

CANADA / JUDGMENT

Horne v. Goglia

2020 BCSC 122

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 122 Horne v. Goglia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Horne v. Goglia,

2020 BCSC 122

Date: 20200203

Docket: M169549

Registry: Vancouver

Between:

KC Horne also known as Tanya Horne

Plaintiff

And

Sabrina Anne Goglia, Marie Madeline Carole Brind Amour, and Nola Margaret Morris

Defendants

Before: The Honourable Madam Justice Douglas

Reasons for Judgment

Counsel for Plaintiff:

T.L. Spraggs

D. O'Neill

Counsel for S.A. Goglia and M.M.C.B. Amour:

J. Wong

No other appearances

Place and Date of Trial:

Vancouver, B.C.

June 17 - 21, 2019

August 6 - 9 and 15, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 3, 2020

Table of Contents

INTRODUCTION. 3

BEFORE THE ACCIDENT. 3

Background. 3

Plaintiff's Pre-Accident Education and Employment History. 3

THE ACCIDENT. 4

AFTER THE ACCIDENT. 5

Injuries and Current Status. 5

Post-Accident Treatment 7

Current Activities. 8

Employment 9

MEDICAL EVIDENCE. 11

Treating Health Care Professionals. 11

General Practitioner, Dr. Eddy. 11

Physiotherapist, Mr. Birdsell 14

Dentist, Dr. Ng. 16

Medical Experts. 18

Physiatrist, Dr. Waseem.. 18

Orthopedic Surgeon, Dr. Sovio. 22

CREDIBILITY AND RELIABILITY OF EVIDENCE. 25

CAUSATION. 27

DAMAGES. 29

Duty to Mitigate. 29

General Damages. 29

Loss of Housekeeping Capacity. 35

Past Loss of Income-Earning Capacity. 36

Loss of Future Income Earning Capacity. 39

Future Cost of Care. 44

Special Damages. 49

SUMMARY. 50

INTRODUCTION

- [1] This claim arises from a motor vehicle accident which occurred in Coquitlam on January 20, 2015 (the "Accident"). The defendants admit liability and the trial proceeded on the issue of damages only.
- [2] The plaintiff seeks general damages, special damages, damages for past and future loss of housekeeping and earning capacity, and future care costs. She says the injuries she sustained in the Accident have fundamentally and permanently altered her life. The defendants agree the plaintiff is entitled to general damages for chronic pain arising from the Accident and modest special damages for past physiotherapy expenses but dispute her other claims.

BEFORE THE ACCIDENT

Background

- [3] The plaintiff is 30 years old and lives with Todd Dillon, her common-law partner of about 12 years. She says she was healthy, happy, and active before the Accident. She and Mr. Dillon enjoyed travelling with her close-knit family, engaging in shared activities, and playing sports. The plaintiff golfed for pleasure about three times a week and once or twice a month for work in her sales job. She enjoyed swimming, biking, water sports, snowboarding, and soccer and went to the gym three or four times a week.
- [4] Mr. Dillon and the plaintiff's parents, brother, and sister-in-law all gave evidence at trial. They corroborated the plaintiff's evidence regarding her pre-Accident condition and variously described her as active, outgoing, and enthusiastic before the Accident.

Plaintiff's Pre-Accident Education and Employment History

- [5] The plaintiff has a high school diploma but no post-secondary education. She does not plan to go back to school as she said academics are not her strong suit. During high school, she worked in the beauty section of a Superstore. After high school, she did some paid modelling before starting work as a glazer. The plaintiff liked working in construction. Although slight in build, she says she was strong and able to manage this physically demanding job.
- [6] In January 2012, the plaintiff suffered a significant back injury when she and a co-worker dropped a heavy piece of glass they were carrying. Thereafter, she missed eight to nine months of work and was under the care of a WCB team, which included multiple specialists and her family physician, Dr. Donald Eddy. She returned to light duties as a driver for six months before moving into sales where she has remained ever since. She never again worked as a glazer or returned to the same kind of physically demanding work.
- [7] Mr. Dillon and the plaintiff's parents were aware of her 2012 workplace injury but were unable to provide details about the nature or extent of it. Her brother learned she was on light duties some time after 2013 but did not know she had been off work for an extended period following a workplace injury.
- [8] In or about June 2014, the plaintiff accepted a position as a territory account manager with Cannon Industries ("Cannon"), a warehouse packaging and shipping supplier, earning an annual salary of about \$35,000 plus commission. She was working in sales with Cannon at the time of the Accident.

THE ACCIDENT

- [9] On January 20, 2015, the plaintiff was driving home from work when the vehicle in front of her stopped abruptly. Although she slammed on her brakes and stopped her car without hitting the vehicle in front of her, the driver of the car behind her struck the plaintiff. The impact propelled the plaintiff's car into the stationary vehicle about two feet ahead of her.
- [10] Despite wearing a functioning lap belt and shoulder harness, the plaintiff says she hit her forehead on the steering wheel of her car. She experienced left arm pain and tingling and left shoulder pain at the Accident scene. She remembers shaking, being nervous and scared, and having a slight headache.
- [11] The Accident impact damaged the rear bumper, back trunk, and gas cap cover of the plaintiff's car. The air bags did not deploy. Emergency services did not attend and the plaintiff did not go to the hospital.

- [12] The plaintiff spoke to Mr. Dillon by telephone the day of the Accident and reassured him she was ok. He could not recall if she told him about any physical complaints. He stopped in to see her the next day on his way to work and recalls her having neck pain. He could not remember if she took any time off work following the Accident.

AFTER THE ACCIDENT

Injuries and Current Status

- [13] The plaintiff suffered no forehead bruising or bleeding and her forehead pain disappeared within a day or two. In the weeks following the Accident, she experienced left leg pain; it improved a few years after the Accident. Her left arm pain disappeared altogether at some point.
- [14] The plaintiff says she also sustained injuries to her left shoulder, neck, upper, mid and low back and experiences variable headache pain, which often starts in the back of her neck and sometimes radiates up behind her ears and into her temples. She complains of ongoing bilateral neck and back pain, which originates in the middle of her back and travels down her spine. Prolonged driving and working on her laptop aggravates this pain. Sitting is uncomfortable and she adjusts her position frequently; at its worst, she likened this pain to having a knife in her back. She cannot sleep on her left side due to left shoulder pain; doing so causes her to wake up. She plans to continue seeing Dr. Ng, her dentist, for cosmetic Botox injections for temporary relief of headache pain. She is receiving no other treatment for Accident-related injuries.
- [15] The plaintiff currently has good and bad days. A good day is associated with pain of 2/10 intensity (which means she is sore but things are doable); on a bad day, she has constant, more intense neck and back pain which she described as an ache or throbbing sensation. Cold causes her back to tense up and aggravates her pain.
- [16] The plaintiff says her injuries have affected her emotionally. It upsets her that she is unable to do all the things she enjoyed before the Accident. She is now more easily fatigued and frequently takes naps after work. She says she needs to walk away after spending about four hours on her laptop because of pain and to stop for breaks when driving long distances. The plaintiff's family members all testified that, since the Accident, she is now less active, more easily fatigued, and has not returned to her pre-Accident condition.
- [17] Mr. Dillon said that, until recently, the plaintiff was in limbo with her job, which created some financial uncertainty. Pressure to start a family weighs on him and creates some strain in his relationship with the plaintiff. He said they now argue about things he never thought would be an issue for them including, for example, housework. Her physical difficulties have affected their intimate relationship. He said she is restless at night and has trouble finding a comfortable sleeping position.

- [18] Mr. Dillon described the plaintiff as "more of a ride-along partner" now. Sometimes he would like to be active and she wants to sit on the couch. They now go to the driving range instead of golfing together, take easy walks instead of going hiking, and cycle in the city instead of biking on trails. He bought her a new snowboard after the Accident but she has not used it.
- [19] To Mr. Dillon's knowledge, the plaintiff is managing at work. He described her as a star in her customer relations role. He understands her job has no physical requirements and that it now takes her a bit longer to drive places for work as she stops for breaks. He said she often works on her laptop for another four hours after getting home. According to Mr. Dillon, the plaintiff smiles at work and he deals with the aftermath at home. Sometimes he gives her neck massages for temporary pain relief. He understands physiotherapy was of limited benefit to the plaintiff, that she has ongoing headache, back, neck, leg, and arm pain, and that Botox injections provide her with temporary relief from headache pain.

Post-Accident Treatment

- [20] The plaintiff went to see Dr. Eddy about two days after the Accident. He has treated her since the Accident. The plaintiff knows him well, trusts him, and is fully open with him about her health issues. He has been her family doctor her whole life. She sees him for neck, back, and shoulder pain, does not think he has treated her headache pain, and could not recall if he referred her to anyone for her leg issues. She thinks he referred her to one or two specialists after the Accident but could not recall any further details.
- [21] The plaintiff treats her headaches with over-the-counter Advil, which alleviates some but not all her headache pain. A family history of addiction has made her wary of taking any other medications. In about 2016, she started receiving Botox injections from her dentist, Dr. Ng, for cosmetic reasons. Her aunt and a friend suggested this treatment might help her headaches. Over time, the plaintiff discovered Botox injections improved her headache pain. She now attends at Dr. Ng's office about every three months for cosmetic Botox injections and temporary relief from headache pain. She says her headaches never improved and worsened after the Accident.
- [22] The plaintiff attended for physiotherapy at two different locations in Port Coquitlam from January to May 2015. This therapy involved stretching, TENS treatments, and weights. She switched locations because she did not think the physiotherapy she received at the first location was helpful. She said she derived no long-term benefit from physiotherapy and that her pain typically returned and occasionally worsened within a few hours of a physiotherapy session. She said she discontinued physiotherapy because it was causing her financial hardship and provided her with no benefit between March and May 2015. She said she did so on her own initiative and could not recall discussing the matter with her treating physiotherapist. At some point, Dr. Eddy suggested she go back to the gym and start returning to her usual life.

- [23] The plaintiff went to a spa in Whistler three times with Mr. Dillon for neck massages. She could not recall when they did so. While this felt good at the time, it provided no lasting benefit.

