto Blaeberry School Road. Her passenger was using GPS and gave her a heads up about two minutes before the turn, and then again about one minute before. Ms. Helgason said she started slowing down as she approached the intersection with Blaeberry School Road and she activated her left turn signal. Her best estimate is that she started to slow down about 30 seconds before the intersection. She took her foot off the accelerator then gradually applied the brake.
- [23] Ms. Helgason testified that before the intersection, there is a slight crest in the road and then a long gradual decline leading to the intersection. Shortly before trial, Ms. Helgason returned to the area and measured the length of highway between the crest and the intersection. She estimates it to be 900 metres.
- [24] Ms. Helgason came to a stop at the intersection and waited for oncoming traffic to clear. Just before commencing her turn, she noticed a vehicle passing her on the shoulder to her right. She also looked in her rear-view mirror and saw another vehicle approaching rapidly. She realized she was going to be hit so she turned her steering wheel slightly to the right as she thought it would be better to be pushed into the snowbank on the shoulder than across the highway.
- [25] Ms. Helgason said she was struck from behind which propelled her vehicle to the right. She then struck the vehicle passing on the right which propelled her back to the left and across the highway where she came to rest in the ditch. Ms. Helgason testified that her memory is "foggy" and that she has no clear memory of how her vehicle ended up in the ditch.
- [26] Ms. Helgason's vehicle was written off as a result of the Accident, as was the vehicle driven by Ms. Rondeau.
- [27] Daniel Pederson testified that at the time of the Accident he was driving a large pickup truck owned by KC's Environmental Services Inc., which is his father's company and for which he works. His father, Ken Pederson, was with him in the passenger seat. The Pedersons live in Okotoks, Alberta and had travelled to Nakusp, BC to check out a potential job. On January 25, 2018, they were travelling back to Okotoks along the Trans Canada highway.
- [28] Mr. Pederson testified that he was an experienced driver, including driving large transport trucks, with a class 1 licence. The truck he was driving was equipped with proper snow tires and was in "like new" condition.

- [29] According to Mr. Pederson, the weather was "pretty nasty". It was foggy and rainy and the road was wet, although he had not experienced any traction issues. Given the conditions, he was driving at 80 km/h, 20 km/h below the posted speed limit.
- [30] Mr. Pederson said that as he approached the location of the Accident, he came over a crest in the road and saw ahead of him a vehicle with its left turn signal activated and brake lights on. He estimated that the vehicle was maybe around 150m ahead of him. He was also aware of a vehicle following closely behind him.
- [31] Mr. Pederson said that he applied his brakes and the anti-lock brake system ("ABS") activated. He realized that he had no traction. He said that he knew he had to make a decision quickly. He thought that if he braked, there was a good chance he would be able to stop before hitting Ms. Helgason's vehicle, however if he was unable to stop, a collision would be "catastrophic".
- [32] Mr. Pederson said he made the decision to try to go around Ms. Helgason's vehicle. He took his foot off the brake and moved onto the shoulder of the highway. As he got closer to Ms. Helgason's vehicle, he continued to slow down and he was satisfied that he had room to get by her on the right. He took his foot off the brake so that he could steer past the other vehicle.
- [33] Mr. Pederson said that he was elated when he cleared the vehicle, but then quickly felt a thud as the other vehicle struck his truck. He then drove just up the road to a right hand turn area and parked. He and his father then walked back to the scene of the Accident, where he observed Ms. Helgason's vehicle in the ditch across the road. He and his father then directed traffic on either side of the Accident scene to ensure that other vehicles would stop. He agreed in cross-examination that other vehicles who came upon the scene were in fact able to stop in time.
- [34] Ken Pederson also testified. As noted, he was in the passenger seat of the truck being driven by Daniel Pederson.
- [35] He said that in the time leading up to the Accident, the weather was not great but he does not remember any loss of traction or black ice. He said that when they came over the crest in the road, they saw Ms. Helgason's vehicle ahead of them with the signal and brake lights activated. Daniel applied the brakes and when the ABS activated, Ken Pederson told Daniel that he had better go around the other vehicle. Daniel then eased over onto the shoulder in order to get past the vehicle.
- [36] According to Ken Pederson, Daniel slowed to about 20 km/h and it was clear they had enough room to get by on the right side. As they passed however, he heard a bang and felt the impact.
- [37] Like Daniel, Ken Pederson said it was possible that the truck could have stopped in time, however, Ken said that Daniel took the prudent course to go around the other vehicle.

Post Accident Health, Treatment, Activities and Employment

- [38] Ms. Helgason testified that she experienced two impacts in the Accident, the first when her vehicle was struck from behind by Ms. Rondeau's vehicle and the second when she was propelled to the right into Mr. Pederson's vehicle.
- [39] The first impact caused her body to be thrown forwards and backwards and her head struck the headrest. The second impact involved a side to side movement of her body.
- [40] Police and ambulance attended, but Ms. Helgason was not examined by the paramedics. She spoke to the police officer who called a tow truck who then towed her vehicle to the cabin she had rented with her friends. It was subsequently towed away.
- [41] Ms. Helgason said she felt "dazed and confused" after the Accident and also experienced adrenalin.
- [42] After arriving at the cabin, over that night and throughout the weekend, she said she got progressively worse. She started to notice numbness and tingling in her right arm, pain in her neck and shoulders and "pretty intolerable" headaches. She also began to experience sensitivity to light and had trouble with focus and concentration.
- [43] Ms. Helgason stayed at the cabin for the weekend because she did not have a functioning vehicle and she did not want to ask any of her friends to leave early. When she returned to Kamloops, she went to the hospital. At that time, she was experiencing pain in her neck and shoulders extending down through her right arm.
- [44] Three days after going to the hospital, she went to an urgent care clinic because she was still experiencing headaches and light sensitivity. She was diagnosed with a concussion and post-concussion syndrome.
- [45] In the weeks and months following the Accident, Ms. Helgason continued to experience neck, shoulder and mid and upper back pain as well as ongoing numbness, tingling and pain down her right arm. She also experienced headaches, including migraines, and had problems with nausea, dizziness and loss of concentration.
- [46] As noted, the Accident occurred during Ms. Helgason's first year of law school. She missed two weeks of classes after the Accident and then missed time intermittently through the balance of her time at TRU due to flare-ups in her condition.
- [47] She said she continued to experience cognitive issues which often required her to reread things. She had difficulty focussing for extended periods so she adapted her study regime to accommodate. For example, to achieve six hours of study time she would spread it out over 10 hours.
- [48] During the summer of 2019, Ms. Helgason obtained temporary articles at Fulton. She worked through the summer, typically from 7:00 a.m.-5:30 p.m., although she still struggled with focus and concentration.

- [49] Ms. Helgason graduated law school in May 2020 with a GPA of 3.24 which she said was "average" by her standards. She attended the PLTC bar admission course in June and July and commenced articles with Fulton in August of that year. She was called to the Bar in May of 2021 and was kept on as an associate lawyer at Fulton.
- [50] Ms. Helgason testified that she found articling to be gruelling. She was generally in the office by 7:00 a.m. and worked until 5:30 p.m., plus she often worked evenings and weekends. She said that she continued to experience pain in her neck, shoulders and back, numbness and tingling in her hands and headaches. She tried to push through but the harder she worked, the worse things got. Her symptoms got progressively worse.
- [51] Upon her call to the Bar, she joined the business law practice group at Fulton. Her work is largely office based and involves reviewing and drafting contracts and dealing with clients and third parties like the banks. She does a considerable amount of keyboard work.
- [52] It is apparent on the evidence that Ms. Helgason is very well thought of at Fulton. Her principal and mentor, Ms. McCabe, described her as having superior analytical skills and an excellent work ethic. Ms. McCabe characterized Ms. Helgason as "definitely above average" and said she had what it takes to be on a partnership track. Mr. Mark, the leader of the business law practice group, said that Ms. Helgason had good legal skills as well as a strong networking ability. He said she likely would have progressed to partnership. Both Ms. McCabe and Mr. Mark however said that partnership was now unlikely if Ms. Helgason continues to work on a reduced basis.
- [53] Ms. Helgason testified that she struggled with work through the summer of 2021. In June 2021, she met with a counsellor who suggested that what she was doing was unsustainable. Later that summer, she spoke to Ms. McCabe and they discussed reducing her work load. Beginning in September 2021, she went to a 60% schedule. That schedule varies throughout the week in that some weeks she may take full days off and other weeks she will work reduced hours.
- [54] As a result of this adjustment, she is being paid 60% of the normal first year salary of \$68,000.
- [55] In terms of her household and recreational activities, Ms. Helgason said she still plays golf but less frequently and usually only nine holes. She still hikes, but for shorter distances and duration. The same is true for jogging. She tried snowmobiling once, but found it too jarring and she now plans to sell her snowmobile.
- [56] As noted, Ms. Helgason was an avid gardener before the Accident. She said she still gardens but does less of the heavy work. Her partner has taken over things like mowing the lawn, although he is away from home for long stretches of time. Ms. Helgason has hired bi-weekly housekeeping assistance to assist with the heavier household tasks.