Current Activities

- [24] The plaintiff is independent in all the usual activities of daily living although she has some difficulty drying and straightening her hair. Mr. Dillon assists with changing bed linens. The plaintiff said she is strong, tries hard, is not a quitter, and is able to do everything at her own pace. She is not as active with her young niece and nephew as she would like to be. She is unable to throw them in the air or carry them around due to back pain; she finds it tiring to look after them without assistance. She did not golf for about a year after the Accident. She no longer enjoys golf as much as she did because she is unable to play all the holes due to left shoulder and leg, neck, and side pain, and because she is now unable to win all the time.
- [25] The plaintiff no longer enjoys being on the water in Mr. Dillon's boat as she is apprehensive about hitting waves and jarring her back. She described being in the Okanagan with him two summers ago and using the boat for less than one day; she said pain impaired her enjoyment and that she did not have the arm strength necessary to propel herself back into the boat. The plaintiff has travelled with her family to Hawaii since the Accident. While she would have previously participated in water sports, she did not do so on that occasion as she does not trust her arms, does not want to get sore, and gets "shiver pain" when cold.
- [26] The plaintiff now engages in different activities. While she and Mr. Dillon used to walk on the beach while on holidays for hours, she now has pain in her back, leg, and neck after only a few hours. She no longer does water sports and usually just relaxes, often on her own, on the beach. This is upsetting to the plaintiff who wants to be with her family and friends. Although Mr. Dillon recently bought the plaintiff a new snowboard, she has not used it because she is too scared to do so. She no longer plays soccer because she is too timid to get into a tackle. She said she is too concerned about pain and is worried about injury. She no longer goes to the gym. She now gets her exercise at work, in her personal life, and while doing housework. She no longer bikes trails but rides her bicycle on the streets; she is able to do so for up to three hours at a time but has pain thereafter.
- [27] The plaintiff would like to have children but worries about her ability to carry a pregnancy and to deliver and care for a child given her ongoing back and neck issues. She says she currently has trouble bathing her three-pound dog.
- [28] At the time of the Accident, the plaintiff was living with her parents. Apart from cleaning up after herself, she had minimal duties at home. After the Accident, her mother assisted her with changing bed linens and washing her car. In 2017, at the age of 27, the plaintiff moved in with Mr. Dillon into an 1100 square foot condominium, with an 800 square foot patio. He now picks up the slack and does some housework. The plaintiff said she makes an effort to do housework but when she does so, she experiences pain, sits down, and hopes she has not

pushed herself too far. She wants to be able to help and finds it frustrating she cannot do as much as she would like. She takes pride in having a clean home.

- [29] In 2019, after using a garden hose for less than ten minutes to clean small pebbles from her deck, the plaintiff said she experienced sudden numbness and tingling in her legs and almost collapsed. She went inside to rest, had trouble walking and lying flat, and spent the rest of the weekend in bed. She did not go to the hospital or speak to her family doctor. She has not hired anyone to assist with housekeeping duties since the Accident.

Employment

- [30] After the Accident, the plaintiff immediately returned to all her regular job duties. She had some flexibility in her position and modified how she did her job (including periodically leaving early, resting, taking breaks, and doing some work from home). She said she paid couriers to make some heavy client deliveries that she was unable to do herself after the Accident and that her employer deducted those costs from her commission income.
- [31] In January or February 2016, the plaintiff left Cannon and accepted a position as territory manager with Colonial Countertops in Burnaby. She did so because she would earn a salary in this job and not be dependent on commission income or required to make client deliveries. She measured and sold countertops, ensured timely installation, and found and maintained clients. In about April 2017, she left Colonial Countertops for personal reasons unrelated to the Accident. Thereafter, she worked briefly as a project manager for Springridge Construction before accepting a merchandiser position with Breakthru Beverage Group ("Breakthru"), a liquor distribution company. This job required her to assemble large promotional displays, which was physically demanding. The plaintiff described herself as a "go-getter" who would do this work and struggle later with the consequences of having done so. Following Breakthru, she worked as a sales representative and merchandiser with PMA Canada ("PMA"), another liquor distribution company. Putting together displays was the most physically demanding part of this job. She worked Monday to Friday and some evenings and weekends at conferences and promotional events.
- [32] In April 2019, the plaintiff accepted her current position as a territory sales manager with Goodman Manufacturing ("Goodman") selling HVAC units after being headhunted by someone who knew her when she was at Cannon. Her current base salary is \$90,000 plus commission, which drops to \$50,000 plus commission in one year. The plaintiff was offered this favourable salary as an incentive to leave PMA. She understands she should be able to maintain her \$90,000 income by earning commission.

- [33] The plaintiff's current plan is to remain with Goodman, build up her clientele, and increase her commission income. She enjoys her job and earned \$1,200 commission in the month before trial, representing an increase in income over her first two months in this job. She no longer needs to pay couriers to make client deliveries. Her main job duty is travelling within her region. Driving long distances and working for extended periods on her laptop computer are her biggest physical challenges at work.
- [34] The plaintiff is concerned about whether she will be able to perform indefinitely in her current position given her injuries from the Accident. She does not know what her condition will be in the future or whether her back pain will worsen over time.

MEDICAL EVIDENCE

Treating Health Care Professionals

General Practitioner, Dr. Eddy

- [35] Dr. Eddy is a Port Coquitlam family practitioner who was involved in the plaintiff's treatment following her January 2012 workplace injury and the Accident. I found him to be a credible and forthright witness. Heavily redacted portions of his medical records were in evidence. No detailed records regarding the plaintiff's extensive treatment following her 2012 work injury were in evidence.
- [36] On February 5, 2015, Dr. Eddy first assessed the plaintiff after the Accident. He recorded she was having marked pain and spasm of the parathoracic and paralumbar muscles down to the left SI joint, her neck was okay, and she was trying physiotherapy with minimal results. On objective assessment, he recorded the presence of marked left-sided muscle spasm from the thoracic spine to the sacrum. He prescribed a variety of medications.
- [37] On February 19, 2015, Dr. Eddy recorded the plaintiff was having increased pain in the parathoracic area and some radiation to the paralumbar area despite anti-inflammatories and muscle relaxants. He noted that, several years ago, she had experienced similar problems after lifting, nothing was found, and she healed over about one and a half to two years.
- [38] A March 18, 2015 consultation report from rheumatologist, Dr. Manhas, is contained within Dr. Eddy's chart. In this report, Dr. Manhas referenced the plaintiff's 2012 workplace back injury and noted she had stopped attending physiotherapy because she did not feel it was helping much. He indicated the plaintiff's symptoms improved about one and a half years after this injury and she eventually re-entered the work force. He referenced the Accident, following which the plaintiff reported experiencing a recurrence of her back pain and attending physiotherapy, which she had discontinued because of the cost. He noted she planned to resume privately funded physiotherapy and that she took muscle relaxants, anti-inflammatories, and prescription pain-relieving medication. He recorded his physical and neurological examinations as normal. He wrote that he reassured the plaintiff her

symptoms should settle with time, encouraged her to continue physiotherapy, and arranged no follow-up but agreed to see her again as necessary.

- [39] On March 31, 2015, Dr. Eddy noted the plaintiff was attending physiotherapy which she reported was causing some improvement for her. On May 13, 2015, he recorded a complaint of pain on abduction of the left shoulder and reports of minimal results from physiotherapy, from which she had been discharged. On June 10, 2015, the plaintiff reported some left-sided trapezius, paralumbar and parathoracic spasm and occasional pain; Dr. Eddy charted that most of the time the pain is gone and noted the range of motion in the plaintiff's neck, back, and shoulders was normal. In cross-examination, he clarified this to mean he understood she could move normally without pain. He agreed this note indicated some improvement since the date of her last visit.
- [40] On May 13, 2015, Dr. Eddy completed a CL-19 form for ICBC. He wrote the plaintiff had subjective complaints of mid and low back pain and left paraspinal and trapezius muscle spasm on objective assessment. He diagnosed musculo-ligamentous strain of the neck and back, noted she had made slow progress, could not do vigorous exercise or lifting, was then at work doing light duties, was not precluded from working full duties, and her anticipated functional outcome was recovery. Dr. Eddy had no information to suggest she was having any difficulties doing her job.
- [41] Thereafter, Dr. Eddy continued to see the plaintiff periodically. His clinical notes record her subjective complaints and make frequent reference to normal range of motion of the back and neck on objective assessment. Dr. Eddy recorded no Accident-related abnormal objective findings on September 3, 2015, December 9, 2015, January 28, 2015, or March 24, 2016. On April 16, 2016 and July 13, 2016, he recorded the presence of prominent parathoracic muscle spasms. On April 16, 2016, he completed a second CL-19 form and referenced a normal bone scan of the spine. He was then checking for the presence of an inflammatory disease of the spine.
- [42] On March 3, 2017, Dr. Eddy assessed the plaintiff as having some tenderness and spasm of the paraspinal muscles and noted she reported having been seen at a pain clinic. Dr. Eddy had no recollection of referring the plaintiff to a pain clinic or of her attending one. The plaintiff said nothing about this at trial. He wrote the plaintiff had had extensive investigations, all of which were normal.
- [43] On July 25, 2017, Dr. Eddy recorded the plaintiff's complaints of mid-thoracic pain and her reports of a vague sensation of sweating, coolness, and fatigue for no apparent reason. He noted she gets lightheaded at times. Dr. Eddy wrote he did not know what could be causing those symptoms and was trying to figure out if something else was going on.

- [44] Dr. Eddy's August 26, 2018 clinical notes indicate the plaintiff refused trigger point injections and was then working full duties full-time. On August 28, 2018, he wrote the plaintiff questioned why she was unable to gain weight. On February 5, 2019, he charted tenderness in the bilateral sacroiliac joints; this was a new complaint and he ordered x-rays and blood tests to see if he was missing anything.
- [45] Dr. Eddy made no referrals to any other specialists. The plaintiff never reported any psychosocial symptoms to him. He recorded no complaints of post-Accident headache. There are only three references to headache in the extracts of Dr. Eddy's records in evidence: May 14, 2014 (in the context of flu-like symptoms), November 25, 2014 (in the context of a diagnosis of viral meningitis), and January 22, 2015 (in Dr. Wilson's January 22, 2015 MVA report where he notes "also headaches"). There is no reference in Dr. Eddy's records to a diagnosis of migraine headache, post-traumatic headache with migraine features, or to the plaintiff reporting any migraine features, including photophobia or visual disturbances.

Physiotherapist, Mr. Birdsell

- [46] Treating physiotherapist, Robert Birdsell, was called by the defendants. He completed a Bachelor's degree in Kinesiology at the University of Lethbridge and a Masters in Physiotherapy in Perth, Western Australia. He became a licensed physiotherapist in Canada in 2013 and was involved in the plaintiff's care from March 24, 2015 to May 13, 2015. He was an impressive witness.
- [47] Dr. Eddy referred the plaintiff to Mr. Birdsell for her complaints of neck, back, and leg pain after the Accident. She reported having tried physiotherapy previously without benefit and her GP suggesting she see a different physiotherapist. Mr. Birdsell's clinical notes and records were in evidence. He completed his initial assessment of the plaintiff on March 24, 2015 and saw her on eight subsequent occasions.
- [48] Mr. Birdsell obtained and recorded the following history from the plaintiff at her first visit:
- a) "[F]our years ago" (which he assumed meant she told him she had been involved in another car accident four years earlier);
 - b) Pain in the:
 - i. Left leg, buttock, and inside leg;
 - ii. Upper back/shoulder blade; and
 - iii. Left side of neck;
 - c) Intermittent headaches with no associated nausea or any of the "five Ds" (i.e., dysarthria, dysphasia, diplopia, dizziness, or drop attacks);
 - d) Otherwise healthy; and

e) Medications included anti-inflammatories and pain killers.

[49] On examination, Mr. Birdsell noted the plaintiff had:

- a) A mild forward head posture;
- b) Some scapula winging (which he described as very common);
- c) Some increased tone in the left levator scapula muscle and the upper fibres of the trapezius and rhomboid muscles;
- d) Active range of motion of the cervical spine;
- e) Some painful cervical flexion;
- f) Mild limitation of C4/5 to C6/7 but no pain on passive physiological intervertebral movement ("PPIVM");
- g) Some pain down her left leg on active straight leg raise ("ASLR") which was alleviated when he took the weight of her leg;
- h) Pain in the lumbar spine on PPIVM; and
- i) On active range of motion, her two most notable reported complaints were pain on rotating her head forward and to the right (check marks on his diagrams indicate no reports of sharp pain or pinching).

[50] On March 24, 2015, Mr. Birdsell's treatment notes describe working on tight muscles and education regarding anatomy and the physiotherapy plan. Thereafter, the plaintiff attended for additional treatment sessions on March 31, April 2, 7, 9, 14, 16 and 28, and May 12, 2015, at which time Mr. Birdsell performed a suboccipital release (i.e., of the muscles at the base of the skull). On March 31, 2015, Mr. Birdsell wrote "SNAG" in his notes which he explained refers to Sustained Natural Apophyseal Glide. On April 7, 2015, he performed a soft tissue release (which he explained is a massage). He provided the plaintiff with a home exercise program.

[51] April 28, 2015 was the plaintiff's second last visit with Mr. Birdsell. He wrote she reported having a few random days with aching but no headache or leg issues since her last visit about two weeks earlier. He noted she would benefit from registered massage therapy ("RMT") but did not arrange for her to undergo this treatment. She did not report attending for RMT while he was involved in her care.

[52] It is Mr. Birdsell's practice to taper physiotherapy visits before ending them to see how the patient responds. At the plaintiff's second last visit, he told her they could attempt a discharge from physiotherapy if she was doing well. He wrote she reported having had quite a successful two-week period and to be feeling quite good. Accordingly, he discharged her from physiotherapy and advised her she was welcome to return if she had any ongoing symptoms. He recommended she might like to try massage therapy and gave her a home

exercise program.

- [53] Mr. Birdsell wrote two letters to referring physician, Dr. Eddy, on April 7, 2015 and May 13, 2015. In his May 13, 2015 letter to Dr. Eddy, Mr. Birdsell noted the plaintiff:
- a) Reported doing much better;
 - b) Had responded well to physiotherapy;
 - c) Was no longer experiencing headaches or left posterior leg pain and her low back pain had settled; and
 - d) Still experienced mid-thoracic discomfort at times but reported these occurrences were now rare.
- [54] Mr. Birdsell wrote he was optimistic that, with some home strengthening and massage treatment, the rest of the plaintiff's symptoms would settle, and he had instructed her to return if her symptoms persisted. She did not do so. Mr. Birdsell recorded nothing about the plaintiff reporting any work-related concerns. He said he includes what he considers is relevant in his records and has a memory of working with the plaintiff. In cross-examination, Mr. Birdsell admitted he diagnosed the plaintiff with a whiplash associated disorder ("WAD") grade 2 - 3. If neural changes are present, he would assess a grade 3 WAD. In this case, he considered the plaintiff to be "more of a grade 2" although he agreed she did have some nerve tension present on his initial assessment.

Dentist, Dr. Ng

- [55] The defendants called Dr. Matthew Ng, the plaintiff's dentist of about 10 years. On September 12, 2016, she attended at his office for the first time after the Accident for a hygiene appointment, molar sensitivity assessment, and Botox consultation. Dr. Ng was unaware of her involvement in the Accident until served with a subpoena to attend trial. I found him to be a frank and forthright witness.
- [56] On October 22, 2016, the plaintiff saw Dr. Ng's colleague, Dr. Chow, for fillings and spoke to Dr. Ng about Botox. She said she was interested in this treatment for her forehead wrinkles, frown line, and crow's feet. Following their discussion, the plaintiff confirmed she wished to proceed and Dr. Ng injected her with Botox that day. Before doing so, he reviewed with her the Botox protocol and the cost, risks, and potential side effects associated with this treatment (including possible bruising, swelling, and headache, although he would have said that sometimes Botox improves headache). He would have explained the need to repeat Botox injections (which are required every 3 - 4 months to maintain cosmetic results) and the non-negotiable fee of \$350 per injection, payable the day treatment is administered. The plaintiff's account with Dr. Ng is current and he could not recall her expressing any concern to him about this cost.

[57] Dr. Ng testified the plaintiff said nothing to him about headache pain on October 22, 2016, or at any other visit. He was aware of no contraindications to this treatment in the plaintiff's case. He noted she has a "stubborn" frontalis muscle, which required an additional Botox injection to achieve the intended cosmetic result. The plaintiff subsequently attended at Dr. Ng's office for top-up Botox injections (to maintain the desired cosmetic effect) on November 4, 2016, February 3, 2017, May 9, 2017, April 3, 2018, August 1, 2018, November 21, 2018, December 4, 2018, and April 11, 2019. All injections were in the same three areas. Dr. Ng administered 50 units of Botox at each visit, the accepted dose for the treatment of wrinkles. He has not seen the plaintiff since April 2019.

Medical Experts

Physiatrist, Dr. Waseem

[58] The plaintiff called Ontario physiatrist, Dr. Waseem, who was qualified to give opinion evidence as an expert in the area of physical medicine and rehabilitation. Dr. Waseem's physiatry practice includes the assessment and treatment of patients with chronic pain and neurologic and musculoskeletal injuries. He answered questions in a direct and responsive manner and made reasonable admissions in cross-examination. I found him to be a credible witness.

[59] Dr. Waseem explained that post-traumatic headache with migraine features is a specific class of headache which develops following trauma and is associated with elements of migraine headache (meaning they are severe, can be activity-disabling, are typically pulsatile, and may be accompanied by nausea and vomiting). Reference in his report to "migraine features" is to photophobia and other visual and auditory disturbances; Dr. Waseem agreed that headache without such features is not likely migraine headache pain. He described chronic myofascial pain syndrome as pain that emanates from soft tissue structures. He said chronic pain syndrome refers to the presence of chronic pain (i.e., pain that persists for at least six months) and psycho-emotional issues (ex., depressed mood, irritability, anger, anxiety, nervousness, worry, disordered sleep and reduced functional tolerance).

[60] Dr. Waseem assessed the plaintiff for about 1.5 hours in January 2017. Before doing so, she met with his colleague to complete a questionnaire. Dr. Waseem reviewed the medical records provided to him before he assessed the plaintiff. He obtained a history from the plaintiff which included the following information:

- a) She worked at home for two days after the Accident, following which she returned to her normal work hours and activities although she periodically had to leave work early due to pain;
- b) Her cervical spine injury resolved within two months of the Accident;

- c) Her headaches began within one month of the Accident, had not changed in the two years since the date of onset, and were no better or worse at the time of his assessment than they had been following the Accident; and
 - d) She continued to vacation following the Accident, had resumed playing golf in a limited way, and was no longer playing sports.
- [61] In cross-examination, Dr. Waseem admitted the plaintiff may have left work early on occasion after the Accident without suffering any loss in productivity. He agreed the statement in his report about lost productivity represents his own judgment. He admitted he is of the opinion the plaintiff has no work-related disability and that she did not report leaving Cannon for any Accident-related reason.
- [62] Dr. Waseem's physical examination of the plaintiff included the following findings:
- a) A normal biomechanical gait pattern and no focal muscular atrophy;
 - b) Examination of the cervical spine demonstrated:
 - i. No pain on palpation;
 - ii. No muscle stiffness, increased muscle tone, or spasms, taut bands or trigger points;
 - iii. A symmetric range of motion within normal limits;
 - c) Examination of the thoracic spine demonstrated:
 - i. Muscle pain on palpation;
 - ii. Muscle stiffness, taut bands, and notable trigger points; and
 - iii. A symmetric range of motion within normal limits;
 - d) Examination of the lumbar spine demonstrated:
 - i. Pain on palpation of the lumbar paraspinals bilaterally;
 - ii. Muscle stiffness, taut bands, and notable trigger points;
 - iii. Normal and symmetric range of motion; and
 - iv. Lumbar spine movements did not increase pain;
 - e) Examination of the upper extremities demonstrated no pain on palpation or movement and no muscle stiffness, increased muscle tone, spasms, taut bands or trigger points;
 - f) Examination of the lower extremities demonstrated:
 - i. No pain on palpation or movement; and
 - ii. No evidence of muscle stiffness, increased muscle tone, spasms, taut bands or trigger points; and