- [57] In terms of treatment, Ms. Helgason initially had 21 sessions of physiotherapy that ended in late 2018. She says that by then her symptoms had plateaued and she was discharged with instructions for a home exercise program. She says she has continued to engage in that program. She has tried a variety of medications for her headaches, with minimal success.
- [58] In November 2021, she began counselling with a registered clinical counsellor. At the time of trial, she had been to eight sessions.
- [59] I note that the defendants place some weight on a number of physiotherapy clinical record entries that purport to record improvements in Ms. Helgason's symptoms at various points in time. For example, she was asked about entries in April 2018 that suggest a reduction in the frequency and severity of her headaches and entries in the fall of 2019 suggesting an improvement in her symptoms.
- [60] Ms. Helgason did not take issue with these entries and acknowledged that there were times when she felt she was improving. These entries, and indeed Ms. Helgason's own evidence, suggests some degree of "waxing and waning" of her symptoms over time. In noting this, I acknowledge that the Court must be cautious in relying too heavily on clinical records given their limited scope and content: *Edmondson v. Payer*, 2011 BCSC 118 at paras. 31-37; *aff'd* 2012 BCCA 114.

Current Condition

- [61] Ms. Helgason testified that none of her symptoms have resolved, although there have been periods of "variable improvement", particularly with reduced activity. She continues to experience neck, shoulder and back pain, as well as pain and numbness in her right arm which is exacerbated by certain household activities as well prolonged desk work. She continues to experience daily headaches which she relates to the ongoing pain and tension in her neck and shoulders. Approximately 12-16 times per month, the headaches will develop into migraines, which she finds particularly disruptive.
- [62] A number of the corollary witnesses called by Ms. Helgason described her current condition. Her friend and colleague, Ms. Murray, said she often observes Ms. Helgason struggling while at the office and she shows signs of pain on her face. Ms. Helgason's mother, Ms. Keiff, said that Ms. Helgason is not as active as before the Accident and that she struggles with her memory. Ms. Helgason's partner, Mr. Neis, said that she does not do as much around the house now as some of the household chores cause her symptoms to flare up. He said she is not as outgoing since the Accident and "doesn't quite seem herself".

Expert Evidence

- [63] I will provide a brief summary of the expert medical opinion evidence and then will address that evidence in more detail as needed when dealing with the issues that arise.

Evidence Concerning the Plaintiff's Physical Injuries

Physiatrists

- [64] Both parties rely on expert reports from specialist physicians in the field of physical medicine and rehabilitation (physiatry).
- [65] Dr. Kshitij Chawla assessed Ms. Helgason on July 2, 2021 and prepared a report dated August 6, 2021. In addition to being a physiatrist, Dr. Chawla has a subspecialty in pain medicine. Dr. Chawla diagnosed Ms. Helgason with the following conditions that, in his opinion, resulted from the Accident:
- a) Concussion and chronic and persistent post-concussive symptoms;
 - b) Chronic posttraumatic headaches subclassified as:
 - i. Cervicogenic headaches;
 - ii. Migraine headaches with aura;
 - c) Chronic axial neck pain of myofascial and facet joint origin;
 - d) Thoracic outlet syndrome;
 - e) Depression; and
 - f) Insomnia.
- [66] With respect to the post-concussive (cognitive) symptoms, headaches and neck pain, Dr. Chawla opines that, given the length of time that they have persisted, these conditions qualify as chronic and are likely permanent. In terms of Ms. Helgason's depression, Dr. Chawla describes the interrelationship of pain and mood disorders, but notes that he would defer to a psychiatrist or psychologist for a more detailed analysis. He noted that the existence of both pain and a mood disorder can result in a "vicious cycle" in which it is difficult to tell whether the mood issues are making the pain worse or vice versa.
- [67] In Dr. Chawla's opinion, given the length of time that Ms. Helgason's symptoms have persisted, the likelihood of any meaningful recovery or return to pre-injury function is extremely unlikely and she is likely to have ongoing physical and cognitive limitations on a permanent basis.
- [68] The defendants rely on the report of Dr. Zeeshan Waseem dated January 13, 2022. Dr. Waseem did not examine Ms. Helgason but rather, was asked to review her medical records and provide a critique of Dr. Chawla's report. His principal comments about Dr. Chawla's report are:
- a) Dr. Chawla's physical examination was brief and focussed on specific areas of Ms. Helgason's body. There was insufficient orthopaedic testing of the cervical spine to establish that the pain has a facetogenic origin;

- b) The diagnosis of concussion was based on self-report of a possible brief period of loss of consciousness and no cognitive testing was done to substantiate any objective impairment;
- c) There was no formal mental status examination or psychometric testing to substantiate a diagnosis of depression; and
- d) In terms of prognosis, with appropriate treatment, Ms. Helgason may not be as impaired in the domains of employment and household activities as she is now.

Neurologists

- [69] Both parties also rely on opinion evidence from neurologists on the issue of whether Ms. Helgason suffered a mild traumatic brain injury ("MTBI or concussion") and, if so, the impacts of that injury.
- [70] Dr. Donald Cameron assessed Ms. Helgason on August 3, 2021 at the request of her counsel and he prepared a report dated August 19, 2021. Dr. Cameron opines that Ms. Helgason "probably" suffered a brief altered state of consciousness or loss of consciousness at the time of the Accident and that she "probably" fulfills the criteria for a diagnosis of MTBI. Dr. Cameron also opines that Ms. Helgason has developed symptoms of post-traumatic brain injury syndrome as well as post-traumatic headaches. With respect to the headaches, he notes that they are intermixed with musculoskeletal or cervicogenic headaches relating to her soft tissue injuries.
- [71] Dr. John Falconer assessed Ms. Helgason at the request of the defendants and prepared a report dated October 21, 2021. It is Dr. Falconer's opinion that Ms. Helgason did not suffer an MTBI. He notes that the diagnosis of MTBI depends upon an analysis of what happened immediately at the time of an accident, specifically whether there is a loss of consciousness, objective confusion or post-traumatic amnesia. In his view, Ms. Helgason's alleged lack of recall for a few seconds after impact does not qualify as significant post-traumatic amnesia. Further, there is no indication of a loss of consciousness or objective confusion.
- [72] In Dr. Falconer's opinion. Any cognitive issues experienced by Ms. Helgason are secondary to fatigue, pain or other psychological issues. He suggests she is particularly susceptible to stress which may also contribute to her cognitive symptoms. With respect to Ms. Helgason's headaches, Dr. Falconer opines that she was likely born with a predisposition to developing migraine headaches.
- [73] The defendants also commissioned a responsive report from a neurosurgeon, Dr. Navraj Heran. Dr. Heran did not examine Ms. Helgason thus his opinion is based on a review of Dr. Cameron's report and various medical records.

- [74] Dr. Heran is of the view that the medical records support a finding that Ms. Helgason did have a brief period of amnesia following the Accident and probably experienced symptoms of post-concussive syndrome. However, these were fairly short lived and, in his view, any ongoing cognitive issues are related to anxiety and depression. He also opined that Ms. Helgason's ongoing headaches are largely triggered by work, excessive stress and anxiety.

Thoracic Outlet Syndrome

- [75] Ms. Helgason relies on a report dated November 22, 2021 prepared by Dr. Anthony Salvain, a vascular surgeon. Dr. Salvain assessed Ms. Helgason on August 25, 2021.
- [76] The principal focus of Dr. Salvain's report is on Ms. Helgason's complaints of pain, numbness and tingling down her right arm into her fingers. In his opinion, those symptoms are due to post-traumatic thoracic outlet syndrome with related irritation of the upper and lower nerves of the brachial plexus. He also notes that she has developed chronic myofascial pain.
- [77] The defendants rely on a second report prepared by Dr. Heran in response to Dr. Salvain's report. Again, Dr. Heran did not assess Ms. Helgason in person and his opinion is based on his review of various medical records. Dr. Heran agrees with Dr. Salvain's diagnoses of thoracic outlet syndrome and chronic myofascial pain syndrome. He also agrees generally with Dr. Sylvain's opinion about possible treatments. I will return to the issue of treatment when discussing the cost of future care claim.

Psychiatric Evidence

- [78] The parties both rely on reports prepared by psychiatrists.
- [79] Dr. Chris Babbage assessed Ms. Helgason on September 23, 2021 at the request of her counsel and his report is dated November 29, 2021. In Dr. Babbage's opinion, Ms. Helgason meets the DSM-5 criteria for a diagnosis of Somatic Symptom Disorder ("SSD") with predominant pain. An SSD is characterized by an individual focussing on physical symptoms like pain to the extent that it results in distress and impairment of function. According to Dr. Babbage, Ms. Helgason has one or more somatic symptoms that are distressing and that give rise to significant disruption of her daily life. Dr. Babbage also opines that Ms. Helgason meets the DSM-5 criteria for a Persistent Depressive Disorder ("PDD") but not for Post Traumatic Stress Disorder ("PTSD").
- [80] The defendants rely on the report of Dr. Eugene Okorie dated November 22, 2021. Dr. Okorie assessed Ms. Helgason on November 12, 2021. Dr. Okorie opines that Ms. Helgason likely did not sustain an MTBI as a result of the Accident. Like Dr. Falconer, he notes the absence of any indication of a loss of consciousness, objective confusion or behavioural disorganization. In cross-examination, he acknowledged that Ms. Helgason's symptoms could form the basis for a diagnosis of MTBI, but he said that if it was an MTBI it was of the mildest form.

- [81] In his view, Ms. Helgason's complaints of cognitive issues are due to headaches, neck pain, sleep disruption, fatigue and emotional distress. According to Dr. Okorie, Ms. Helgason satisfies the DSM-5 criteria for a diagnosis of adjustment disorder with depressed mood.

Functional Capacity Evidence

- [82] Mr. Paul Pakulak is an occupational therapist who conducted a functional capacity evaluation ("FCE") of Ms. Helgason on September 9, 2021 and he prepared a report dated November 22, 2021. Based on his assessment, he found that Ms. Helgason demonstrated certain physical restrictions with the result that, in his opinion, she is best suited for activities requiring light level strength. With specific reference to her work as a lawyer, he suggested that she could meet the physical demands of this work at a sustainable level on a part-time basis. Even on that basis, she will require flexibility to change positions frequently and take breaks.
- [83] Mr. Rob Gander is also an occupational therapist who was asked by counsel for the defendants to review and critique Mr. Pakulak's report. Mr. Gander did not conduct an FCE of Ms. Helgason nor did he interview her. His report is dated January 14, 2022.
- [84] Mr. Gander disagrees with Mr. Pakulak that the outcomes of the FCE demonstrate an incapacity on the part of Ms. Helgason to sustain full-time work. A central criticism made by Mr. Gander is that Mr. Pakulak's FCE involved a high volume of physical demands that she would not regularly encounter in her work as a lawyer. In contrast, despite Ms. Helgason stating that much of her work involves computer work, the FCE did not adequately test her capacity for doing that type of work. Mr. Gander also suggests that there has been insufficient consideration and testing of an ergonomic work set up and other modifications such as voice recognition software.

Economic Evidence

- [85] Mr. Kevin Turnbull is an economist who prepared income loss calculations based upon certain assumptions provided by Ms. Helgason's counsel. A central assumption relied upon by Mr. Turnbull is that absent the Accident, Ms. Helgason would have continued to work at Fulton, ultimately becoming a partner and that she would have remained there for the balance of her legal career.
- [86] Mr. Mark Gosling, another economist, prepared a responsive report at the request of the defendants. Mr. Gosling notes that Mr. Turnbull does not include normal labour market contingencies in his calculations nor does he account for the possibility that Ms. Helgason would not have continued in private practice. Mr. Turnbull provides income loss calculations based on a number of different alternative scenarios. One point of difference, and contention, between him and Mr. Turnbull is Mr. Gosling's use of female only statistics.
- [87] I will return to the economic evidence when dealing with the income loss claims.

Liability of the Defendant Pederson

[88] Ms. Helgason claims against Mr. Pederson is negligence. In order to succeed, Ms. Helgason must meet the well-established test for negligence, which has four elements:

- a) The defendant owed the plaintiff a duty of care;
- b) The defendant breached the applicable standard of care;
- c) The plaintiff suffered damage; and
- d) The damage was caused by the defendant's breach.

(See for example: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3).

[89] The duty of care and damage criteria are not in dispute. In terms of the standard of care, Ms. Helgason submits that Mr. Pederson breached the applicable standard by the manner in which he operated of his vehicle, particulars of which include:

- a) Driving too quickly for the conditions;
- b) Following too closely behind Ms. Helgason's vehicle;
- c) Not paying sufficient attention to traffic in front of him;
- d) Driving with undue care and attention and at a speed that was excessive for the prevailing conditions; and
- e) Performing the dangerous maneuver of attempting to pass Ms. Helgason on the right by leaving the laned roadway and driving on the shoulder.

[90] Ms. Helgason submits that it was Mr. Pederson's negligence that resulted in his vehicle being in the spot on the shoulder where it collided with Ms. Helgason's vehicle after it was struck by Ms. Rondeau. Ms. Helgason characterizes the Accident as involving two collisions, both of which contributed to her injuries.

[91] In support of her position that Mr. Pederson was negligent, Ms. Helgason relies on s. 158 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA]:

158 (1) The driver of a vehicle must not cause or permit the vehicle to overtake and pass on the right of another vehicle, except

- (a) when the vehicle overtaken is making a left turn or its driver has signalled his or her intention to make a left turn,
- (b) when on a laned roadway there is one or more than one unobstructed lane on the side of the roadway on which the driver is permitted to drive, or

- (c) on a one way street or a highway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and is of sufficient width for 2 or more lanes of moving vehicles.
- (2) Despite subsection (1), a driver of a vehicle must not cause the vehicle to overtake and pass another vehicle on the right
 - (a) when the movement cannot be made safely, or
 - (b) by driving the vehicle off the roadway.

[92] Pursuant to s. 119 (1), the term "roadway" means "the portion of the highway that is improved, designed or ordinarily used for vehicular traffic, but does not include the shoulder". The exclusion of the shoulder from the definition of roadway was confirmed by the Court of Appeal in *Ormiston v. Insurance Corporation of British Columbia*, 2014 BCCA 276 at para. 25.

[93] Sections 144 and 162 are also relevant:

Careless driving prohibited

144 (1) A person must not drive a motor vehicle on a highway

- (a) without due care and attention,
- (b) without reasonable consideration for other persons using the highway, or
- (c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

Following too closely

162 (1) A driver of a vehicle must not cause or permit the vehicle to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the amount and nature of traffic on and the condition of the highway.

[94] These sections essentially require that drivers drive their vehicles appropriately for the existing conditions with due regard for the safety of other vehicles on the road, including vehicles in front of them. Driving appropriately includes making allowances for emergencies or unanticipated occurrences: *Uy v. Dhillon*, 2019 BCSC 1136 at paras. 23-25; *Reimer Express Lines Ltd. v. Burke*, 2010 BCSC 450 at para. 35.

[95] Ms. Helgason submits that it was Mr. Pederson's failure to drive appropriately in the conditions that put him in the position of making the "illegal and dangerous maneuver of passing on the shoulder" (plaintiff's written submission, para. 57) and that caused the two vehicles to collide.

[96] Mr. Pederson denies that he breached the standard of care. Specifically, he denies that he was driving at too high a speed, following too closely or otherwise driving without due care and attention to the prevailing conditions. In terms of passing Ms. Helgason on the right,

Mr. Pederson submits that he made the prudent decision to go around Ms. Helgason's stopped vehicle to ensure he would not hit her given his uncertainty as to whether he would be able to stop in time. He points out that his maneuver was successful as he was in fact able to get by Ms. Helgason. The two vehicles only came into contact when Ms. Helgason's vehicle was propelled into Mr. Pederson's vehicle after being struck by Ms. Rondeau.

- [97] Mr. Pederson cites *Nason v. Nunes*, 2007 BCSC 266, aff'd 2008 BCCA 203, where the Courts held that not all accidents occur as a result of negligence and that where a defendant takes all reasonable precautions in the circumstances, they will not be held liable in negligence: *Nason* BCSC at para. 56; *Nason* BCCA at para.14. The Court of Appeal cautioned against inferring negligence merely because of the fact of an accident occurring where such an inference is not supported in the evidence: at para. 14, citing *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424, 46 B.C.L.R. (3d) 1 at para. 35.
- [98] I find that Ms. Helgason has not established that Mr. Pederson operated his vehicle in a manner that breached the applicable standard of care. I reach this conclusion for the following reasons.
- [99] In terms of Mr. Pederson's speed, I accept his evidence that he was travelling at about 80 km/h along his route, which was 20 km/h below the posted speed limit, including at the point in time when he saw Ms. Helgason activate her turn signal and her brake lights came on. While Mr. Pederson testified that the road conditions were "bad", he also said that he had not experienced any skidding or sliding before applying his brakes upon seeing Ms. Helgason activate her turn and brake lights. Moreover, I also accept that he was driving at that reduced speed to account for the prevailing conditions.