- g) A neurological examination demonstrated normal reflexes and no objective motor deficits or sensory abnormalities.
- [63] Dr. Waseem tested for the presence of non-organic findings but did not describe those tests in his report. He did no neuropsychological testing and agreed no prominent psychosocial features were present; if they had been, he would have referred the plaintiff to a counsellor or psychiatrist. In cross-examination, he admitted he would be inclined to delete reference in his report to "syndrome" and simply diagnose the plaintiff with chronic myofascial (i.e., soft tissue) pain.
- [64] Dr. Waseem relied on the plaintiff's subjective reports regarding her sitting and standing tolerance. She reported no difficulty carrying or delivering supplies as part of her job at Cannon. He was aware she had suffered a workplace injury in about 2012, been off work for eight or nine months thereafter, and made a subsequent WorkSafeBC claim. He did not review or request any documents from WorkSafeBC before authoring his report and understood from speaking with the plaintiff those injuries had resolved within about 18 months and were not ongoing at the time of the Accident. He understood she had been involved in one other car accident following which her injuries resolved fully within one week.
- [65] Dr. Waseem assumed the history he obtained from the plaintiff was accurate. Based on their discussions, he understood her primary complaint was back pain and that her neck pain was a non-issue and had resolved within three to four months of the Accident. At the time of his assessment, she complained of only two ongoing symptoms arising from the Accident: back and headache pain. In cross-examination, Dr. Waseem agreed (based on the March 2016 note of Dr. Eddy that the plaintiff was having pain and spasms and could only sit for a few minutes) her condition had improved by the date of his own assessment (at which time she had a sitting tolerance of 40 - 60 minutes). The plaintiff told Dr. Waseem she had pain with physical exertion or prolonged activity and not minimal activity pain; he agreed that too represented an improvement in her condition between January 2016 and January 2017.
- [66] Dr. Waseem offered the following opinions in his report dated January 17, 2017:
- a) The plaintiff sustained a sprain/strain soft tissue injury, predominantly of the cervical, thoracic, and lumbar spine as a result of the Accident;
 - b) These injuries resulted in chronic myofascial pain syndrome of the thoracic and lumbar spine (revised in cross-examination to a diagnosis of chronic pain) and post-traumatic headache with migraine features;
 - c) The plaintiff's physical condition is permanent and unlikely to improve;
 - d) Her condition worsens with physical exertion and she has reduced functional tolerance; and

- e) The plaintiff is not disabled from her usual work duties but is unable to engage in bed-making (clarified at trial to mean changing bed linens) and some recreational athletic pursuits.
- [67] Dr. Waseem concluded a six to 12 month absence from the plaintiff's usual housekeeping duties following the Accident was reasonable. In cross-examination, he confirmed it was his opinion she was thereafter capable of resuming all her usual housekeeping activities. Although Dr. Waseem was provided with updated records following his assessment of the plaintiff, he made no use of them. He did not re-assess the plaintiff after January 2017 and before trial.
- [68] Following his assessment, Dr. Waseem made various treatment recommendations intended to assist the plaintiff with symptom management, improve her level of function, and enhance her quality of life including:
- a) A three-month course of active rehabilitation;
 - b) Low-impact cardiovascular exercise;
 - c) A trial of IMS;
 - d) Physiotherapy 1 - 2 times per month for an unspecified period;
 - e) Topical medication for application to affected areas; and
 - f) Consideration as necessary in the event of ongoing pain to a physiatrist or pain specialist referral for trigger point injections and a trial of 2 - 3 Botox injections and intermittently thereafter if intervention offers decreased headache and/or improved function.
- [69] Dr. Waseem agreed it is important to confirm a person has migraine headache before prescribing Botox; he would not otherwise recommend Botox. He explained Botox can be associated with significant adverse side effects including muscle weakness, paralysis, and dropped head syndrome (a condition that results in an inability to hold up the head due to weakened neck muscles following Botox injections to the head). Dr. Waseem said dentists inject Botox for TMJ pain. He was unaware the plaintiff had been receiving Botox from her dentist at the time of his assessment. He agreed Botox is dose-dependant, the doses for therapeutic and cosmetic indications differ, and that this is an important distinction. Dr. Waseem does not administer cosmetic Botox.
- [70] Dr. Waseem did not request or receive the plaintiff's physiotherapy records. He understood the plaintiff had discontinued physiotherapy on the advice of her GP as she had achieved maximum benefit from it. Dr. Waseem's main recommendation was for her to exercise more. Based on the plaintiff's history, he understood physiotherapy assisted her with temporary pain management for a few days at a time; on that basis, he contemplated further physiotherapy to assist with future pain flare-ups as necessary. The plaintiff did not advise him she had discontinued physiotherapy for financial reasons.

Orthopedic Surgeon, Dr. Sovio

- [71] Dr. Sovio, a Royal College certified orthopaedic surgeon since 1985, was called by the defendants. He was qualified as an expert in the areas of orthopedic medicine and surgery relating to the diagnosis, treatment, and prognosis of musculoskeletal injuries. He admitted he is not a pain specialist but said orthopedic surgeons commonly treat patients with pain (including post-operative and trauma pain) and that about 80% of his patients have non-surgical soft tissue or ligament injuries which are mostly treated conservatively. I found him to be a frank and forthright witness.
- [72] Dr. Sovio assessed the plaintiff on February 28, 2019 and authored a report of the same date. In accordance with his usual practice, he would have spent about an hour with the plaintiff, obtained a medical, surgical, and social history, and completed a head to toe functional inquiry and physical examination. Thereafter, he would have reviewed the documents sent to him.
- [73] Dr. Sovio recorded the following history:
- a) The plaintiff was rear-ended when her vehicle was stopped and pushed into the car ahead of her; she was wearing her lap and shoulder harness at the time;
 - b) Her head and neck were a bit sore and she thought she had hit her head on the steering wheel but she was able to drive her car home;
 - c) The next day she was achier and felt pain in her neck down towards her shoulders and the left side of her back; and
 - d) She derived no benefit from the therapy recommended to her by her family doctor.
- [74] The plaintiff described the following ongoing complaints:
- a) Headache about every two days;
 - b) Blurred vision in the morning and at night at times when concentrating;
 - c) No shoulder or neck pain, except when sitting for a significant length;
 - d) No limited range of motion in the neck (but some discomfort if using her arms in front of her, as when typing);
 - e) Muscle tightness in her back down towards the left buttock and a pulling sensation in the left paravertebral muscles;
 - f) Recent onset of discomfort in her right hip and ongoing left hip discomfort but good hip range of motion; and
 - g) No ongoing numbness or tingling in her lower extremities.
- [75] Dr. Sovio made the following findings on examination:

- a) Normal gait, stance, and posture;
 - b) No abnormality of the cranial nerves and full range of motion of the neck with no discomfort;
 - c) Mild discomfort on palpation of the paravertebral muscles, periscapular, trapezial, and upper posterior cervical spine areas.
 - d) No shoulder abnormalities, asymmetry, or subacromial tenderness and normal range of motion;
 - e) No muscle wasting and no motor or sensory abnormality of the upper extremities;
 - f) Normal alignment of the back;
 - g) Mild discomfort in the left paravertebral muscles from the thoracic to lumbar regions but no pain on palpation of the spine;
 - h) No abnormality on a straight leg raising test (which involved lifting a leg when the plaintiff was on her back to see if it elicited pain);
 - i) Normal hip range of motion;
 - j) No varus or valgus instability of the knees;
 - k) No wasting of the musculature of the lower extremities, normal motor power, and no sensory abnormalities;
 - l) Normal balance and coordination; and
 - m) No other abnormalities.
- [76] Based on his physical examination, Dr. Sovio concluded there were no objective abnormalities. He noted the plaintiff had intermittent subjective complaints of back pain. He recommended no further investigations or any formal treatment but suggested increased exercise to strengthen core muscles. He disagrees that the plaintiff is permanently disabled and noted Dr. Waseem apparently based this opinion on subjective grounds.
- [77] The plaintiff variously described her complaints of left neck/shoulder pain to Dr. Sovio as sore, achy, or burning. He said pain falls on a continuum; in his view, reference to discomfort or aching falls on the mild end of that spectrum. In cross-examination, he agreed pain is subjective and that one man's ache is another man's pain. Dr. Sovio considers it his mandate to report any physical findings and structural abnormalities detected on examination and to leave it to the court to assess subjective complaints of pain. He agreed it is possible for a person to experience subjective pain in the absence of any anatomical abnormality.

CREDIBILITY AND RELIABILITY OF EVIDENCE

- [78] The factors to be considered when assessing credibility are summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392. Such an assessment involves a consideration of the witness' ability and opportunity to observe events, the firmness of the witness' memory, the ability of the witness to resist the influence of interest in modifying her recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections, the witness' demeanour generally, whether the witness' evidence seems generally unreasonable, impossible, or unlikely, and whether the witness has a motive to lie. The validity of the evidence will depend on whether the evidence is "consistent with the probabilities affecting the case as a whole and shown to be in existence at the time": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 356.
- [79] As set out in these reasons, I found the treating health care professionals and medical experts to be credible and forthright witnesses.
- [80] The plaintiff presented as a pleasant but somewhat imprecise witness. She demonstrated a relatively poor memory for dates and details. For example, she said she had been referred to a "few" specialists, but could not recall the exact number, their name/s, when or whether she saw one person more than once or more than one person. In fact, Dr. Eddy referred the plaintiff to only one specialist after the Accident. The plaintiff was also vague about certain aspects of her claim for damages including, for example, details of the courier charges deducted from her commission income at Cannon.
- [81] There were some striking inconsistencies in the plaintiff's reports regarding the nature, severity, and date of onset of her post-Accident symptoms as relayed by her to Dr. Eddy, the medical experts who assessed her, and the court at trial. For example:
- a) While she admitted she was wearing a functioning lap and shoulder harness, which she said she felt hold her back at the time of the Accident, she maintains she struck her forehead on the steering wheel of her car. This detail is noticeably absent from the history she reported to Dr. Waseem, as recorded by him in his report.
 - b) At trial, the plaintiff testified she had headache pain immediately after the Accident; Dr. Waseem's history indicates she reported the onset of headache pain within one month of the Accident.
 - c) At trial, the plaintiff said her headaches have worsened since the Accident; Dr. Waseem wrote she reported they were no better and no worse since the Accident.

- d) Although the plaintiff admitted she was fully open with Dr. Eddy about her health issues and described headache pain as a significant ongoing issue at trial, he charted no post-Accident complaints of headache pain.
- e) Although the plaintiff testified she saw Dr. Ng for Botox injections, in part, for Accident-related headache pain, she admitted she said nothing to him about headache pain before her first injection. Dr. Ng testified the plaintiff said nothing to him about headache pain at any time. His notes record no complaints of headache pain. The plaintiff suggested she is a stoic patient but admitted to discussing her headaches with family members, at least one friend, Mr. Birdsell, and Dr. Waseem.
- f) Although Dr. Waseem assessed the plaintiff for Accident-related difficulties and suggested a referral to a specialist for a trial of Botox for headache pain, she did not advise him she was already receiving Botox injections from Dr. Ng or that they were providing her with temporary pain relief. She said she forgot to do so.
- g) The plaintiff also forgot to mention on discovery that she was receiving Botox injections from Dr. Ng and was finding them helpful for headache pain. Defence counsel said he was informed of this claim the week before trial.
- h) At trial, the plaintiff complained of ongoing neck pain. Dr. Waseem's recorded history indicated this problem had resolved. He understood it was a non-issue.
- i) At trial, the plaintiff said she discontinued physiotherapy because she could not afford it. Drs. Waseem and Sovio both noted she reported discontinuing this therapy because it was providing her with minimal results, a history which is consistent with Dr. Eddy's records.
- j) Curiously, although the plaintiff described suffering debilitating symptoms after minor physical exertion while hosing her deck following the Accident, she did not report this incident to Dr. Eddy and sought no medical attention thereafter.