- [100] In the circumstances, the observations of Justice Jackson in *Jahanian v. Jahanian*, 2021 BCSC 1890 at para. 28 are particularly apt:

There is no expert opinion evidence that he was driving too fast for the conditions or that speed was a causal factor in the accident. It is not for the defendant to prove he was driving slowly enough for the circumstances; the burden is on the plaintiff to establish he was not: *Singleton* at para. 31. The legal burden of proof remains on the plaintiff throughout: *Marchuk v. Swede Creek Contracting Ltd.* (1998), 116 B.C.A.C. 318 at para. 10

- [101] I am similarly unable to find that Mr. Pederson was following Ms. Helgason too closely. In fact, the evidence establishes that he was well behind Ms. Helgason, to the point that it cannot be said that he was "following" her within the meaning of s. 162. A more accurate description is that Mr. Pederson came upon Ms. Helgason when he came over the crest of the slight hill leading down to the intersection where Ms. Helgason was intending to turn left.

- [102] I note that there is uncertainty in the evidence about how far away Mr. Pederson was from Ms. Helgason when she activated her turn and brake lights. As indicated above, according to Ms. Helgason, the crest of the hill to the intersection is about 900 meters. Her evidence was that when she started to slow down, she saw a vehicle "quite a bit in the distance" in her rear view mirror. The sight of that vehicle did not cause her to think that there was any danger in her slowing down.
- [103] Mr. Pederson estimated that he was 150 meters or more away from Ms. Helgason when he saw her vehicle lights activate. Mr. Pederson senior put the distance at 150-200 meters.
- [104] These are obviously imperfect estimates but regardless, the evidence falls short of establishing that Mr. Pederson was following too closely behind Ms. Helgason.
- [105] Ms. Helgason essentially asks the Court to infer that Mr. Pederson was driving too fast and following too closely based upon her assumption that Mr. Pederson was unable to stop in time to avoid hitting her from behind. Respectfully, that assumption is flawed in two respects. First, it is the type of inference that this Court and the Court of Appeal cautioned against in *Nason* (see para. 97 above). Second, the evidence does not in fact establish that Mr. Pederson was unable to stop. Rather, I accept his evidence that he was uncertain whether he would be able to do so and therefore made the decision to go around Ms. Helgason to avoid the risk of hitting her from behind.
- [106] I would add that I put no weight on the evidence that Mr. Pederson and his father flagged down other approaching vehicles that were then able to stop in time. Without evidence of the speed of those vehicles and the precise distance away from when they were flagged, this is not evidence that supports a finding that Mr. Pederson breached the standard of care.
- [107] With respect to Mr. Pederson's decision to go around Ms. Helgason by driving onto the shoulder, I accept Mr. Pederson's submission that this was not an attempt to "pass" Ms. Helgason within the meaning of s. 158 of the MVA but was an evasive action based upon the circumstances that presented: see *Graham v. Carson*, 2015 BCCA 310 at para. 13. This is not diminished by the fact that, again, Mr. Pederson was not certain if he would be able to stop in time.
- [108] In short, Ms. Helgason's claim that Mr. Pederson breached the standard of care is based upon speculation and inferences unsupported by the evidence. As such, she has not met the burden of establishing negligence on his part.
- [109] While that is sufficient to dismiss the claim against Mr. Pederson in negligence, I also find that, in any event, even if Mr. Pederson breached the standard of care, Ms. Helgason has not established that Mr. Pederson caused the damages sustained by Ms. Helgason.

- [110] As set out above, Ms. Helgason submits that Mr. Pederson caused the collision between their vehicles because his vehicle was on the shoulder to her right when she was struck by Ms. Rondeau's vehicle. However, even if it is found that Mr. Pederson breached the standard of care in how he was driving, that led him to be on the shoulder in that specific location, it cannot be said that his breach caused the collision in fact.
- [111] At various points in Ms. Helgason's written submission, she refers to Mr. Pederson's vehicle colliding with or impacting her vehicle (see for example paras. 57-58). That is not what happened. It was Ms. Helgason who struck Mr. Pederson, albeit as a result of Ms. Rondeau striking her. Ms. Helgason would still have sustained the injuries from the latter collision without subsequently colliding with Mr. Pederson.
- [112] Mr. Pederson poses a hypothetical scenario in support of his position. He suggests that if the same circumstances existed except that the highway had two lanes in each direction and he moved into the right hand lane in order to go around Ms. Helgason, it could not credibly be argued that by being in the right lane when Ms. Helgason was struck, he caused or contributed to the accident. I agree.
- [113] Similarly, if a vehicle had been parked illegally on the shoulder and struck by Ms. Helgason after she was hit by Ms. Rondeau, it is difficult to see how the owner of the parked vehicle could be found to have caused or contributed to the Accident.
- [114] It also cannot be said, even if Mr. Pederson breached the standard of care in how he was driving, that he was the cause in law of Ms. Helgason's injuries. Establishing causation in law requires Ms. Helgason to show that "the actual injury was the reasonably foreseeable result of the defendant's negligent conduct" (*Nelson (City) v. Marchi*, 2021 SCC 41 at para. 97). The focus of this inquiry is the actual injury, not just the type of injury suffered by the plaintiff (*Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63 at para. 78). An injury that is reasonably foreseeable is one that is a "real risk", or one "which would occur to the mind of a reasonable [person] in the position of the defendan[t] and which he would not brush aside as far-fetched" (*Mustapha* at para. 13).
- [115] The hypothetical provided by Mr. Pederson is instructive in this respect. If passing Ms. Helgason by driving on the shoulder to her right created a "real risk" of causing her injuries, overtaking her vehicle and passing it on the right on an unobstructed lane would also create a real risk to her. That conclusion is untenable, regardless of whether visibility was "good" but with some risk of slippage (as Ms. Helgason suggests) or whether it was foggy and rainy (as Mr. Pederson suggests). While overtaking Ms. Helgason's vehicle on her right may have created a possible risk of injury in either set of weather conditions, it was not a reasonably foreseeable outcome. The actual injuries she sustained from colliding with Mr. Pederson as a result of being propelled to the right after being rear-ended by Ms. Rondeau were still less reasonably foreseeable.

[116] Put another way, the collision between Ms. Helgason's and Mr. Pederson's vehicles, and any resulting injuries, were too remote to meet the causation test. Remoteness was described by the Supreme Court in *Mustapha* in these terms at para. 12:

The remoteness inquiry asks whether "the harm [is] too unrelated to the wrongful conduct to hold the defendant fairly liable" (*Linden and Feldthusen*, at p. 360). Since *The Wagon Mound* (No. 1), the principle has been that "it is the foresight of the reasonable man which alone can determine responsibility"

[117] A finding that Mr. Pederson is liable to Ms. Helgason would transform tort damages into a term of insurance rather than compensation for harm done on the basis of reasonable foresight (*Mustapha* at para. 16).

[118] Ultimately, as established on the evidence, the Accident was caused solely by the admitted negligence of Ms. Rondeau.

[119] In summary on this issue, Ms. Helgason has failed to establish that Mr. Pederson was negligent. The claim against Mr. Pederson is therefore dismissed, as is Mr. Pederson's third party claim against Ms. Rondeau.

Findings of Fact on Causation and the Plaintiff's Condition

[120] Before making the findings of fact that will underpin my assessment of Ms. Helgason's damages claims, it is useful to first make some general observations about the expert evidence. As set out above, both parties rely extensively on expert opinion evidence. Indeed, there was no evidence from a treating physician, due in large part to the fact that Ms. Helgason did not have a family doctor for much of the relevant time. That is not particularly unusual, however, it meant that virtually all of the medical evidence was provided by experts who met with Ms. Helgason for only a brief period and who offered opinions based upon a single assessment. Not surprisingly, the opinions provided by these various witnesses largely aligned with the position of the party who retained them.

[121] In their final submissions, both parties made arguments about why the expert evidence they rely on should be preferred to that of the other party. Many of these arguments involve calling into question the objectivity or thoroughness of the other party's witnesses.

[122] For example, the plaintiffs submit that Dr. Falconer was selective in the clinical history he set out in his report and that he was not an objective witness. They submit that the reports of Dr. Waseem and Dr. Heran as well as Mr. Gander should be discounted because they never met with or assessed Ms. Helgason.

[123] For their part, the defendants submit that Drs. Salvain, Cameron and Babbage presented as advocates for Ms. Helgason.

- [124] I am satisfied that all of the experts who gave evidence were well qualified to give the opinions that they did (which of course is a threshold requirement for admissibility). I am also satisfied that none of them crossed the line into advocacy or undue partiality on behalf of the party who commissioned their evidence, so as to render the evidence inadmissible: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 53.
- [125] Certainly, some of the experts were more aggressive in defending their opinions when challenged in cross-examination. As a general principle, there is nothing untoward about an expert witness pushing back against challenges made to their opinion; indeed that is part of the "thrust and parry" that occurs during cross-examination. An expert defending their opinion is not the same as an expert advocating on behalf of a party.
- [126] Turning to Ms. Helgason's condition and the issue of causation, the evidence is uniform that Ms. Helgason suffered a soft tissue injury to her neck that has persisted to the present time and is now chronic. I am satisfied that this injury along with the associated pain and functional limitations was caused by the Accident. This same injury continues to cause pain through her shoulders and upper back.
- [127] The evidence also establishes that Ms. Helgason suffers from post-traumatic thoracic outlet syndrome that causes pain, numbness and tingling down her right arm into her fingers. Dr. Salvain and Dr. Heran agreed on this diagnosis and I am satisfied that the condition was caused by the Accident.
- [128] Ms. Helgason also continues to experience headaches, which are cervicogenic in nature i.e relating to her soft tissue neck injuries. In addition to those headaches, she periodically experiences migraines which are often triggered by her cervicogenic headaches and pain in her neck and shoulders. Again, I am satisfied on the evidence that her headaches, both cervicogenic and migraine, were caused by the Accident. I would add that I do not accept Dr. Falconer's opinion that Ms. Helgason was born with a predisposition to developing migraine headaches. There is nothing in the evidence that would support this highly speculative opinion.
- [129] As reflected in my summary of the expert medical evidence, there is a dispute about whether Ms. Helgason suffered an MTBI as a result of the Accident. While I rejected Dr. Falconer's opinion about Ms. Helgason's migraines, I accept his view that Ms. Helgason did not suffer an MTBI. Virtually all of the doctors noted that a diagnosis of MTBI turns largely on what occurred immediately after the Accident, specifically whether there was a loss of consciousness, objective confusion or post-traumatic amnesia. As Dr. Falconer, noted, there was no clear indication of any of these conditions.

- [130] In her own evidence, Ms. Helgason describes her memory as "foggy" about how her vehicle ended up in the ditch across the highway. In my view, this rather vague evidence does not provide a foundation for concluding that Ms. Helgason suffered a loss of consciousness, confusion or post-traumatic amnesia. Indeed, by all accounts, including her own, she was lucid and capable of carrying on conversations with the people around her immediately following the Accident.
- [131] Alternatively, even if she did suffer an MTBI, I am satisfied that the symptoms resulting from that injury were short lived and that her ongoing cognitive issues are the result of other factors. On this point, I accept the evidence of Dr. Heran.
- [132] Ultimately, not much turns on whether Ms. Helgason suffered an MTBI because the evidence also establishes that she has continued to experience cognitive difficulties, including difficulty concentrating. She also experiences symptoms of depression. Whether caused by an MTBI or other factors, those issues are ongoing and interfere with both her capacity to work and her enjoyment of life.
- [133] Both psychiatrists, Dr. Babbage and Dr. Okorie, opine that Ms. Helgason has a psychological condition, although they differ on the specific diagnosis. I incline towards Dr. Babbage's diagnosis of an SSD because it aligns most closely with Ms. Helgason's own evidence. Essentially, she testified that most of her problems are associated with the pain she experiences and it is that pain, or her interpretation of and focus on it, that contributes to her cognitive difficulties. Regardless of how characterized, the evidence establishes that Ms. Helgason's cognitive issues continue to affect her. As noted by Justice Blake in *Aylen v. Mellin*, 2022 BCSC 223 at para. 61, the focus of the analysis is less on the specific diagnosis and more on the sequelae which arise from the injury.
- [134] In summary on her condition, I am satisfied that as a result of the Accident, Ms. Helgason continues to experience chronic neck, shoulder and upper back pain, headaches, both cervicogenic and migraine, thoracic outlet syndrome and cognitive issues, including depressive symptoms.
- [135] With respect to her prognosis, the evidence is uniform that her soft tissue or myofascial pain symptoms are likely chronic given their duration. That said, I agree with the defendants that Ms. Helgason's symptoms have not been adequately treated in the past and that there is a very real likelihood of improvement in the future with proper treatment. For example, Dr. Chawla suggests that while a return to a pain-free state is extremely unlikely, her pain will wax and wane and "can be managed and controlled symptomatically with [his] treatment recommendations". In terms of her cognitive/psychological issues, again the evidence indicates that these issues have not been adequately treated. Apart from some general counselling sessions, she has had no focussed psychological or psychiatric treatment. I note that Dr. Babbage describes Ms. Helgason's psychiatric prognosis as "guarded" whereas Dr. Okorie opines that her condition would likely "improve/remit" with proper psychotherapeutic treatment.

[136] In my view, "guarded" is an accurate (albeit somewhat vague) way to describe Ms. Helgason's prognosis for all of her symptoms in the sense that it is unlikely that she will recover completely from either the pain or the cognitive/psychological symptoms. However, I also find that there is a significant likelihood of some improvement with proper treatment. A number of the medical experts, including Dr. Chawla in particular, talked about the interrelationship of pain and cognitive issues, for example how increased pain can exacerbate the cognitive problems. They also noted that improvement in one area may lead to improvement in the other. In my view, a course of treatment for Ms. Helgason that focuses both on her physical and psychological issues will likely lead to improvement in both. I will return to the proposed treatments when assessing her claim for damages for the cost of future care.

Damages

[137] As a preliminary observation, while Mr. Pederson and Ms. Rondeau were separately represented, Ms. Rondeau generally accepted and endorsed Mr. Pederson's submissions on damages.

Non-Pecuniary Damages

[138] The factors that the Court must consider when assessing non-pecuniary damages are well known and have been set out in a number of cases, most notably by the Court of Appeal in *Stapley v. Hejslet*, 2006 BCCA 34 at para. 46. I have taken those factors into consideration.

[139] Awards of non-pecuniary damages in other cases provide a useful guide to the Court, however the specific circumstances of each individual plaintiff must be considered. This is because any award of damages is intended to compensate for the pain and suffering experienced by that specific plaintiff. Moreover, the compensation award must be fair and reasonable to both parties: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-89; *Miller v. Lawlor*, 2012 BCSC 387 at para. 109, citing *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229.

[140] Ms. Helgason seeks an award of non-pecuniary damages of \$180,000. She cites the following cases in support:

- a) *Sirna v. Smolinski*, 2007 BCSC 967;
- b) *Mastromonaco v. Moraal*, 2015 BCSC 228; and
- c) *Gill v. Dhaliwal*, 2021 BCSC 1562.

[141] Ms. Helgason submits that the plaintiffs in these cases experienced a similar constellation of symptom as Ms. Helgason which resulted in awards of non-pecuniary damages in the range of \$160,000-\$200,000 (\$187,000 to \$265,000 in 2022 dollars). Ms. Helgason also submits that an additional factor to consider in her case is the impact on her career. Leaving aside the pecuniary losses, which will be addressed below, she submits that being a lawyer is an essential component of her identity and that the negative career consequences resulting

from the Accident are particularly devastating to her. Ms. Helgason notes in particular the observation of Chief Justice Dickson in *Reference Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313 at para. 91 about the importance of work to a person's sense of self-worth.

[142] Mr. Pederson submits that an award of \$140,000 is more appropriate. He cites the following cases:

- a) *Kirkham v. Richardson*, 2014 BCSC 1068;
- b) *Vespaziani v. Lau*, 2021 BCSC 1361; and
- c) *Lo v. Hughes*, 2020 BCSC 840.

[143] As I alluded to in my summary of Ms. Helgason's condition, there is no doubt that her ongoing problems have impacted her work and her life generally. She is likely to continue to experience pain for the foreseeable future. That said, the evidence suggested that she has continued with many of her recreational activities, although at a reduced level. Of some note as well is the fact that after the Accident, Ms. Helgason successfully completed law school and articles and was kept on as an associate lawyer. I do agree with Ms. Helgason that the most significant non-pecuniary impact has been the effect on her career aspirations.

[144] Ultimately, having considered the evidence, the submissions, the authorities advanced by counsel, and the relevant factors as set out in cases like *Stapley*, I find that an appropriate award of non-pecuniary damages for Ms. Helgason is \$160,000.

Past Loss of Earning Capacity

[145] Ms. Helgason has a relatively modest claim for past loss of earning capacity. The Accident again happened while she was in law school and not working full-time. She testified that she gave up a part-time work opportunity at Fulton during her second year of law school in order to better manage her school work load due to her diminished capacity resulting from her injuries. She says she otherwise would have worked one eight hour shift per week at an hourly wage of \$13.00 per hour. Adjusting for exam periods when she would have taken time off, she calculates that she lost 26 weekly shifts for a total of approximately \$2,700.

[146] Ms. Helgason also claims for losses resulting from her transition to working at 60% capacity and pay. A 40% reduction applied to the first year associate salary of \$68,000 results in an annual loss of \$27,200, however she only claims the loss from November 1, 2021, when the pay reduction commenced to the date of trial for a total of approximately \$9,100.