[82] I conclude the plaintiff was not a consistently careful historian. I do not accept the details she failed to mention are all "mere quibbles", as suggested by her counsel. I conclude stoicism does not adequately explain her failure to mention relevant medical information to the physicians retained to assess her in the context of this personal injury claim, or the professionals directly involved in her ongoing care. Ultimately, while I accept that she did her best, I found her evidence to be somewhat unreliable. For these reasons, I have approached it with some caution. To the extent the plaintiff's evidence differs from that given by her treating physicians, all of whom were forthright witnesses with no interest in the outcome of this litigation, I generally prefer the latter.

[83] In closing submissions, plaintiff's counsel raised an objection based on the rule in *Browne v. Dunn*, (1893), 6 R.67 (H.L.), arguing the plaintiff was not confronted with the records of Mr. Birdsell or asked about her experience with physiotherapy in cross-examination. He did not request an opportunity to recall the plaintiff to address this issue. The plaintiff was asked why she did not pursue physiotherapy after May 2015; she said it provided minimal results

and she could not afford to continue with it. On that basis, I infer she would have disputed the records of Mr. Birdsell, which suggest the discontinuation of physiotherapy followed an improvement of her condition.

- [84] Ultimately, what I find to be most significant is the undisputed fact the plaintiff pursued no further physiotherapy after May 2015. She was then working full-time and paying privately for substantially more expensive cosmetic Botox. On the evidence, she also had generous and supportive parents. On that basis, I conclude she could have pursued physiotherapy after May 2017, had she wished to do so.

CAUSATION

- [85] The plaintiff must establish on a balance of probabilities that the defendants' negligence caused or materially contributed to her injury. The defendants' negligence need not be the sole cause of the injury, provided it forms part of the cause beyond the de minimis range. Causation need not be determined by scientific precision: *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 13 - 17; *Farrant v. Laktin*, 2011 BCCA 336 at para. 9.
- [86] The primary test for causation asks: but for the defendant's negligence, would the plaintiff have suffered the injury? The "but for" test recognises that compensation for negligent conduct should only be made where a substantial connection between the injury and the defendant's conduct is present: *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 21 - 23.
- [87] Whether a defendant is liable to a plaintiff for an injury is a matter of causation; the amount of compensation the defendant must pay is a matter of assessment of damages: *Moore v. Kyba*, 2012 BCCA 361 at para. 36. If the plaintiff had a pre-existing condition and there was a "measureable risk" that condition would have resulted in a loss in any event, this pre-existing risk is to be considered when assessing the damages resulting from the defendant's negligence. That is consistent with the general rule that a plaintiff is to be returned to her original (and not a better) position: *Moore* at para. 43.
- [88] In this case, there is some question about what the plaintiff's "original position" was at the time of the Accident. She suffered a serious workplace injury in 2012 to the same area of her back injured in the Accident. This 2012 injury resulted in a prolonged recovery and absence from work, an unknown diagnosis, extensive treatment, and an unclear prognosis. The evidence at trial did not address those issues in any detail. Dr. Waseem did not receive the WCB records; Dr. Sovio received them but offered no opinion regarding the issue of causation.
- [89] The plaintiff and her family members all testified that, from their perspective, she returned to her pre-injury status after her 2012 accident. While that does not necessarily mean she had fully recovered or will never experience any further adverse sequelae from that injury, the evidence is insufficient to permit me to conclude on a balance of probabilities that anything other than the Accident is the cause of the plaintiff's ongoing symptoms. The medical evidence does not support the conclusion that, absent the Accident, there is a

measurable risk her 2012 injury would have detrimentally affected her in the future. Accordingly, I find the Accident was the cause of her current injuries.

DAMAGES

Duty to Mitigate

[90] A plaintiff has an obligation to take all reasonable steps to reduce her damages, including undergoing treatment to alleviate or cure injuries: *Danicek v. Alexander Holburn Beaudin & Lang*, 2010 BCSC 1111 at para. 234. Whether the plaintiff acted reasonably is a factual question and involves a consideration of all of the circumstances: *Gilbert v. Bottle*, 2011 BCSC 1389 at para. 202.

[91] The test for failure to mitigate by not pursuing recommended treatment was set out in *Chiu v. Chiu*, 2002 BCCA 618 at para. 57:

In a personal injury case in which the plaintiff has not pursued a course of medical treatment recommended to him by doctors, the defendant must prove two things: (1) that the plaintiff acted unreasonably in eschewing the recommended treatment, and (2) the extent, if any, to which the plaintiff's damages would have been reduced had he acted reasonably.

[92] While some evidence at trial suggested the plaintiff did not follow all the recommendations of Drs. Eddy and Waseem (including, for example, the trigger point injections both recommended), I am not satisfied it establishes a failure to mitigate. I am unable to conclude that, if that treatment had been undertaken, it would have resolved the plaintiff's complaints. Accordingly, I decline to find a failure to mitigate by the plaintiff.

General Damages

[93] Non-pecuniary damages are awarded to compensate a plaintiff for pain, suffering, loss of enjoyment of life, and loss of amenities. The compensation awarded should be fair to all parties; fairness is measured against awards made in comparable cases. Such cases, while helpful, serve only as a rough guide. Each case depends on its own unique facts: *Trites v. Penner*, 2010 BCSC 882 at paras. 188-189.

[94] In *Stapley v. Hejslet*, 2006 BCCA 34, the Court of Appeal outlined the factors to be considered when assessing non-pecuniary damages at para. 46:

The inexhaustive list of common factors cited in [*Boyd v. Harris*, 2004 BCCA 146] 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).

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

[96] The correct approach to assessing injuries which depend on subjective reports of pain was discussed in *Price v. Kostyba* (1982), 70 B.C.L.R. 397 (S.C.) (quoted with approval in *Edmondson v. Payer*, 2012 BCCA 114 at para. 2). In referring to an earlier decision, McEachern C.J. wrote in *Price* at 399:

In *Butler v. Blaylock*, decided 7th October 1981, Vancouver No. B781505 (unreported), I referred to counsel's argument that a defendant is often at the mercy of a plaintiff in actions for damages for personal injuries because complaints of pain cannot easily be disproved. I then said:

I am not stating any new principle when I say that the court should be exceedingly careful when there is little or no objective evidence of continuing injury and when complaints of pain persist for long periods extending beyond the normal or usual recovery.

An injured person is entitled to be fully and properly compensated for any injury or disability caused by a wrongdoer. But no one can expect his fellow citizen or citizens to compensate him in the absence of convincing evidence - which could be just his own evidence if the surrounding circumstances are consistent - that his complaints of pain are true reflections of a continuing injury.

[97] The plaintiff presented as a personable, outgoing, and ambitious young woman. Her partner and family described her as a driven, competitive "go-getter". By all accounts, she has now found a job that she likes, does well, and is suited to her strengths and interests. She appears motivated to work hard, a quality that is likely to serve her well in adapting to her changed circumstances following the Accident.

- [98] The plaintiff complains predominantly of headaches and mid to low back pain. While objective findings on examination and investigation are minimal, it is clear on all the evidence she is no longer as physically active as she was before the Accident. While she gave evidence at trial over the course of two days, without any outward sign of physical discomfort, I accept she has ongoing complaints of headache and back pain.
- [99] In cross-examination, Dr. Waseem revised his diagnosis of myofascial pain syndrome to one of chronic pain. He agreed he had no evidence of any psychosocial component to the plaintiff's condition and therefore conceded the diagnosis of a syndrome was likely not appropriate. Dr. Waseem did not reassess the plaintiff after January 2017, and did not prepare a supplementary report incorporating any updated medical records or information. He was therefore unable to determine whether there has been any change in her status since he last assessed her.
- [100] Ultimately, I conclude there are no significant discrepancies between the findings of the two experts who gave evidence at trial; the examinations of both were essentially normal except for subjective complaints of pain on palpation and some muscle stiffness, taut bands, and notable trigger points detected by Dr. Waseem in the thoracic and lumbar spine. Dr. Waseem opines the plaintiff's condition is permanent; Dr. Sovio disagrees.
- [101] In closing submissions, plaintiff's counsel suggested this court had more complete information about the plaintiff's current condition than Dr. Waseem. He highlighted the plaintiff's evidence about being upset and frustrated and having complaints of sleep disturbance and worries about the future. He suggested it was open to this court to consider that evidence (which he argued comprised the missing psychosocial components required to establish a myofascial pain syndrome) and to assess damages based on that medical diagnosis.
- [102] I reject that suggestion. It was open to the plaintiff to provide Dr. Waseem with updated medical information and to request a re-assessment of the plaintiff and a supplementary report before trial. On the evidence at trial, the plaintiff has never been referred to or seen any health care professional for the management of psychological symptoms arising from the Accident. The portions of Dr. Eddy's chart in evidence contain no recorded complaints of psychosocial problems. In my view, the diagnosis of a plaintiff's medical condition is properly left to medical practitioners. While I acknowledge my fact-finding role permits me to accept or reject a medical diagnosis on an assessment of all the evidence, this is not what the plaintiff requests. The plaintiff is effectively asking me to make the diagnosis from which her own expert retreated at trial. I am not prepared to do so. Accordingly, I base my assessment of general damages on a diagnosis of chronic pain and the plaintiff's predominant subjective complaints of ongoing back, neck and headache pain.
- [103] While the plaintiff is now less active than she was before the Accident, she remains very functional. On her own evidence, she is able to:

- a) Work full-time and perform all the regular duties and responsibilities of her job without restriction since the Accident;
- b) Drive (with periodic breaks as necessary on long trips);
- c) Engage in all the usual activities of daily independent living (although she has some difficulty drying and straightening her hair);
- d) Stand and sit for extended periods (as demonstrated at trial);
- e) Do all her own housework (with the exception of changing bed linens) at her own pace, without assistance;
- f) Work on her laptop for up to four hours;
- g) Cycle for up to three hours; and
- h) Look after her young niece and nephew for up to six hours.