[147] When these figures are combined, the total past loss claimed is \$11,800. While the evidence about Ms. Helgason's employment at Fulton during law school is somewhat vague, the defendants do not seriously contest her figures. Accordingly, I set her past income loss at \$11,800. This is a gross figure, subject to adjustment for income taxes to be agreed to by the parties.

Loss of Future Earning Capacity

Legal Principles

[148] The test for assessing claims for loss of earning capacity has been canvassed at length in this Court and in the Court of Appeal. The jurisprudence was recently reviewed at some length and synthesized by Justice Grauer in *Rab v. Prescott*, 2021 BCCA 345, where he held at para. 47:

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

[149] The three-step analysis set out by Justice Grauer was recently confirmed in *Ploskon-Ciesla v. Brophy*, 2022 BCCA 217.

[150] As evident from the *Rab* quote, a plaintiff must establish that her earning capacity was impaired and a real and substantial possibility that the impairment resulted in a compensable loss.

[151] Assessment of Ms. Helgason's future losses involves a consideration of hypothetical events, specifically what her employment and earnings would have been had the Accident not occurred and what it will look like now given the impacts of her injuries sustained in the Accident. This in turn requires the Court to weigh the possibilities and probabilities of such hypothetical events occurring: *Grewal v. Naumann*, 2017 BCCA 158 at para. 49.

[152] Ms. Helgason submits that the first two elements of the test have been met on the evidence: there is both a potential future event that could lead to a loss of capacity (i.e her ongoing symptoms that are likely to continue into the future) and a real and substantial possibility that the future event will cause a pecuniary loss. Ms. Helgason submits that pecuniary losses are already occurring and will continue to do so over the long term.

- [153] Ms. Helgason submits that the central issue for the Court is therefore the valuation of the loss under the third-step of the test.
- [154] The defendants generally agree that the first two elements of the test are satisfied. Where they take issue with Ms. Helgason's position is on the assessment of the future without and with Accident earnings projections and the applicable contingencies that will inform the assessment.
- [155] The starting point therefore is assessing what Ms. Helgason's career and future earnings would have been had the Accident not occurred.

Economic Evidence

- [156] Ms. Helgason submits that but for the Accident, she would have continued as an associate lawyer at Fulton, been admitted into the partnership and enjoyed a long and remunerative career at that firm.
- [157] She relies on the report of Mr. Turnbull. As noted above, Mr. Turnbull provides income projections based on the assumption that but for the Accident, Ms. Helgason would have been employed as an associate lawyer at Fulton, earning the annual salary set for each year of call, and then would have become a partner in 2028. For the years 2028, she would have received a reduced partnership draw to account for her capital contribution to the firm, and then beginning in 2031, and carrying through to age 70, she would earn \$400,000 per year, which the evidence established is the average per partner earnings at Fulton. The income figures are discounted to reflect present values and Ms. Helgason's probability of survival based on mortality statistics. No labour market or other contingencies are applied.
- [158] Using this approach, Mr. Turnbull calculates future earnings to age 70 of \$9,934,077. He also provides a figure of \$9,330,567 to age 67 and \$8,904,423 to age 65. Ms. Helgason submits that these figures reflect the appropriate starting point for assessing her future losses, subject to an appropriate adjustment for contingencies, which I will return to below.
- [159] The defendants rely on the report of Mr. Gosling. He notes, accurately, that Mr. Turnbull's report does not account for labour market contingencies such as non-participation in the labour market, unemployment and part-time work. Relying on 2016 census data for Canadian females with bachelor's degrees in law, he estimates that those contingencies typically reduce future earnings by about 32%.
- [160] I will return to the issue of using female statistics shortly, however it is useful to note that, although not included in his report, Mr. Gosling did a second analysis using earnings statistics for Canadian males with a bachelors degree in law. That analysis estimated that the typical labour market contingencies applied to males reduces future earnings by approximately 21%.

- [161] On instruction from the defendants' counsel, Mr. Gosling also did an alternate analysis of future without Accident earnings. Essentially, he considered three different scenarios and applied a weighted average based upon the statistical likelihood of the scenario occurring. The three scenarios considered were (i) Ms. Helgason stays in private practice with Fulton or something equivalent, (ii) she pursues an alternate career in law other than private practice, and (iii) she leaves the legal profession entirely. While the percentages change somewhat over time, the basic assumptions used by Mr. Gosling are:
- a) There is a 50% likelihood that Ms. Helgason remains in private practice earning \$400,000 per year, the equivalent to a full-time partner at Fulton;
 - b) There is a 20% likelihood that Ms. Helgason pursues an alternate career in law, for example in an in-house position, earning \$150,000 per year; and
 - c) There is a 20% likelihood that she leaves law altogether but remains employed and earns the average salary of a female in BC with a masters degree, ranging from approximately \$80,000-\$100,000.
- [162] This analysis includes a 10% likelihood, based upon census statistics, that she would leave the workforce entirely.
- [163] Using this weighted average approach, Mr. Gosling projects total without Accident earnings for Ms. Helgason to age 70 of \$4,747,979.
- [164] In addition to the reports of Mr. Turnbull and Mr. Gosling, the parties reached a "Second Agreed Statement of Facts" which attached three studies looking at retention rates in the practice of law. For example, in 2018 the Equity and Diversity Committee of the Law Society of BC published a report titled "Retrospective Analysis of Gender in the Legal Profession in BC (1992-2017)" which found that among women called to the bar in 2012, 74.2% maintained practicing status in 2016 (21.4% were non-practising members of the Law Society and 4.4% had ceased membership). The statistics for men were 82.5% maintaining practicing status, 11.8% non-practising status and 5.7% had ceased membership. For those remaining in practice, the report does not distinguish between types of practice, for example private firm versus corporate or government law department.
- [165] Similarly, the Law Society of Alberta published a report in October 2014 titled "Retention and Re-engagement Task Force Final Report" which found that within five years of being called to the bar, 57% of women will have left private practice and 28% will have left the practice of law entirely. For men, the numbers were 49% leaving private practice and 29% leaving law entirely.
- [166] These reports suggest that there is a significant rate of attrition in the practice of law, for both females and males.

[167] As I alluded to above, there is an issue between the parties about the appropriateness of Mr. Gosling's use of statistics relating to females with bachelors degrees in law. This issue has been the topic of considerable discussion in the courts: see for example *Steinebach v. O'Brien*, 2011 BCCA 302; *Crimeni v. Chandra*, 2015 BCCA 131; and *Gill v. Lai*, 2019 BCCA 103. The principles emerging from these cases were summarized by Justice Abrioux in *McColl v. Sullivan*, 2021 BCCA 181 at para. 41:

- a. damages for loss of future earning capacity are to be assessed on an individual basis: *Gill* at para. 55;
- b. gender-based earning statistics "may be useful where they can fairly be said to be the most accurate predictor of the lost stream of earnings": *Crimeni* at para. 23;
- c. however, gender-based earning statistics require caution because they may incorporate bias: *Steinebach* at para. 55; *Crimeni* at para. 23; *Gill* at para. 54; and
- d. it may be reasonable, depending on the evidence, for a court to assume a convergence in earnings: *Crimeni* at para. 23.

[168] Justice Abrioux made two further observations that are worth noting:

[43] Suffice it to say, gender-specific statistics guide rather than determine damages. Gender-specific statistics may incidentally align with a plaintiff's gender, but not invariably so. Two examples illustrate this point. To the extent that female economic multipliers reflect a greater likelihood of leaving the workforce to care for children, they may be appropriate for a male plaintiff who intends to be a "stay at home dad". Those same statistics may be inappropriate for a female plaintiff who intends to remain in the workforce without interruption. In every case, the burden is on the plaintiff to demonstrate their future losses.

[47] I would add that certain lower court decisions have regarded the use of female statistics for female plaintiffs as "not appropriate" as a general matter: *Fancello v. Cupskey*, 2019 BCSC 1724 at para. 233 and *Orregaard v. Clapci*, 2020 BCSC 1726 at para. 229. This may erroneously imply that female statistics may never be appropriate or of assistance to the court and/or that male statistics should be considered as a default position.

Without Accident Earnings

[169] As noted, Ms. Helgason submits that the starting point for assessing her future without Accident earnings is in Mr. Turnbull's report. While acknowledging Mr. Gosling's point that Mr. Turnbull does not incorporate any labour market contingencies into his projections, she submits that the general or average contingencies employed by Mr. Gosling do not apply to Ms. Helgason. This is because i) many of the contingencies are based upon choices made by individuals, for example to leave the workforce or to work at a reduced capacity; and ii) the use of averages does not account for the fact that Ms. Helgason is not an "average" female with a bachelors degree in law; rather she is a highly driven and talented young lawyer who falls well outside of the "average" range. She makes a similar point about

the attrition statistics contained in the law society reports; they are based on averages that do not account for her specific circumstances.