[104] The plaintiff is currently:

- a) Not engaged in formal therapy (apart from receiving periodic cosmetic Botox injections from her dentist) and none is contemplated;
- b) Not awaiting specialist referrals; and
- c) Has minimal objective findings relative to the severity of her subjective complaints.

[105] I have assessed general damages on the basis the plaintiff has experienced persistent, variable, mild to moderate back pain, headache, disturbed sleep, and reduced stamina in the four years since the Accident. I am satisfied this pain interferes with her ability to be as physically active as she would like and is a source of some frustration and friction in her relationship with Mr. Dillon. The evidence suggests a fear of re-injury, which I infer is due, at least in part, to her significant 2012 workplace injury, plays a key role in the plaintiff's decision to restrict her participation in some recreational activities. Fortunately, she enjoys the strong support of her partner and close-knit family.

[106] On all the evidence, I am not satisfied the plaintiff's condition will never improve. Dr. Waseem's opinion in this regard is somewhat dated and based on records up to only November 2016. The plaintiff is young and has had minimal treatment. She has not exhausted all treatment options available to her including, for example, trigger point injections, physiatry, neurology, or other referrals, and trials of prescription medications. The only treatment the plaintiff has received since the Accident is a brief period of physiotherapy, massage (in a non-clinical spa setting), and Botox (administered by her dentist for cosmetic rather than therapeutic reasons).

- [107] Drs. Eddy and Waseem both suggested a trial of trigger point injections that the plaintiff declined. The plaintiff's family doctor referred her to only one specialist (a rheumatologist in March 2015) after the Accident. She has not seen a neurologist for the diagnosis or management of migraine headache pain or for consideration of a therapeutic trial of Botox. She has had no physiotherapy since May 2015 and no RMT in a clinical setting.
- [108] Significantly, Dr. Waseem admitted in cross-examination that the plaintiff's condition had improved in the year before he assessed her. I conclude that concession suggests his prognosis of a permanent disability may have been unduly pessimistic.
- [109] On the evidence of Mr. Birdsell, I conclude the plaintiff derived some benefit from physiotherapy. Both medical experts agree she would benefit from increased exercise to improve her core strength. I conclude that too suggests there is room for further improvement in her condition. I note that Dr. Manhas, the rheumatologist to whom the plaintiff was referred after the Accident, documented a normal physical and neurological examination in March 2015 and that he expected the plaintiff's symptoms would settle with time. While he invited the plaintiff to return to see him if her situation changed or she had further concerns, she has not done so.
- [110] The plaintiff argues an appropriate range for non-pecuniary damages is \$75,000 to \$115,000, reduced by \$10,000 to \$15,000 if this court finds she does not have a myofascial pain syndrome. The plaintiff relies on three decisions she argues are comparable to this case:
- a) *Beagle v. Cornelson Estate*, 2013 BCSC 933: \$85,000 + \$15,000 loss of housekeeping capacity (present day value: \$102,172 total)
 - b) *Senger v. Graham*, 2018 BCSC 257: \$80,000 (present day value: \$81,738)
 - c) *Luck v. Shack*, 2019 BCSC 1172: \$75,000
- [111] The defendants assess general damages in the range of \$40,000 to \$50,000 and cite the following decisions which they say offer useful comparisons for the purpose of calculating non-pecuniary damages:
- a) *Hunter v. Yuan*, 2010 BCSC 1526: \$35,000 (present day value: \$40,630);
 - b) *Loeppky v. Insurance Corporation of British Columbia*, 2012 BCSC 7: \$45,000 (present day value: \$50,353)
 - c) *Christoffersen v. Howarth*; 2013 BCSC 144: \$35,000 (present day value: \$38,813)
 - d) *Pichugina v. Matula*, 2014 BCSC 1011: \$45,000 (present day value: \$48,947)
 - e) *Kostecki v. Li*, 2014 BCSC 1056: \$42,000 (present day value: \$45,684)
 - f) *Barnes v. Lima*, 2014 BCSC 1282: \$45,000 (present day value: \$48,947)
 - g) *Haroon v. Basran*, 2015 BCSC 794: \$45,000 (present day value: \$48,293)

h) *Lowe v. Johnson*, 2019 BCSC 1283: \$60,000

[112] Having regard to the decisions cited by counsel and the evidence as a whole and recognising each case is unique, I award non-pecuniary damages of \$80,000. In doing so, I have considered the plaintiff's age, the treatment she has engaged in to date, her ongoing ability to work full-time with minimal accommodations, and her current level of function. I have also taken into account that she was physically more active before the Accident than she is now, that she remains able to engage in many recreational activities with some limitations, and that while she is independent in the activities of daily living and able to do her own housework, she necessarily paces herself and experiences some pain.

Loss of Housekeeping Capacity

[113] The plaintiff seeks to recover damages for lost housekeeping capacity. Plaintiff's counsel suggested \$25/hour would be an appropriate figure for the replacement cost of household services and submitted damages for the loss of housekeeping ought to be assessed in the range of \$10,000 to \$50,000. There was no evidence to substantiate this hourly rate. Like Sharma J. in *Tsai v. Murdoch*, 2019 BCSC 179, I am not persuaded it is appropriate to rely on case law alone to fix a replacement rate for the provision of household services in the absence of any supporting evidence.

[114] Dr. Waseem opined the plaintiff suffered a loss of housekeeping capacity for six to 12 months after the Accident. He states in his report that she is partially disabled from bed making and will experience ongoing pain when engaging in household tasks.

[115] I have considered the reduction in the plaintiff's housekeeping abilities. On the evidence, that includes an inability to change her bed linens and wash her car. The plaintiff testified she is able to do all her own housework, at her own pace, albeit with some pain and not to her preferred standard. I conclude the plaintiff would not have engaged in domestic tasks requiring heavy physical demands before the Accident, given her stated fear of re-injury following her 2012 injury. On all the evidence, I conclude this case does not warrant a separate pecuniary award for the loss of housekeeping capacity. I have considered the modest impairment in the plaintiff's housekeeping capacity in assessing non-pecuniary damages.

Past Loss of Income-Earning Capacity

[116] Compensation for past loss of earning capacity is to be based on what the plaintiff would have, not could have, earned but for the injury that was sustained: *Rowe v. Bobell Express Ltd.*, 2005 BCCA 141 at para. 30; *M.B. v. British Columbia*, 2003 SCC 53 at para. 49.

[117] Pursuant to s. 98 of the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231, a plaintiff is entitled to recover damages for past net income loss only. This means the court must deduct the amount of income tax payable from lost gross earnings: *Hudniuk v. Warkentin*, 2003 BCSC 62. A trial judge has the discretion to determine what periods of time are appropriate for the

determination of net income loss: *Lines v. W.D. Logging Co. Ltd.*, 2009 BCCA 106, at paras. 181-184. When exercising this discretion, a trial judge is to consider the fact a plaintiff is to be returned to the position she would have been in absent the accident: *Lines* at paras. 185-186.

[118] The standard of proof for actual past events is a balance of probabilities. An assessment of loss of past and future earning capacity involves a consideration of hypothetical events. A plaintiff is not required to prove these hypothetical events on a balance of probabilities. The hypothetical possibility will be taken into consideration provided it is "a real and substantial possibility and not mere speculation": *Athey* at para. 27; *Morlan v. Barrett*, 2012 BCCA 66 at para. 38.

[119] The plaintiff's tax returns disclose pre-Accident income as follows:

- a) 2013: \$30,118 (T4 income);
- b) 2014: \$32,855 (T4 income) and \$1,560 (EI benefits); and
- c) 2015: \$45,292 (T4 income) and \$24,820 (commission).

[120] To her credit, the plaintiff is clearly a hard-working, committed, and valuable employee who excels in her sales role and takes pride in doing so. I conclude she worked hard after the Accident to ensure her work performance did not suffer and she did not lose clients or income. Mr. Dillon's evidence that she was a star in her sales job supports this conclusion. The plaintiff's income tax returns indicate she suffered no actual income loss after the Accident.

[121] The plaintiff claims damages for a loss of past income earning capacity in the amount of \$25,000. Of this amount, she claims \$15,000 as reimbursement for courier charges incurred to make heavy client deliveries in the one year after the Accident (deducted from her commission income) and lost commission occasioned by her inability to play golf, thereby reducing face time with clients. The plaintiff was unable to quantify this loss with any precision. No documents were in evidence to substantiate it. The plaintiff did not disclose her claim related to deducted courier costs on discovery.

[122] While the plaintiff said she would have kept detailed client records on her laptop computer (including information regarding quotes, invoices, and deliveries) when working at Cannon, she offered no explanation for why none was in evidence. The amount of actual lost commission was not quantified. No specific clients or courier delivery dates were identified. No one from Cannon was called to substantiate this claim and no explanation was given for why this was not done.

- [123] In cross-examination, the plaintiff said sometimes Cannon would deduct these amounts; she later said they would sometimes deduct less to help her. She agreed she did not pay a courier to make all her client deliveries while at Cannon but only the heaviest ones. While the plaintiff said this data would stay on her work laptop, she agreed some of it would be her own, including amounts deducted from her commission for courier deliveries.
- [124] In my view, the plaintiff's claim for past loss of commission income resulting from deductions for client delivery charges is a claim for an actual rather than hypothetical past income loss. Accordingly, I conclude it must be proven on a balance of probabilities. I am not satisfied the plaintiff has met that burden.
- [125] The plaintiff seeks to recover an additional \$10,000 for the loss of past income-earning capacity on the basis that, but for the Accident, she was more likely to have hit her sales targets at Breakthru and PMA, and secured seasonal work in a more labour intensive field in 2017 (instead of being employed sporadically while between jobs for seven to eight months).
- [126] While the plaintiff testified that she struggled with the physical aspects of her jobs at Breakthru and PMA, she managed them. Ultimately, she secured other employment, not associated with the same physical demands, to which she is better suited. Breakthru was a salaried position. While the plaintiff testified PMA offered incentives for hitting sales targets, I am not satisfied the evidence supports a finding, beyond mere speculation, that she would have met them but for the Accident. No one from PMA gave evidence at trial regarding the nature of these financial incentives, the plaintiff's job performance, or whether it was realistic for her to have achieved them. It is unclear on the evidence what the plaintiff might have earned if she had met them. I conclude the plaintiff was unlikely to have pursued more physically demanding seasonal employment in 2017, absent the Accident, given her fear of re-injury following her 2012 workplace injury. The plaintiff periodically re-positioned herself in the workplace for a variety of reasons after her 2012 injury and the Accident, for reasons unrelated to the Accident before finding her current position.
- [127] Ultimately, on all the evidence, I am not satisfied there is a real and substantial possibility, beyond mere speculation, that the plaintiff would have earned more pre-trial income, but for the Accident.