- [170] Ms. Helgason submits that accordingly, the 32% deduction made by Mr. Gosling for labour market contingencies should not apply to her. She submits that when the choice based contingencies are eliminated, a more appropriate deduction, reflecting general risk contingencies is 15%. She acknowledges a further modest 5% deduction to account for unknowns, like the possibility (albeit unlikely in her view) that she would not in fact continue as a lawyer at Fulton.
- [171] This results in a 20% contingency deduction. Ms. Helgason submits that this should then be applied to Mr. Turnbull's projected earnings to age 70 of \$9,934,077, resulting in future without Accident earnings of \$7,947,262.
- [172] The defendants submit that because Ms. Helgason has only just embarked on her career in law, the use of statistical averages makes sense because there is minimal evidence on which to engage in an individualized assessment of her future career. They cite the cautionary note sounded by the Court in *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 28 about projecting a future pattern of success based upon a relatively short period of employment.
- [173] Relying on the law society reports referred to above, the defendants note the significant attrition rates in the practice of law, with an average of, approximately 57% of women and 49% of men leaving private practice within the first 5 years, and 30% of women and 24% of men leaving practice altogether. They also point to the evidence of Ms. McCabe suggesting that over the past 21 years, only 8 new partners have been added to the firm, which equates to approximately 38% of persons hired as first year associates.
- [174] The defendants submit that the future loss projections provided by Mr. Gosling are to be preferred over those of Mr. Turnbull. Specifically, they submit that Mr. Gosling's projections apply appropriate labour market contingencies whereas Mr. Turnbull's do not. They submit that there is no basis on which to suggest that the average contingencies used by Mr. Gosling should not apply to Ms. Helgason. Similarly, they submit that there is no basis for using male-based statistics for Ms. Helgason. They rely on Mr. Gosling's evidence that female statistics are the most accurate measure from an actuarial perspective for predicting future earnings for a female in the position of Ms. Helgason.
- [175] The defendants submit that Mr. Gosling's weighted average approach (see paras. 160-162 above) is reasonable when assessing Ms. Helgason's future without Accident earnings. They note, for example, that his assumption of a 50% likelihood of Ms. Helgason staying in private practice and earning the equivalent of a Fulton partner salary is generous given the statistical evidence indicating a 57% attrition rate from private practice for female lawyers. Mr. Gosling again projects future without Accident earnings of \$4,747,979. This works out to average annual earnings of just over \$275,000.

- [176] In considering the respective positions of the parties and assessing the evidence as a whole, I find that I am unable to accept Ms. Helgason's position that it was all but certain she would have made partner at Fulton but for the Accident. While there is no doubt that she is both driven and intelligent, and is highly thought of by her colleagues at Fulton, it is simply too early in her career to be able to make that assertion. Further, the statistical evidence and, more importantly, Fulton's own history suggest that well under 50% of first year associates who stay on ultimately make partner.
- [177] In my view, the weighted average approach taken by Mr. Gosling is reasonable. As noted, it assumes a 50% likelihood that Ms. Helgason will achieve partnership at Fulton or an equivalent position, an assumption that I agree is generous. I note Ms. Helgason's point that there is no evidence to support Mr. Gosling's use of a salary level of \$150,000 for his alternative law position scenario, however I think that the figure is reasonable, particularly considering that the overall average annual earnings based on Mr. Gosling's three different scenarios is again in excess of \$275,000.
- [178] Having said that Mr. Gosling's approach is reasonable, it is necessary to exercise caution about his reliance on female-based statistics. While Mr. Gosling may be correct in saying that these statistics provide the most accurate basis for actuarial projections, I am not satisfied that they reflect the reality of the modern practice of law. I note for example that the statistics relied on by Mr. Gosling are from the 2016 census, which suggests that they are dated. Further, common knowledge and experience tells us that more women are going to law school and coming into and excelling in the profession. This is consistent with Ms. McCabe's evidence that in recent years, the majority of the top applicants to the firm have been women.
- [179] I am also mindful of the need to engage in an individualized assessment with due regard to the characteristics and circumstances of the particular plaintiff: McColl at para. 41. In this regard, I do accept that Ms. Helgason is driven to succeed and has always had a particular attachment to Fulton, which weighs in favour of the idea that she viewed Fulton as a long-term career option.
- [180] That said, intelligence, drive and career focus are adjectives that likely apply to the majority of young lawyers. Indeed, it is those qualities that typically propel students through law school, into articles and beyond. As Mr. Mark testified, Fulton has always attracted top quality students and associates. Thus, while Ms. Helgason undoubtedly has many attributes that would make her a successful and valued lawyer and may put her somewhat above average, I am not satisfied that she is so far above the pack as to render statistical averages and normal contingencies wholly inapplicable.
- [181] Taking all of these factors into account, I find that the reasonable and proper approach is to take Mr. Gosling's weighted average future earnings projection of \$4,747,979 and adjust it upwards by 20% to \$5,697,574. This 20% adjustment accounts for the fact that Ms. Helgason is unlikely to choose to leave the workforce entirely (which accounted for a 10%

contingency deduction in Mr. Gosling's projections); it offsets somewhat of Mr. Gosling's reliance on female-based statistics; and it addresses the fact that Ms. Helgason is a "somewhat above average" candidate. I would note again, that above average status is also reflected in the assumption of a 50% likelihood of her becoming a Fulton partner.

[182] I therefore assess Ms. Helgason's without Accident future earnings at \$5,697,574.

With Accident Earnings/ Assessment of Damages

[183] Ms. Helgason submits that her best case scenario for with-Accident future earnings is achieving an annual salary of \$120,000, which is the maximum associate salary paid by Fulton. Assuming she continues to work at 60%, this equates to annual earnings of \$72,000 per year. Using Mr. Turnbull's multiplier, this equates to total earnings to age 70 of \$2,153,376. She then applies a 25% contingency deduction, noting that with her injuries, Ms. Helgason is no longer above average and is therefore subject to contingencies applicable to average or below average individuals. This approach results in future with Accident earnings of \$1,615,032.

[184] The difference between Ms. Helgason's projected without Accident future earnings of \$7,947,262 and with Accident future earnings of \$1,615,032 is \$6,332,230. Based on this analysis, Ms. Helgason claims \$6,000,000 for loss of future earning capacity.

[185] The defendants submit that Ms. Helgason's post-Accident history is relevant when assessing her future career trajectory. They note that following the Accident, she successfully completed law school as well as both summer and regular articles, producing work at a level described by Ms. McCabe and Mr. Mark as "excellent". This supports the view that she is more capable than working at her current 60% level.

[186] The defendants rely on two different with-Accident scenarios addressed by Mr. Gosling. Under the first scenario, Ms. Helgason continues at 60% for two years and then returns full-time. For this scenario, Mr. Gosling uses statistical averages for Canadian females with bachelor's degree in law and projects future of \$4,705,329. In the second scenario, he assumes that Ms. Helgason works at 60% for two years then leaves private practice and pursues an alternate legal career. Under this scenario, he projects future earnings of \$2,604,528.

[187] Under the first scenario, deducting the projected future with Accident earnings of \$4,705,329 from the without Accident earnings of \$5,697,574 results in a loss of \$992,245. If the approximately \$2.6 million future with Accident figure is used, the difference or loss is \$3,093,046.

[188] I do not accept Ms. Helgason's projection of her future with Accident earnings for a number of reasons. First, it assumes that she will continue to work at 60% capacity for the balance of her career. However, the 60% capacity is what was negotiated between Ms. Helgason and the law firm; it is not necessarily evidence of her actual residual capacity. For example, the

reduction to 60% was not based on a recommendation by a medical professional. Second, it does not reflect the fact that she has demonstrated considerable additional capacity post-Accident by successfully completing law school and articles, and being kept on as an associate lawyer producing above average work. Third, it also assumes that her annual earnings will be capped at \$72,000, which is 60% of the current top associate salary at Fulton. This is inconsistent with the evidence that the law firm is unlikely to continue with that arrangement over the long-term. Finally, it does not account for the likelihood, or even the possibility, that if Ms. Helgason's career opportunities stall at Fulton, she will pursue other opportunities in law that will present her with the ability to earn more than \$72,000 per year.

- [189] I also do not accept Mr. Gosling's first scenario under which Ms. Helgason continues to work at 60% capacity at Fulton for two years then returns full-time. None of the evidence, even that of the defendants, provides a basis for finding that she will be able to return to full-time private practice in two years.
- [190] Based on the evidence, I find that the most likely scenario is Mr. Gosling's second scenario under which Ms. Helgason works for Fulton for two years at 60% and then finds alternate legal employment. A number of factors support this finding. First, it is clear that Ms. Helgason is intelligent, career focussed and business minded, which suggest she is well placed to take on an in-house legal role (acknowledging there is no vocational evidence). Second, the expert evidence suggests that Ms. Helgason's problems, both physical and psychological, are exacerbated by the stress and demands of her current practice. Dr. Babbage, for example, suggests she would benefit from a shift to a less demanding role. Third, as I have noted, with proper treatment, there is a significant likelihood of some improvement in her condition. This, combined with a move to a less stressful/demanding position is likely to enhance her future work capacity.
- [191] For these reasons, I find that Mr. Gosling's second scenario earnings figure of \$2,604,528 is a reasonable starting point for assessing Ms. Helgason's future with Accident earnings. Consistent to the assessment of her without Accident earnings, I would adjust this figure upwards by 20% to reflect the fact that Mr. Gosling uses female statistics that are likely below Ms. Helgason's earning potential, and the fact that she is a somewhat above average candidate who is unlikely to voluntarily leave the workforce entirely. On this point, I do not accept Ms. Helgason's submission that the Accident has brought her back from above average into the average or below average range.
- [192] A 20% upwards adjustment results in a figure of \$3,125,433. Mr. Gosling's second scenario however assumes that Ms. Helgason will engage in full-time employment after the first two years. This assumption does not account for my finding that Ms. Helgason is unlikely to recover completely and that she will continue to experience some degree of both physical and cognitive impairment into the future.

- [193] Assessing the impact of that impairment on her capacity to earn income is obviously challenging. As indicated above, I do not accept Ms. Helgason's position of an ongoing and indefinite 60% impairment. Minimal guidance as to a more appropriate degree of residual capacity is found in the expert evidence. Dr. Babbage suggests only that Ms. Helgason should switch to a less demanding role "and likely not full-time". Dr. Cameron suggests that she is "permanently partially disabled", but does not indicate what that means in terms of actual work capacity. Dr. Chawla does further to suggest that she would benefit from working a three-four day work schedule at four to six hours per day. I note that Dr. Chawla offers this opinion with no apparent evaluation of what the actual demands associated with Ms. Helgason's work as a lawyer would be. Mr. Pakulak suggests that Ms. Helgason is capable of meeting the physical demands of her work as a lawyer at a sustainable level part-time but not full-time, however, I share Mr. Gander's concern that Mr. Pakulak tested Ms. Helgason's capacity to engage in a number of physical activities that do not align with her actual work requirements.
- [194] The most that can be taken from these reports is that, in the view of these experts, Ms. Helgason will be limited to "part-time" employment. The experts relied on by the defendants take a more optimistic view of Ms. Helgason's future capacity, but again their opinions are of minimal assistance in quantifying that capacity.
- [195] In my view, if Ms. Helgason does shift to a less demanding legal role and achieves improvement in both her physical and cognitive/psychological symptoms, her ongoing disability will be reduced, although not eliminated entirely. I therefore find that the future with-Accident earnings figure of \$3,125,433, which again is based on full-time employment, should be reduced by 15% to reflect the likelihood that her ongoing symptoms will prevent her from working full-time or will result in periods of time in which she is required to miss work or reduce her work load. That results in a with Accident earnings figure of \$2,656,618. The difference between that figure and the without-Accident earnings of \$5,697,574 is \$3,040,956. I would round that figure down to \$3,000,000 which I consider to be a fair assessment of Ms. Helgason's loss of future earning capacity.

Cost of Future Care

- [196] The test for an award of future care costs is that the treatments or care items be reasonable and medically justified in the sense that they are intended to ameliorate the impacts of the plaintiff's injuries and to promote the physical and mental health of the plaintiff: *Owen v. Folster*, 2018 BCSC 143 at paras. 311-12; *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 at 84, *aff'd* (1987), 49 B.C.L.R. (2d) 99 (C.A.).
- [197] The parties do not differ significantly on the cost of future care. One item recommended by both psychiatrists, Dr. Babbage and Dr. Okorie, is course of psychotherapy with a registered psychologist. Dr. Babbage recommended 12-24 treatments. Ms. Helgason's suggests 18 treatments using her current counselling rate of \$168 per hour. While there is no evidence of this, I think it can fairly be assumed that a registered psychologist would have a higher

hourly rate. Twenty sessions at a rate of \$200 per hour is \$4,000. It is not unreasonable to also build into any award, some allowance for future or ongoing counselling, likely on a periodic or as need basis. I would therefore make allowance for a further 20 sessions, which results in award for counselling of \$8,000.

[198] Ms. Helgason testified that she has experienced some albeit short term relief from passive therapies like massage and physiotherapy. As Dr. Salvain noted, these therapies are not curative but may provide some relief. Ms. Helgason proposes six sessions per year to age 70, which translates in approximately \$14,000 present value. I am not satisfied that the evidence supports an award of that magnitude extending to age 70. However, I do accept that these therapies are of benefit to Ms. Helgason and I therefore award her \$10,000.

[199] Ms. Helgason also seeks an award of \$4,800 for Botox treatments. Dr. Cameron suggested that she is a candidate for this treatment, although he recognizes that it is not a long-term treatment. In my view, an allowance of \$4,000 is reasonable.

[200] In summary, I award \$22,000 for the cost of future care.

Loss of Housekeeping Capacity

[201] Depending on the nature of the claim and the evidence, loss of housekeeping capacity may be dealt with as an element of non-pecuniary damages or may warrant a separate pecuniary award: *Kim v. Lin*, 2018 BCCA 77. In *Kim*, Chief Justice Bauman reviewed a number of cases and academic writings addressing the question of whether loss of housekeeping capacity should be dealt with as an element of non-pecuniary damages or as a separate head of pecuniary damages and concluded:

[33] Therefore, where a plaintiff suffers an injury which would make a reasonable person in the plaintiff's circumstances unable to perform usual and necessary household work -- i.e., where the plaintiff has suffered a true loss of capacity -- that loss may be compensated by a pecuniary damages award. Where the plaintiff suffers a loss that is more in keeping with a loss of amenities, or increased pain and suffering, that loss may instead be compensated by a non-pecuniary damages award. However, I do not wish to create an inflexible rule for courts addressing these awards, and as this Court said in *Liu*, "it lies in the trial judge's discretion whether to address such a claim as part of the non-pecuniary loss or as a segregated pecuniary head of damage": at para. 26.

[34] Whichever option a court chooses, when valuing these different types of awards, courts should pay heed to the differing rationales behind them. In particular, when valuing the pecuniary damages for the loss of capacity suffered by a plaintiff, courts may look to the cost of hiring replacement services, but they should ensure that any award for that loss, and any deduction to that award, is tied to the actual loss of capacity which justifies the award in the first place.

- [202] I am satisfied that this is an appropriate case in which to make a separate award for loss of housekeeping capacity. The evidence establishes that Ms. Helgason does less around the house, both in terms of inside chores and garden/yard work. There is also evidence that she has hired some outside assistance to help with the housework. That said, the evidence is somewhat vague about the extent to which she is limited and it is not clear, as a busy professional, that she would not have hired a cleaner in any event but for the Accident.
- [203] In the circumstances, a relatively modest award in the amount of \$15,000 is appropriate, particularly given my finding that she is likely to improve somewhat with appropriate treatment.

Special Damages

- [204] In *Manhas v. Jaswal*, 2020 BCSC 586, Justice Basran provided a succinct summary of the principles governing special damages, at para. 86:

- Claims for special damages are subject to a consideration of reasonableness, taking into account the nature of the injury sustained, once causation is established.
- Medical justification for an expense is a factor as to reasonableness, but is not a prerequisite.
- Subjective factors may also be considered such as whether the plaintiff believes the treatment is medically necessary.
- \$0.50 per kilometer is a reasonable rate to attend treatment.

- [205] Again, the parties do not differ significantly on special damages. Ms. Helgason claims \$8,920 for various treatment costs incurred. The defendants submit that certain expenses for gardening and housekeeping services should be dealt with under the non-pecuniary head and that expenses for some medications are not justified as they are for treating ADHD, which Ms. Helgason does not have.

- [206] I am satisfied that the disputed items are proper. The medications were prescribed and taken as part of Ms. Helgason's attempts to deal with her symptoms. I have found that a modest award for future gardening and housekeeping services is warranted and it follows that a similarly modest award for past expenses can also be sustained. I therefore award Ms. Helgason \$8,920.

Conclusion

- [207] In summary, I award Ms. Helgason the following damages:

- a) Non-pecuniary damages

\$160,000

- b) Past loss of earning capacity (gross)

\$11,800

c) Loss of future earning capacity

\$3,000,000

d) Cost of future care

\$22,000

e) Loss of housekeeping capacity

\$15,000

f) Special damages

\$8,920

Total:

\$3,217,720

[208] In addition, Ms. Helgason advances a statutory claim under the Health Care Costs Recovery Act, S.B.C. 2008, c. 27, on behalf of the Ministry of Health in the amount of \$1,515.71.

[209] If the parties are unable to agree on costs, they may make arrangements through Supreme Court Scheduling to speak to the matter.

"Skolrood J."

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