Loss of Future Income Earning Capacity

- [128] A claim for loss of future income earning capacity raises two key questions: (1) has the plaintiff's earning capacity been impaired by her injuries; and, if so (2) what compensation should be awarded for the resulting financial harm that will accrue over time? The assessment of loss must be based on the evidence, and not the application of a purely mathematical calculation. The appropriate means of assessment will vary from case to case: *Brown v. Golaiy* (1985), 26 B.C.L.R. (3d) 353 (S.C.); *Pallos v. Insurance Corp. of British*

Columbia (1995), 100 B.C.L.R. (2d) 260 (C.A.); *Pett v. Pett*, 2009 BCCA 232. The assessment of damages is a matter of judgment, not calculation: *Rosvold v. Dunlop*, 2001 BCCA 1 at para. 18.

- [129] To the extent possible, a plaintiff is to be put in the position she would have been in but for the injuries caused by the defendant's negligence: *Lines* at para. 185. The essential task of the Court is to compare the likely future of the plaintiff's working life with and without the accident: *Gregory v. Insurance Corp. of British Columbia*, 2011 BCCA 144 at para. 32.
- [130] There are two possible approaches to assessment of loss of future earning capacity: the earnings approach, as in *Pallos*, and the capital asset approach, as in *Brown*. Both are correct. The earnings approach is generally more useful when the loss is easily measurable: *Perren v. Lalari*, 2010 BCCA 140 at para. 32. When the loss is not measurable in a pecuniary way, the capital asset approach is more appropriate: *Perren* at para. 12.
- [131] The earnings approach involves a math-oriented methodology such as: (i) postulating a minimum annual income loss for the plaintiff's remaining years of work, multiplying the annual projected loss by the number of remaining years and calculating a present value; or (ii) awarding the plaintiff's entire annual income for a year or two: *Pallos* at para. 45; *Gilbert* at para. 233.
- [132] The capital asset approach involves considering factors such as: (i) whether the plaintiff has been rendered less capable overall of earning income from all types of employment; (ii) whether the plaintiff is less marketable or attractive as a potential employee; (iii) whether the plaintiff has lost the ability to take advantage of all job opportunities that might otherwise have been open to her; and (iv) whether the plaintiff is less valuable to herself as a person capable of earning income in a competitive labour market: *Brown* at para. 8; *Gilbert* at para. 233; *Morgan v. Galbraith*, 2013 BCCA 305 at paras. 53. Although the capital asset approach is not a mathematical calculation, the trial judge must still explain the factual basis for the award: *Morgan* at para. 56.
- [133] The principles which apply in assessing loss of future earning capacity were summarized by Low J.A. in *Reilly v. Lynn*, 2003 BCCA 49 at para. 101:

The relevant principles may be briefly summarized. The standard of proof in relation to future events is simple probability, not the balance of probabilities, and hypothetical events are to be given weight according to their relative likelihood. A plaintiff is entitled to compensation for real and substantial possibilities of loss, which are to be quantified by estimating the chance of the loss occurring. The valuation of the loss of earning capacity may involve a comparison of what the plaintiff would probably have earned but for the accident with what he will probably earn in his injured condition. However, that is not the end of the inquiry; the overall fairness and reasonableness of the award must be considered. Moreover, the task of the Court is to assess the losses, not to calculate them mathematically. Finally, since the course of future events is unknown, allowance must be made for the contingency that the assumptions upon which the award is based may prove to be wrong.

[Citations omitted.]

[134] The plaintiff reported post-Accident income as follows:

- a) 2015: \$45,292 (T4 income) and \$24,820 (commission income);
- b) 2016: \$51,739 (T4 income);
- c) 2017: \$22,556 (T4 income) and \$3,545 (EI benefits); and
- d) 2018: \$33,238 (T4 income).

[135] After redirecting her career path from construction into sales following her 2012 workplace injury and periodically re-positioning herself to take advantage of new opportunities, it appears the plaintiff has now found her niche. She was recruited to her current position, enjoys her job and, on all the evidence, excels at sales. She intends to remain with her current employer and to work on building her clientele to maximise her commission income. She now earns a salary of \$90,000 plus commission, which greatly exceeds her pre-Accident income. When asked, she agreed the economy for HVAC is currently booming, noting Goodman is well-established and the largest HVAC manufacturer in North America.

[136] None of the plaintiff's current or former employers gave evidence at trial. The plaintiff testified she made some minor accommodations at work following the Accident (including stopping for breaks on long drives and walking away from her laptop after four hours of inputting data at home). In my view, the evidence supports the conclusion she is encountering no significant difficulties performing her job duties, remains highly functional, and is managing well. There was no expert evidence at trial to suggest she will be unable to continue doing her sales job indefinitely or that she will be required to reduce her hours of work or restrict her job duties. The plaintiff's own expert, Dr. Waseem, opined she has no work-related disability. The plaintiff reported no work-related difficulties to either of the experts who assessed her or to Dr. Eddy, her trusted family doctor.

[137] The plaintiff says she does not know what her condition will be in the future. She worries her back pain might worsen and negatively affect her job performance. Neither of the two experts in this case suggested her condition is unstable or likely to deteriorate over time. The plaintiff argues she is now less marketable because of her chronic pain, reduced stamina, and fatigue and has therefore suffered a loss of her income-earning capacity due to the Accident. Plaintiff's counsel argued sales is a competitive industry and that the plaintiff is not as well placed to do the "grinding" required to generate commission sales as she was before the Accident.

[138] I am satisfied that physically demanding jobs are effectively foreclosed to the plaintiff given her serious 2012 workplace accident which was followed by a prolonged recovery and left her with a residual fear of re-injury. On her own evidence, she has moved on from construction work. I conclude the plaintiff is generally less competitive in the marketplace for that reason, which is unrelated to the Accident.

- [139] There is no expert evidence to suggest the plaintiff's chosen career path is unsustainable. On the evidence, she has some flexibility in her schedule and is able to take breaks as needed when driving or working from home on her laptop. She agreed that, in the winter, she will likely fly for work rather than drive and that client trips are likely to become less frequent over time once she has established initial contacts. The plaintiff has been employed full-time continuously since the Accident (apart from brief interruptions when she chose to change jobs for personal reasons, to pursue new opportunities, or to reposition herself in the workplace to advance her career in sales). She agreed there are many jobs available in the sales sector in British Columbia. On her own evidence, she has encountered no significant difficulties securing one she likes.
- [140] In my view, subjective apprehension about the future is insufficient to ground a claim for loss of income earning capacity. The evidence does not suggest the plaintiff has foregone any opportunities to earn income as a result of the Accident. She identified no specific loss of sales or clients occasioned by the Accident.
- [141] The plaintiff suggests she has suffered a loss of future income-earning capacity in the range of \$78,200 - \$117,300, based on two to three years of her average annual income since 2015 (\$39,100). The defendants say the plaintiff has suffered no loss of income-earning capacity.
- [142] On all the evidence, having regard to the relevant authorities, I find there is a real and substantial possibility the plaintiff's condition may improve with further treatment (which could include trigger point injections, further physiotherapy, medical management, and/or specialist referrals). On the evidence, I also find there is a real and substantial possibility the plaintiff will start a family at some point and, if she does, voluntarily withdraw from the work force, at least while her children are young.
- [143] Ultimately, the question I must ask is whether there is a real and substantial possibility, beyond mere speculation, that the Accident will impair the plaintiff's ability to earn an income given her ongoing complaints of chronic pain, fatigue, and reduced stamina. Neither of the experts who assessed the plaintiff suggested she suffers from any work-related disability. She is now earning substantially more income than she was at the time of the Accident. I am satisfied, based on her own evidence (which includes the addition of commission income in the month before trial) and her industrious and competitive nature, the plaintiff is unlikely to suffer a significant future loss of income. She is currently performing all her work-related duties without restriction and has done so since the Accident.
- [144] I have assessed general damages on the basis the plaintiff has chronic pain. On the plaintiff's evidence, I conclude she will likely continue working indefinitely in her present position for her current employer, a well-established company which offers good job security and an opportunity to earn commission income, and focus on building her clientele. She likes her job, does it well, and is motivated to work hard. I do, however, conclude there is a real and substantial possibility her chronic pain, reduced energy, and

impaired stamina may render her less capable of doing her job in the future.

- [145] I have considered the comments of Frankel J.A. in *Morlan v. Barrett*, 2012 BCCA 66 at paras. 39-41. In that case, the trial judge gave two reasons for finding there was a real and substantial possibility the plaintiff's fibromyalgia would shorten her career. The first was that he found it to be common experience that a stable but persistent energy-draining condition would make it more difficult for someone to continue working with advancing age. The second reason, based on expert evidence, was that the plaintiff's condition was likely to worsen over time.
- [146] In my view, chronic back pain is not the same as a diagnosis of fibromyalgia, which is well known to be associated with debilitating fatigue. There is no evidence before me to suggest the plaintiff's condition will worsen over time. I am not satisfied on the evidence the plaintiff's pain is permanent and will never improve. In my view, those facts distinguish the *Morlan* case from the one before me.
- [147] I conclude the Accident caused the plaintiff a modest impairment of a capital asset. Courts have assessed damages where a plaintiff's ability to earn an income has been impaired but not lost entirely, as some fraction or multiple of the plaintiff's average annual income: *Hill v. Durham*, 2009 BCSC 1480, at para. 47. I accept the plaintiff requires energy and enthusiasm to succeed in her sales job and that her chronic pain, fatigue and reduced stamina leave her with less of both. Even if the plaintiff's pain does not improve with further treatment, I do not accept she has suffered a significant loss of earning capacity because of the Accident. Ultimately, I assess this loss of a capital asset in the amount of \$10,000, representing approximately 25% of the plaintiff's average income over the past three years.

Future Cost of Care

- [148] The plaintiff is entitled to compensation for the cost of future care based on what is reasonably necessary to restore her to her pre-Accident condition to the extent that is possible. When full restoration cannot be achieved, the court must strive to ensure full compensation through the provision of adequate future care. The award is to be based on what is reasonably necessary on the medical evidence to preserve and promote the plaintiff's mental and physical health: *Milina v. Bartsch* (1985), 49 B.C.L.R. (2d) 33 (S.C.); *Williams v. Low*, 2000 BCSC 345; *Spehar v. Beazley*, 2002 BCSC 1104; *Gignac v. Insurance Corporation of British Columbia*, 2012 BCCA 351 at paras. 29-30.
- [149] The test for determining the appropriate award under the heading of cost of future care is an objective one based on medical evidence. A cost of future care award must be: (1) supported by a medical justification for claims for cost of future care and (2) reasonable: *Milina* at para. 211; *Tsalamandris v. McLeod*, 2012 BCCA 239 at paras. 62-63. Future care costs are justified if they are both medically necessary and likely to be incurred. The award of damages therefore involves predicting what will happen in the future. If a plaintiff has

not used a particular item or service in the past, it may be inappropriate to include its cost in a future care award. However, if the evidence shows that previously rejected services will not be rejected in the future, the plaintiff can recover for such services: *Izony v. Weidlich*, 2006 BCSC 1315 at para. 74; *O'Connell v. Yung*, 2012 BCCA 57 at paras. 55, 60, 68-70.

[150] The extent to which a cost of future care award should be adjusted for contingencies depends on the plaintiff's specific care needs. In some cases, negative contingencies are offset by positive contingencies and a contingency adjustment is therefore not required. In other cases, the award is reduced based on the prospect of improvement in the plaintiff's condition or increased based on the prospect that additional care will be required. Each case falls to be determined on its particular facts: *Gilbert* at para. 253. An assessment of damages for future care costs is not a precise accounting exercise: *Krangle (Guardian ad litem of) v. Brisco*, 2002 SCC 9 at para. 21.

[151] The plaintiff claims future care costs as follows:

DESCRIPTION

Yearly Cost

TOTAL To Age 70

Total to Age 75

Total to Age 79

TREATMENT

Physiotherapy

1 - 2 session per month @ \$70.00 per session

\$840.00 - \$1,680

\$23,351.58 - \$46,703.16

\$25,109.53 - \$50,219.06

\$26,395.82 - \$52,791.65

Botox Treatment

3 - 4 sessions per year @ \$350.00 per session

\$1,050 - \$1,400

\$29,189.48 - \$38,919.3

\$31,386.92 - \$41,849.22

\$32,994.78 - \$43,993.04

- [152] The plaintiff says these amounts are properly discounted by 20% to reflect the negative contingency of possible early death.

Physiotherapy

- [153] The plaintiff has pursued no physiotherapy since May 2015, despite the recommendation of her own expert that she would benefit from it, and Mr. Birdsell's evidence that past physiotherapy provided her with some benefit and he would see her again if her symptoms persisted. The plaintiff gave conflicting evidence about why she discontinued physiotherapy. She said she did so on her own initiative (which is inconsistent with the records and the evidence of Mr. Birdsell) and for financial reasons (which I find is unlikely as she was then working full-time, living at home, paying privately for substantially more expensive Botox treatments, and had generous parents). In closing, the plaintiff argued it was reasonable for her to discontinue physiotherapy as it provided temporary benefit only but maintains she ought to receive compensation for weekly physiotherapy for the next 50 years. In my view, that is not reasonable or necessary on the evidence.
- [154] On all the evidence, I am satisfied the plaintiff might benefit from further physiotherapy as it has apparently assisted her in the past. I am not persuaded it is appropriate to award damages for future care equal to the present value of two physiotherapy sessions per month to age 80. No expert suggested she would benefit from regular ongoing physiotherapy over the next 50 years. She has pursued no such treatment in more than four years and it is unclear whether she would do so in the future.
- [155] Ultimately, I accept the recommendation of Dr. Waseem that further physiotherapy might be appropriate for the management of flare-ups. On that basis, I award \$10,000 for use by the plaintiff as a contingency fund to cover future physiotherapy costs as necessary. While this amount is approximately equal to the cost of 143 physiotherapy sessions, assuming a cost of \$70/session, or approximately four sessions/month for 3 years, and significantly exceeds the total physiotherapy sessions undertaken by the plaintiff to date, it is a contingency fund to compensate her for the impact of the Accident for her lifetime. There may be periods when the plaintiff requires more treatment than at other times.

Botox

- [156] The most contentious future cost of care item is Botox, calculated based on the cost of the privately funded cosmetic injections the plaintiff currently receives, to age 79. In closing submissions, plaintiff's counsel conceded one or two years of Botox treatments would be more reasonable than projecting this cost to age 79.
- [157] There was minimal medical evidence at trial to support the plaintiff's claim of disabling migraine headache pain. Dr. Eddy's clinical notes include no reported complaints of Accident-related headache and no reference to any migraine features of photophobia or visual disturbances, as described by Dr. Waseem in his report. The records of Mr. Birdsell

specifically record intermittent headache with no nausea, dizziness, or diplopia. It was unclear whether the evidence about the plaintiff's complaint of occasional blurry vision when concentrating was associated with any headache pain. She described no other unusual symptoms associated with her headaches.

- [158] Surprisingly, despite maintaining she was seeing Dr. Ng, at least in part for the relief of headache pain, Dr. Ng, whose evidence I accept on this point, testified she told him nothing about any headache complaints. His records are consistent with that evidence. Similarly, the plaintiff said nothing to her own expert about having received Botox injections which she says offered her some incidental temporary relief from headache pain. The plaintiff admitted in cross-examination she did not mention Botox to Dr. Eddy until after she had been assessed by Dr. Waseem in 2017, and that Dr. Eddy never suggested Botox to her. The only professional with whom she spoke about Botox before she began receiving these injections was Dr. Ng and the first time she spoke to him about Botox was in 2016 for cosmetic reasons.
- [159] On all the evidence, I conclude the plaintiff's headache pain is not as debilitating as she suggests and was not a predominant complaint at the time of her discovery (when she failed to mention she was paying for cosmetic Botox treatments, in part, for relief from headache pain) or at the time of Dr. Waseem's assessment. In my view, that is the most probable explanation for why she failed to mention this complaint to her trusted GP, Dr. Eddy.
- [160] I am troubled by the fact that, while the plaintiff claims she has suffered continuous headache pain which has worsened since the Accident, for which Advil provides only temporary relief, she made no claim for future care costs related to Botox until the Wednesday before this trial commenced. She had attended for many Botox injections at that point and, although on discovery she recalled discontinuing PT because it was expensive, she agreed two Botox injections were roughly equal to the total PT costs she incurred.
- [161] According to the plaintiff, she told Dr. Ng Botox was helping her headache pain about six months after he administered his first Botox injection to her. She could not recall if she ever told him she had been involved in the Accident; he said she did not do so. She says he then told her Botox works for headaches. Thereafter, he did not change the location or protocol for the Botox injections. I prefer the evidence of Dr. Ng to that of the plaintiff on this matter.
- [162] It is open to the plaintiff to seek a referral to a medical specialist, as suggested by Dr. Waseem, for a trial of medical management for headache with Botox, assuming she has migraine headache pain. There was no evidence at trial to suggest that if the plaintiff has migraine headache pain, and if treatment with Botox is indicated, she will be required to fund this cost privately. The plaintiff confirmed she is currently looking into whether she can obtain funding for this therapy. She offered no explanation for why she had not done so before trial.

[163] It is also possible that if Botox were administered for therapeutic, rather than cosmetic, reasons based on a different treatment protocol and a therapeutic dose, she might enjoy complete resolution of her headache pain, rather than temporary incidental pain relief only. While the evidence suggests the Botox injections administered by Dr. Ng are in the same general vicinity as those which might be administered for the therapeutic management of migraine headache pain, I am not satisfied the evidence is sufficient to permit me to award future care costs based on the amount Dr. Ng charges for cosmetic Botox injections. I am also not persuaded the evidence is sufficient to allow me to find the cosmetic treatment administered by Dr. Ng is appropriate for the management of the plaintiff's headaches. Dr. Ng is not a physician, is not qualified to manage migraine headache pain, and concedes he is not injecting the plaintiff with Botox for that purpose. Drs. Ng and Waseem both agreed the dose and treatment protocol is different for cosmetic and therapeutic indications.

[164] On the evidence, I also infer the plaintiff would probably have incurred the cost of cosmetic Botox absent the Accident. For all these reasons, I decline to award any amount for cosmetic Botox injections as a future cost of care.

Special Damages

[165] Past physiotherapy expenses of \$720 are admitted.

[166] The plaintiff seeks to recover additional special damages as follows:

- a) Over-the-counter Advil: \$500;
- b) Four Whistler spa massage sessions: \$600 (4 x \$150); and
- c) Botox injections from October 2016 to April 2019: \$2,450

[167] The plaintiff testified she has taken a significant amount of over-the-counter Advil to manage her back pain since the Accident. She says she purchases large containers of Advil from Costco and suggests, in the absence of any supporting documentation or evidence, that \$500 is an appropriate amount to reimburse her for this cost. There was no evidence from any witness, including Dr. Eddy, about whether or not it is appropriate for the plaintiff to be consuming large quantities of Advil. However, although no receipts were in evidence, I am satisfied \$500 for the cost of four years of over-the-counter Advil is reasonable.

[168] The plaintiff testified she and Mr. Dillon attended a spa in Whistler for massages after the Accident. The evidence does not support the conclusion those sessions involved RMT which was medically justified. On the plaintiff's own evidence, massage provided her with no lasting benefit. No documentation was introduced at trial to substantiate the cost or number of these massage sessions; no clinical records from a registered massage therapist were in evidence. Defence counsel advises this cost was not disclosed before trial. Ultimately, on all the evidence, I am not satisfied the cost of these spa sessions is an appropriate special damages claim.

[169] For the reasons set out herein, I decline to award special damages in any amount for past cosmetic Botox injections.

SUMMARY

[170] In summary, I award damages as follows:

- a) General Damages (including loss of housekeeping capacity): \$80,000
- b) Loss of Future Income Earning Capacity: \$10,000
- c) Future Care Costs: \$10,000
- d) Special Damages: \$1,220
- e) TOTAL: \$101,220

[171] Absent any offers to settle of which I am unaware, the plaintiff is entitled to her costs. If the parties are unable to agree on quantum, they may apply to speak to this issue within 30 days.

"Douglas J."

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